

Europe as Transnational Law – The Transnationalization of Values by European Law

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A. Introduction

Values define an important link between law and culture. Giving consideration to the title of the German Law Journal's Tenth Anniversary Symposium, "The Transnationalization of Legal Cultures," I will address how European law has affected the transnationalization of values.

Generally speaking, values are basic attitudes of society or individuals characterised by a particular strength and conviction of truth.¹ As such, they fulfil a normative orientation and ordering function by differentiating between good and bad, between right and wrong.² Effectively, values are positioned between law and morality.³ From a legal point of view, values describe the assets recognised by a legal system as given or compulsory.⁴ Thus, each norm is based on at least one value substantiated and transformed by that norm. In this context, values may serve both as an interpretive guideline and a norm-controlling standard: they deploy a legitimising significance.

Of course, values are vague, complex, subjective and dependent on their contexts.⁵ Moreover, they change with time and adapt to the respective social circumstances,⁶ providing historically evolved, culturally influenced, sometimes power-manipulated, and often alterable orientation guidelines and standards.

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¹ See Udo Di Fabio, *Die Grundrechte als Wertordnung*, 59 JURISTENZEITUNG (JZ) 1, 3 (2004).

² *Id.*

³ *Id.*

⁴ Franz Reimer, *Wertegemeinschaft durch Wertennormierung? Die Grundwerteklausel im europäischen Verfassungsvertrag*, 18 ZEITSCHRIFT FÜR GESETZGEBUNG (ZG) 208, 209 (2003).

⁵ Benedikt Speer, *Die Europäische Union als Wertegemeinschaft – Wert- und rechtskonformes Verhalten als konditionierendes Element der Mitgliedschaft*, 54 DIE ÖFFENTLICHE VERWALTUNG 981 (2001).

⁶ See Di Fabio, *supra* note 1.

In contrast to State principles (objective) or fundamental rights (subjective), values have no specific limitations, because they are not fixed to particular legal consequences and do not address specific natural or legal persons.⁷ However, in spite of these deficits, the legal system does not want to abandon its values. In this context, the German Federal Constitutional Court⁸ with a view to the fundamental rights of the German Basic Constitutional Law states that values create an objective value order: their influence as a value system reaches out to legislation, administration and legal practice.⁹ At the international level and in light of the Charter of United Nations and other treaties of public international law, particularly on the protection of human rights, it is said that universal values shape the law of the Community of States, which is understood as an “international legal community.”¹⁰

B. The EU as a Union of Transnational Values

As a result of a historically motivated, collective learning process of the Member States, common European values were an implicit precondition in the early days of European integration. Without a common basis of values (keyword: homogeneity), the project of supranational integration would have been impossible from the beginning. As the integration process advanced, these values were increasingly emphasised and gradually incorporated into the treaties. This generation of European values within the context of European integration is vividly described as follows in the first recital in the Preamble of the Charter of Fundamental Rights: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.”¹¹

Apart from the value of the provision of services of general economic interest specified in Art. 16 of the Treaty Establishing the European Community (TEC)¹², the Preamble of the Charter of Fundamental Rights¹³ is the first regulation that explicitly mentions common

⁷ Reimer, *supra* note 4, at 209.

⁸ Starting with BVerfGE 7, 198; for details see WOLFRAM CREMER, FREIHEITSGRUNDRECHTE 191 (2003).

⁹ A critical viewpoint is taken by a number of scholars. See Ernst Forsthoff, *Die Umbildung des Verfassungsgesetzes*, in Festschrift für Carl Schmitt 35 (Hans Barion ed. 1959); Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit: Studien zu Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* 67 (1991); Horst Dreier, *Dimensionen der Grundrechte* 10 (1993); Cremer, *supra* note 8; Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* 7 (2001). Others have taken an ambivalent position. See Di Fabio, *supra* note 1. For a more positive position, however, see Hans Jarass. See Hans Jarass, *Die Grundrechte als Wertentscheidungen*, 110 *Archiv für Öffentliches Recht* (AöR) 367 (1985).

¹⁰ See Matthias Herdegen, *Völkerrecht* 47 (2004).

¹¹ The Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C310) 41 [hereinafter CFREU].

¹² The Treaty Establishing the European Community, Mar. 25, 1957, 2002 O.J. (C325) 15 [hereinafter TEC].

¹³ CFREU Preamble.

values in general.¹⁴ This development towards an express value commitment is consistently accepted and expanded by the Treaty on European Union (TEU).¹⁵ Both the Preamble and the Value Clause of Art. 2 of the Treaty of Lisbon¹⁶ point out very clearly that the Union is a “Community of Values” with a common socio-ethical and political basis.¹⁷ Moreover, by stating that, “[t]hese values are common to the Member States in a society. . . ,” the TEU presents the EU and its Member States as a Community of Values in consideration of the Union’s citizens.¹⁸

II. Categories of European Values

The following value categories can be distinguished in systematising the EU value order:

1. *Guiding values* of the EU are values which have defined the process of European integration from the beginning. They have provided (at least implicitly) the fundamental basis of the EU without which it would not have developed into what it is today. Being the basis of the EU they are virtually essential for its existence. This category primarily comprises the closely connected three values, peace, integration and market freedom (integration formula), as well as solidarity and subsidiarity.

