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The Debate on European Values and the Case of Cultural Diversity

Gabriel N. Toggenburg



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Europäische Akademie Bozen
Drususallee, 1
39100 Bozen - Italien
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

Accademia Europea Bolzano
Viale Druso, 1
39100 Bolzano - Italia
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

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Abstract

'Values' have become a topic of discussion at the European level. This article tries to briefly track the reasons for this phenomenon as well as to detangle the foggy notion of 'values' in this context. The author differentiates between founding values, European ideas and common legal principles. All these different forms of European values differ in their respective legal and political character. Most importantly, they require a different level of European conformity. Special emphasis is given to the value of cultural diversity which can be considered, at most, a 'self-restrictive' value since it can be perceived from an inclusive perspective (including diversity within the states) or from an exclusive perspective (diversity amongst the states). Placing too much emphasis on the inclusive reading endangers the exclusive reading, and vice versa. In this context, the author refers to the new constitutional motto of the European Union as proposed by the constitutional treaty. Unlike the situation in Indonesia and South Africa (which both use the same motto) it does not seem to address subnational diversity. Instead, "united in diversity" aims at protecting national identities against excessive integration, and thus seems the very opposite of the US constitutional motto of "E pluribus unum".

Author

Gabriel N. Toggenburg is a researcher at the European Academy Bolzano/Bozen since 1998. His work focuses on EU Constitutional law and related issues, especially the subject of diversity and its interactions with the Common market. Publications include *The protection of minorities in the enlarged European Union. The way forward*, LGI Books, Budapest, 2004 (available also at <http://lgi.osi.hu/publications.php>). For details see <http://www.eurac.edu/about/collaborators/GToggenburg/index.htm>.

The author can be reached at: Gabriel.vonToggenburg@eurac.edu.

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The Debate on European Values and the Case of Cultural Diversity¹

Gabriel N. Toggenburg

1. The Discussion on ‘European Values’:

Where does it come from, What does it consist of?

Already before the ‘Buttiglione crisis’ of October 2004, it had become obvious that ‘values’ are highly topical in the context of European integration.² Just fifteen years ago one could have speculated whether *fin-de-siècle*-Europe would no longer be a vehicle for values, but a mere end in itself which risks losing any deeper