2. *Fundamental values*, encompass values which—based on the shared constitutional traditions of the EU members—have developed in the course of progressive integration into structural characteristics of the EU. They are inevitably common to both the EU and its Member States. Forming the basis for the EU’s internal and external actions in a wide variety of provisions (as shown above) fundamental values include *democracy* and *the rule of law*,¹⁹ the latter being closely connected with the values of *liberty*, *respect for human rights* and *fundamental freedoms*. They are complemented by *human dignity* and *equality*, stipulated in the future Fundamental-Value Clause of the Treaty of Lisbon, which captures the essence of the rights of freedom.²⁰

3. *Single values* concretise partial aspects of the guiding and fundamental values for certain areas. This may happen either explicitly, such as in Art. 16 of the TEC (services of public interest) or implicitly by concretising values in common-welfare matters. Latter becomes visible in the context of the *Cassis* case law of the European Court of Justice (ECJ) or in the

¹⁴ Armin von Bogdandy, *Europäische Verfassung und europäische Identität*, 59 JURISTEN ZEITUNG 53, 58 (2004).

¹⁵ The Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C115) [hereinafter TEU].

¹⁶ The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. (C306) 1–10.

¹⁷ Thomas Oppermann, *Eine Verfassung für die Europäische Union*, 118 DEUTSCHES VERWALTUNGSBLATT 1165, 1169 (2003).

¹⁸ von Bogdandy, *supra* note 14.

¹⁹ Specified in TEU art. 6, para. 1.

²⁰ Treaty of Lisbon art. 2.

flanking of the single market by policies of environmental, health and consumer protection. Such single values may all be counted among the fundamental values having no independent meaning but merely helping to identify which value is behind a competence or a standardised legal asset.

II. The Significance of Common European Values

As we know from sociology and social psychology, the development of identity also may (or possibly even has to) be linked with differentiation, namely the necessary distinction between “Us and Them”.²¹ In the (unsuspicious) words of Luhmann, “all identity is constituted by negation”.²² Nevertheless, while a common fundament of values may contribute to differentiation, it can at the same time control it. As such, it is important to prevent over-control. When Dutch writer Leon de Winter says that “nobody knows what will happen if the soulless EU is confronted with a soulful enemy that forces it to make decisions and thus to develop an identity,”²³ it shows that he is absorbing an insight originating from social psychology, according to which nothing supports the evolution of a group identity more effectively than a common enemy. This is exactly the kind of identity development which appears (within the context of State theory) in Carl Schmitt’s notorious “friend-enemy scheme,”²⁴ which was used as a literary topic in William Golding’s *Lord of the Flies*, and which last took effect in European politics during the civil war in a crumbling Yugoslavia.

What becomes obvious in this respect is that exploiting differentiation always holds the danger of discrimination through the establishment and maintenance of enemy concepts. This danger, however, is *not* held by an identity that develops on the basis of the EU canon of values elaborated above. By declaring that respect for human dignity, liberty, and equality and commitment to the rule of law, democracy, peace and integration will be its fundamental guiding values, the EU commits to do *without* any enemy concept whatsoever. Therefore, the EU values established by constitutional law do not permit any identity development by means of *discrimination* but at the most allow for an identity development through *differentiation*. The aim is to provide a legitimate and constitutionally demanded differentiation between States and persons, which do either not share these values at all or not to the same extent. It is intended to develop identity through differentiation, which can be achieved if Europeans realise—via constitutionally established values—who they are not. They thereby reveal to whom they can relate, namely all states and persons sharing their own values.

²¹ Heinrich Schneider, *Die Europäische Union als Wertegemeinschaft auf der Suche nach sich selbst*, 1 DIE UNION 25 (2000).

²² NIKLAS LUHMANN & JÜRGEN HABERMAS, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE 25, 60 (1971).

²³ Leon de Winter, *Wo steckt Europas Seele?*, Essay, in: DER SPIEGEL No 19, 152, 158, (2004).

²⁴ CARL SCHMITT, DER BEGRIFF DES POLITISCHEN 26, 50 (1996).

This, too, is a way to support the development of identity. For instance, the EU feels confident about its general harmony with the United States with respect to its internally and externally effectual guiding and fundamental values, despite all differences in detail (e.g., with regard to foreign or social policy). As a result, contrary to occasionally voiced misgivings, even certain verbalisations in the TEU,²⁵ which commit the EU to the European social model as well as to strict compliance with, and further development of, public international law, and which in particular oblige it to protect the basic principles of the United Nations Charter, should not be mistaken for a “furtherance of an anti-American self-perception”.²⁶

1. *Legitimation Effect: Values as a Basis for Majority Decisions within the EU*

Since legitimation is primarily achieved through democratisation and parliamentarisation, vital importance within the EU is given to the decision-making process. Attention is therefore focused on the European Parliament and the Council of Ministers. In both EU organs, decisions are now usually made by majority voting.

Despite occasional critical scepticism,²⁷ common values have a legitimising effect. This becomes particularly visible with regard to the majority decisions in the Council of Ministers—an issue that has consistently been the focus of heavy controversies in the course of integration history. One need only recall the examples of the French “empty chair policy,” which resulted in the Luxemburg compromise, the British veto policy under Thatcher, or the debate with Poland that repeatedly rejected every compromise with regard to the adaption of quality majority voting in the context of reform.²⁸

Majority decisions are legitimisable only if the outcome of the voting offers alternatives for the implementation of values, objectives and principles and if a general consensus on these issues is achieved between the majority and the ultimately overruled minority.²⁹ Against this background, majority decisions within the EU and the EC respectively were unproblematic for as long as the Union regarded itself as a purely economic community whose policy focused on the implementation of the common market. In all policies which affected primarily political issues, unanimous decisions safeguarded the veto power of the Member States.

²⁵ TEU art. 3, paras. 2, 4.

²⁶ von Bogdandy, *supra* note 14.

²⁷ BÖCKENFÖRDE, *supra* note 9. For an affirmation of this position, without further substantiation, see Reimer, *supra* note 4, at 213.

²⁸ See Volkmar Götz, *Mehrheitsbeschlüsse des Rates der Europäischen Union*, in *FESTSCHRIFT FÜR ULRICH EVERLING* 339 (Ole Due ed., 1995).

²⁹ OTTO KIRCHHEIMER, *POLITIK UND VERFASSUNG* 17 (1964). For the EU, see Schneider, *supra* note 21.

In the course of European integration, however, the Community's scope of tasks has been steadily broadening, partly due to a wide interpretation of competence norms and partly as a result of treaty changes. At the same time there have been repeated claims to extend majority voting, owed to the EU's enlargement and the steady blockage policies by several Member States which resulted in lacking efficiency in decision-making and a standstill of common policy, which have been fulfilled to a certain extent in several treaty revisions.³⁰

Especially against the background of the EU's admission of twelve new Member States and the associated danger of the Union's increased incapacity to act, there is a need for further reduction of the domains in which decisions are still made unanimously. There is, however, a threat of subsequent crucial tests of EU stability if the Member States overruled in a majority decision feel steamrolled. As a result of this, the consensus on the basic principles of the EU, which mainly include the European values, the degree of homogeneity and the commitment to solidarity, must be reinforced. Therefore, it is immensely important to the continuity and consolidation of the achievements of European integration that the EU multi-level constitutionalism is sure about its own values. This holds especially true in view of the reduced integrational power of the market.³¹

2. *The Legal Significance of European Values*

European values also possess legal significance. Since the respect for and protection of the fundamental values of the Treaty of Lisbon are explicitly defined as accession requirements,³² those European values form the legal basis of EU membership.³³ The same implicitly applies for the guiding values because they are vitally important to the EU. The legal significance of those values is confirmed by the sanctioning procedure of Art. 7 of the TEU: a Member State running the risk of departing from the common value basis at first receives a warning and—if this has no effect—is then gradually limited in its rights of membership. Such sanctions may ultimately cause the respective State to be “pushed” to withdraw from the Union. The Treaty of Lisbon cautiously indicates this perspective with the new provision of Art. 50.³⁴

a) *Fundamental Rights*

³⁰ Heide Wedemeyer, *Mehrheitsbeschlussfassung im Rat der EU*, 18, 49 (2008); Gerhard Konow, *Die Beschlussfassung des Rates und die Erweiterung der Europäischen Gemeinschaften*, 30 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 321 (1997); AXEL MOBERG, *The Nice Treaty and Voting Rules in the Council*, 40 JOURNAL OF COMMON MARKET STUDIES (JCMS) 259 *et seq.* (2002);

³¹ Schneider, *supra* note 21 at 30.

³² TEU art. 6 para. 1. (Treaty of Lisbon art. 2)

³³ TEU art. 49

³⁴ Treaty of Lisbon art. 50.

As previously shown, the legal development of the European Community of Values is also visible with regard to fundamental rights. While the sanctioning procedure of Art. 7 of the TEU ensures that the EU's fundamental values are protected in extreme cases, fundamental rights guarantee that the Union's value order will be enforced in political every-day life. Fundamental rights subjectify and concretise the EU fundamental values, fulfilling their concretising function by "breaking down" the values contained within their respective scopes of protection into small units suitable for everyday use. Another possibility is to use the Community's fundamental rights in such a way that they formulate—along the lines of the objective value order doctrine of the German Federal Constitutional Court—a European value order that affects all aspects of Community law. This would guarantee an interpretation of secondary community law that conforms with and adds relevance to fundamental rights, particularly with regard to civil law relations. The *Schmidberger* case indicates that the ECJ seems to be tending to this direction by activating European fundamental rights as a barrier to the fundamental freedom of movement of goods.³⁵

b) Flanking of the Single Market

The core of the Economic Community is the creation of a single market,³⁶ legally defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".³⁷ The respective fundamental rights, in addition to guaranteeing subjective rights³⁸ to which each individual single market citizen may refer directly before the national courts, also safeguard—in case of doubt by way of a legal submission procedure before the ECJ—the implementation of the single market objective.

By way of the Four Freedoms, which are directly applicable, the market citizens interested in protecting their rights are mobilised to implement the single market.³⁹ In combination with the ECJ's policy of broadening the fundamental freedoms from mere discrimination prohibitions intended to guarantee equal national treatment in case of transboundary activities to more or less comprehensive limitation prohibitions⁴⁰, the fundamental

³⁵ Case C-112/00, Eugen Schmidberger Int'l Transp. und Planzüge v. Republic of Austria, E.C.R. 2003, I-5659.

³⁶ The ground was prepared by the White Paper of the Commission on "Completion of the Internal Market" of 14 June, 1985 (COM (85) 310), which was the first paper to point out the measures required for the elimination of the trade barriers still existing at that time.

³⁷ TEC art. 14

³⁸ For the basics, see Case C-26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 1. On the subjective rights under Community law, see Thorsten Kingreen & Rainer Störmer, *Die subjektiv-öffentlichen Rechte des primären Gemeinschaftsrechts*, 33 *EUROPARECHT* 263 (1998); JOCHEN GEBAUER, *DIE GRUNDFREIHEITEN DES EG-VERTRAGES ALS GEMEINSCHAFTSGRUNDRECHTE* 32 (2004).

³⁹ See JOHANNES MASING, *DIE MOBILISIERUNG DES BÜRGER FÜR DIE DURCHSETZUNG DES RECHTS* 42 (1997).

⁴⁰ See DIRK EHLERS, *EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN* 147, 156, 172 (2002). For a critical point of view, see THORSTEN KINGREEN, *DIE STRUKTUR DER GRUNDFREIHEITEN DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS* 115 (1999).

freedoms developed an unimagined deregulation force by submitting even non-discriminating national social, environmental or consumer protection standards to a market conformity control on the part of the Commission and the ECJ as guardians of the respective treaties.⁴¹

Especially in this context the ECJ's practice of simultaneously employing a broad interpretation of the Four Freedoms (starting with the famous *Dassonville* judgment⁴²) in the interest of European integration and a narrow interpretation of the justifications based on fundamental freedoms, proved to be an instrument of European deregulation. In light of the limited and narrow justifications (i.e. in accordance with Art. 30 of the TEC), the practice led to a kind of "Market without State", which tended to be ignorant with regard to public welfare and policy issues like environmental or consumer protection. With regard to the *Cassis de Dijon* case,⁴³ the ECJ extended the explicit justifications of Art. 30 of the TEC by employing so-called mandatory requirements. According to the ECJ, these mandatory requirements, which—ultimately acting as unwritten justifications—are suitable for legitimising a uniformly applicable market restriction, including for example customer and environmental protection,^{44,45} efficient fiscal control,⁴⁶ variety in media sources,⁴⁷ the protection of the social security systems,⁴⁸ the workplace environment⁴⁹ or the efficiency of judicature.⁵⁰ That way, in a step-by-step approach, the ECJ—in addition to the values contained in the written justifications of the fundamental freedoms—has formulated a comprehensive list of recognised European individual values capable of legitimising restrictions on market freedoms. In this respect the four economic freedoms have shown how values may conflict with each other in the Single European Market. Therefore it became necessary to balance market freedom (*Dassonville* formula) against public welfare and policy issues (*Cassis* formula) or individual rights. Recent examples for

⁴¹ Astrid Epiney, *Article 28 EC Treaty*, in: KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT marginal note 18 (Christian Calliess & Matthias Ruffert eds., 2d ed. 2002).

⁴² Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville, 1974 E.C.R. 837, 852.

⁴³ Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662.

⁴⁴ Case C-239/90, Boscher, Studer & Fromentin v. SA British Motors Wright, 1991 E.C.R. I-2023.

⁴⁵ Case 302/86, EC Comm'n v. Denmark, 1988 E.C.R. 4607, marginal note 8; Case C-2/90, EC Comm'n v. Belgium, 1992 E.C.R. I-4431, marginal note 27; Case C-379/98, PreussenElektra AG v. Schleswag AG, 2001 E.C.R. I-2099, marginal note 79.

⁴⁶ Case 13/77, SA G.B.-INNO-B.M. v. Ass'n des détaillants en tabac, 1977 E.C.R. 2115.

⁴⁷ Case C-368/95, Familiapress v. Heinrich Bauer Verlag, 1997 E.C.R. I-3689.

⁴⁸ Case C-120/95, Nicolas Decker v. Caisse de Maladie des Employes Privés, 1998 E.C.R. I-1831.

⁴⁹ Case C-312/89, Union dep't des syndicats CGT de l'Aisne v. SIDEF Conforama, 1991 E.C.R. I-997.

⁵⁰ Case C-3/95, Reisebüro Broede v. Sandker, 1996 E.C.R. I-6511.

the latter are the *Schmidberger* (right of demonstration)⁵¹ and *Omega* (human dignity)⁵² cases.

C. Transnational Integration through European Values?

This leads to the question if establishing values in a European Constitution can contribute to further integration and, above all, to the development of a European identity, or if it is simply pathos merely intended to give the EU some artificial patina⁵³.

I. The EU as Federal Multi-Level Constitutionalism

The EU is not intended to become a Federal State in the traditional sense.⁵⁴ However, in view of its supranationality—defined first and foremost through EC law with its accepted priority and direct applicability in the Member States—the EU differs from the classical international organisations.⁵⁵ If the EU cannot be defined by the categories of classical states and international law, it may be best described as a federal type of multi-level constitutionalism, in which state sovereignty is reduced and the constitutional orders of the EU and its Member States are mutually interlocked.⁵⁶

In the course of constitutionalisation taking place within the context of the European integration, the trend in Member States is towards a constitution which according to the *Bundesverfassungsgericht* (BVerfG – German Federal Constitutional Court) in its judgement on the Treaty of Lisbon is “oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration”.⁵⁷ This

⁵¹ Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, 2003 E.C.R. I-5659.

⁵² Case C-36/02 Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9606.

⁵³ In this sense Ulrich Haltern, *Europa – Verfassung – Identität*, in *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 21 (Christian Calliess ed, 2007).

⁵⁴ See THOMAS SCHMITZ, *INTEGRATION IN DER SUPRANATIONALEN UNION* 169, 198, 361 (2001). See also CHRISTOPH DORAU, *DIE VERFASSUNGSFRAGE DER EUROPÄISCHEN UNION* 29 (2001). For a different point of view, see Fritz Ossenbühl, *Maastricht und das Grundgesetz – eine verfassungsrechtliche Wende?*, 108 *DEUTSCHES VERWALTUNGSBLATT* (DVBl) 629, 631 (1993); KARL A. SCHACHTSCHNEIDER & WOLFGANG BLOMEYER, *DIE EU ALS RECHTSGEMEINSCHAFT* 75 (1995).

⁵⁵ See Torsten Stein, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und in der Schweiz?* 53 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (VVDStRL) 26, 29 (1994); SCHMITZ, *supra* note 54, at 65, 113; DORAU *supra* note 54, at 20.

⁵⁶ For a critical opinion on the idea of a constitutional union, see Matthias Jestaedt, *Der Europäische Verfassungsverbund. Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation*, in *GEDENKSCHRIFT FÜR WOLFGANG BLOMEYER* 637, in particular 645 (Richard Richardi & Hermann Reichhold eds., 2004); Marcel Kaufmann, *Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäischen Staatenverbund*, 36 *DER STAAT* 521, 528 (1997); Christoph Möllers, *Staat und Verfassung im Kontext der Europäisierung*, in *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 9 (Christian Calliess ed, 2007).

⁵⁷ See, e.g., *GRUNDGESETZ* (GG- Basic Law/Constitution) arts. 23, 24.

constitutionalisation facilitates the interpenetration and interlocking of national and supranational constitutional and legal orders, which leads to the establishment of a common European constitutional law. Although constitutionalisation creates a system of mutual fertilisation and stabilisation in which European and national constitutional law influence one another and develop a mutual complementarity the primacy of EU law requires national constitutional law to conform to European homogeneity requirements. As such, national constitutional law may have to tolerate considerable relativisations.⁵⁸ At the same time, national constitutional law—communicated through the general rules of law—represents the most import reception reservoir for European constitutional law.⁵⁹ And as shown by the EJC case-law on fundamental rights protection in response to the German Federal Constitutional Court, national constitutional law also has a considerable influence on European constitutional law and the corresponding power to set some standards.^{60,61}

⁵⁸ See, e.g., TEU art. 6, paras. 1, 7.

⁵⁹ See, e.g., TEU art. 6 para. 2; TEU art. 288.

⁶⁰ See, e.g., GRUNDGESETZ (GG- Basic Law/Constitution) art. 23, para. 1.

⁶¹ See Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, *The Columbia Journal Of European Law* Vol 15, No 3, 349 (2009) ; Christian Calliess, *Zum Denken im europäischen Staaten- und Verfassungsverbund*, in *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 187 (Christian Calliess ed, 2007); Rudolf Steinberg, *Grundgesetz und Europäische Verfassung*, 32 ZRP 371 (1999); Peter Häberle, *Verfassungsrechtliche Fragen im Prozess der europäischen Einigung*, *EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT (EUGRZ)* 429 (1992).

II. Concretising Transnational Values in the EU

Behind the national constitutions, there is a long-standing historical development which has led to the creation of established value substances. European constitutional law, on the other hand, is characterised by a continual and still uncompleted integration process. Viewed from this perspective, the above-listed values would be but boilerplates, feigning—much like those famous Potemkin villages—a European reality of values in order to suggest a European identity. Does this mean that one should agree with the criticism cited at the beginning of this paper? Is the European Constitution full of constitutional aesthetics, patina and pathos? Does it devalue European values as a consumption-focussed aesthetic strategy comparable to the one the advertising industry uses just as successfully or unsuccessfully to sell shoes?⁶²

Based on experience, national cultures formed national values, which build the basis for European values. Against the background of different national lines of tradition, the EU's common values first of all originate in the basic historical and cultural experiences of its Member States.⁶³ These start at the much conjured-up (also by the TEU) Greek and Roman world⁶⁴ and reach further to encompass the Renaissance, Humanism and Enlightenment, Reformation and Counter-Reformation including the religious wars, the political liberation of the individual as a result of the French Revolution, and finally the Industrial Revolution including the Social Question. Europe's accompanying formative historical experience continues to be that of war and tyranny. As shown by the countless monuments across Europe, the two World Wars and the dehumanizing dictatorships of the 20th century have burned themselves into the collective memory.⁶⁵ On this experiential basis and as a result of collective learning processes, the EU Member States have witnessed the development of certain values understood as collective preferences. These include freedom and security (91% of EU citizens consider these a paramount task of the EU), the respect for human dignity, democratic principles and the rule of law. Especially important are the protection of fundamental rights including the freedom of science, culture and confession, but also a free economic order with an efficient social security system.⁶⁶

Accepted and acknowledged by all EU Member States in one way or another, these values form the basis of their national constitutions and accordingly also shape the common order of European multi-level constitutionalism. Despite being interwoven with national values, European values have their own independent substance to be revealed. Even though the EU values are originally those of the Member States, they have nevertheless

⁶² ULRICH HALTERN, *EUROPÄISCHE VERFASSUNGSÄSTHETIK*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 261, 264 (2002).

⁶³ Speer, *supra* note 5, at 981, 982.

⁶⁴ HAGEN SCHULZE, *STAAT UND NATION IN DER EUROPÄISCHEN GESCHICHTE* 327 (1994).

⁶⁵ MICHAEL SALEWSKI, *GESCHICHTE EUROPAS* 1101 (2000).

⁶⁶ See SCHULZE, *supra* note 64, at 330.

emancipated themselves to a certain extent from their respective nations by being elevated to the EC level precisely for the purpose of guaranteeing a common European system of values.

If the point is to concretise an established European value, the first thing to be done is to compare it with the substance of values within the respective Member States. The result of such comparison then must be assessed in view of the value system of the European Constitution. Within this context, the mechanisms of European multi-level constitutionalism are required. Its characteristic instruments of cooperation and coordination bring about the necessary consolidation through the interlocking of national and European values. The substance of the national values thus contribute to the creation of the philosophical, political and legal substrate common to all Member States. The acknowledged European value may then be concretised with regard to its substance in the way of a judgmental comparison of the EU members' national constitutions. This form of "value interaction," which facilitates multi-level constitutionalism, generates a European "Community of Values".

In a procedural and a material respect, this European "Community of Values" requires a bracket to help relate both value levels to one another so that they may then be bundled together to form a European value. One can create a link to the European guide value of solidarity in its Member State dimension, which is—as shown before—a central element of the common value order and which may serve as a bridge for merging the national value substances of all Member States into one European value substance.

From this point of view, European and national value substances within the Community of Values share a two-way relationship, in the context of which substance is not only given to the abstractly acknowledged European value, but where vice versa the European value also helps fertilise and shape the national ones. With regard to the legal aspects, the extreme case is the sanctioning procedure of Art. 7 of the TEU, by which the European values of Art. 6, para. 1 of the TEU are enforced.

III. Conflicts of Values

In the EU, conflicts between values cannot be excluded.

Conflicts may arise with regard to different approaches both between the Member States themselves and between the Member States and the EU. This may for instance be the case during the process of creating European law. One part of this process consists in reaching an agreement on the aims and basic principles of the new law, in the course of which governmentally predefined values are extended. This way of Europeanisation of values might bring about a change of substance in the national sphere. The adaptation pressure caused by the European level may cause an identity change of the national legislations that is only limited by the utmost limitation of Art. 6, para. 3 of the TEU which

obliges the EU to respect the national identity of its Member States.⁶⁷ However, since this identity can be violated only by touching the core of one of the national Member States and the resulting occurrence of a loss of identity (comparable to the guarantee of eternity in Art. 79, para. 3 of the German Basic Law), this limitation is normally not reached within the context of a mere identity change.

But how, in the tense relationship between European protected and defined values and those values established in the national constitutions, can a “normal” value conflict be solved? There are three possible solutions:

1. The European values are denied their own legal effect, and as a result, the national values may prevail on the whole. This solution, however, is admittedly contradictory to the outlined constitutional specifications defining the EU as a Community of Values.
2. On a normative level and enforced by supremacy, the EU asserts its claim to formulate and implement the European values in a manner that makes them binding for all Member States. A solution similar to the one practised in the American Constitution or in the Federal Republic of Germany is considered too radical and therefore incompatible with the perception of the EU as a constitutional confederation and a Community of Values.
3. If one agrees with this perception, this leaves just a mediating approach via the principle of solidarity (which fulfils a procedural function). This principle, through Art. 10 of the TEC,⁶⁸ commits the members of the confederation or their corresponding organs to loyal and mutual cooperation as well as reciprocal coordination. Accordingly and in the above-described sense, one needs to accommodate the two-way relationship of the values at both levels by trying to achieve the best possible practical concordance. Only if the EU’s efficiency is threatened may the value conflict be solved by acting on the principle of European law priority. This applies in case of a violation of the “value core,” *i.e.*, if there is a “serious infringement” according to Art. 7 of the TEU.⁶⁹ Otherwise the principle of “concordance search” applies.

If European values are expressed by way of an EU legislative competence (*i.e.*, within the context of the environmental policy of Art. 175 or Art. 95 of the TEC), the value conflict is bound to turn into a competence conflict, which will then have to be solved in accordance with the general rules for the exercise of competences. These primarily include the guidelines for the principle of subsidiarity according to Art. 5 of the TEC (to be examined in a three-step approach), which, however, need to be harmonised with the principle of solidarity⁷⁰ in this respect.⁷¹

⁶⁷ See Albert Bleckmann, *Die Wahrung der “nationalen Identität” im Unions-Vertrag*, 52 JZ 265 (1997).

⁶⁸ TEC art. 10.

⁶⁹ TEU art. 7.

⁷⁰ See Roland Bieber, *Solidarität als Verfassungsprinzip der Europäischen Union*, in *SOLIDARITÄT UND EUROPÄISCHE INTEGRATION* 41, 51 (Armin von Bogdandy & Stefan Kadelbach eds., 2002).

In case of conflict at any rate, the authority qualified to bring about and enforce the congruence of national and European values is always the ECJ in its capacity as the EU's "Constitutional Court."

D. Becoming European by Transnational Values?

The concept of integration is a multi-layered one. In general, but also in view of European integration, it has mainly been used by the political and the social sciences in their attempts to provide a scientific explanation for the EEC founders' European unification idea and to complement the latter by certain integration factors.

From a legal perspective and with regard to the issue at hand, we continue to be especially interested in the thoughts of Rudolf Smend.⁷² According to the traditional view, while integration and identity preceded the Constitution, they were neither its object nor its aim. Particularly with regard to the "rifts between the Constitution and constitutional reality" in the Weimar Republic, the topic of national and social unity development including the respective role of the Constitution evolved into a matter of constitutional theory and constitutional law.⁷³ It was within this context that Smend developed his famous integration theory, according to which the State is not a statically predetermined institution but rather a dynamic process, namely a process of integration.⁷⁴ In contrast to Carl Schmitt,⁷⁵ Smend does not take unity for granted nor does he defend it by excluding heterogeneous elements. He rather understands unity as something which can be achieved in a process of continual re-creation through personal, functional and factual (material) integration factors.⁷⁶ According to Smend, integration is a constitutional commandment, and thus he relates the Constitution—up to the interpretation of individual standards—to the integration task. He also states that the Constitution as a positive right was itself a piece of integrating reality.⁷⁷ In addition to the personal and functional integration factors (creation of organs and procedures), Smend emphasises the importance of factual integration through the Constitution, *i.e.*, by way of the fundamental

⁷¹ For details, see CHRISTIAN CALLIESS, *SUBSIDIARITÄTS- UND SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION* 66, 185 (2nd edition 1999).

⁷² See Stefan Koriath, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, 62 *VVDSTRL* 117, 122 (2003). On the "discovery" of European law, see Ingolf Pernice, *Carl Schmitt, Rudolf Smend und die europäische Integration*, 120 *AöR* 100 (1995).

⁷³ Koriath, *supra* note 72.

⁷⁴ RUDOLF SMEND, *STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE* 119, 171 (1955). For an overview, see PETER UNRUH, *WEIMARER STAATSRECHTSLEHRE UND GRUNDGESETZ* 132 (2004); CHRISTOPH MÖLLERS, *STAAT ALS ARGUMENT* 100 (2000).

⁷⁵ See Möllers, *supra* note 74, at 58, 102.

⁷⁶ SMEND, *supra* note 74, at 142, 148, 160.

⁷⁷ Koriath, *supra* note 72, at 123.

rights, the Preamble or the State's symbols. The integration's success depends on aspects outside State organisation, and in particular on the existence of a social basic consensus in the form of a "Community of Values." Therefore, according to Smend, there is "no integration without a Community of Values" ["keine formelle Integration ohne sachliche Wertegemeinschaft"].⁷⁸

Correspondingly, integration depends on values. As already indicated above, values are of great legal-political importance as far as identity development is concerned. If values are defined as convictions with a high degree of abstraction⁷⁹ and forming part of the social identity of individuals, this completes a conceptual cycle capable of providing the answer to the question of integration through constitutional law. According to conclusions reached in social sciences, identity constitutes itself in a system of fundamental values. Correspondingly, each community, too, is based on collectively shared fundamental values.⁸⁰ In its formulation "[t]hese values are common to the Member States in a society. . .," Art. 2 of the Treaty of Lisbon addresses this fact by addressing both states and citizens. Values may thus be used to create identity-forming preference orders for facilitating a consented orientation, on which the institutions of rule-of-law democracies depend because the effectuation of the legitimating authentication assigned to them—totally in line with Smend's integration theory—requires more than just procedures.⁸¹

As a consequence, the EU now also expressly presents itself as a Community of Values within the framework of the Treaty of Lisbon. With this reference made to values, the future "European Constitution" offers the Union's citizens an identity in the sense of uniform expectations of the political system. However, this does not automatically result in a collective identity through identification with the Union.⁸² In fact, the constitutional establishment of values is just a first step, which by the "visualisation" of the (previously often hidden) European values initiates a corresponding process of integration. Ideally, the elaborated EU values will contribute to a gradually increasing self-assurance by provoking a constant examination of the aims and purposes of European politics. Completely in line with Smend's integration theory, values have the power to effectuate integration through constitutional law. It is clear that in order to achieve this, the EU requires powerful and convincing institutions⁸³ (functional integration) as well as effective procedures (formal integration).⁸⁴

⁷⁸ SMEND, *supra* note 74, at 159, 215.

⁷⁹ von Bogdandy, *supra* note 14, at 53, 58; Christian Starck, *Zur Notwendigkeit einer Wertbegründung des Rechts, in RECHTSPOSITIVISMUS UND WERTBEZUG DES RECHTS* 47 (Ralf Dreier ed., 1990).

⁸⁰ Schneider, *supra* note 21, at 17.

⁸¹ Similarly Schneider, *supra* note 21, at 32.

⁸² von Bogdandy, *supra* note 14, at 58.

⁸³ On the relevance of institutions in this connection, see Walter Leisner, *Der europarechtliche Einigungszwang. Einigung um Werte - oder institutionen als Selbstläufer?*, 57 JZ 735 (2002).

⁸⁴ Schneider, *supra* note 21, at 39.

When defining the content and substance of the acknowledged European values within the framework of the European “Community of Values,” such convincing institutions need to take into account the national value substances and at the same time respect and esteem the common values. Otherwise, integration through value-oriented constitutional law is bound to fail. In the “every-day-life reality of values,” the efforts of the EU institutions towards fulfilling this task are mostly convincing. The protection of fundamental rights, the foreign economic relations with their “value protection clauses,” the protection of the environment and the safeguarding of the services of general economic interest are just a few examples in this respect.

As far as extraordinary challenges are concerned, the EU institutions’ approach to value implementation occasionally shows certain deficits. For instance, the EU must handle questions as to why it still has not decided to use the values of Art. 6, para. 1 of the TEU as an instrument against Berlusconi’s Italian judiciary and media policies and why it has so far refrained from initiating sanctioning proceedings in accordance with Art. 7 of the TEU despite the obvious fact that there is at least the danger of an infringement of the rule-of-law and democratic values. There is also a need for the EU to have a critical look at its expansion policy with regard to Turkey because the feasibility of Turkey’s inclusion in the context of the European Community of Values is doubtful for a variety of reasons.⁸⁵ In both cases, power or strategy-related considerations seem to take priority over European values. If these considerations are allowed to take precedence, Europe will never be able to become a serious Community of Values, and the path of integration through European constitutional law will just lead to nowhere due to a lack of credibility. The integrative functions which values could fulfil are vital for the future of the European Union.⁸⁶ Without a reliable fundament of values, both the “European Constitution” and its values are in danger of being reduced to nothing but pathos, and this in turn might cause the citizens to refuse the European identity offered to them by virtue of values.

⁸⁵ See Edgar Lenski, *Turkey and the EU: On the Road to Nowhere?* 63 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (ZaöRV) 77, 87 (2003).

⁸⁶ See Di Fabio, *supra* note 1, at 3, 4, 7.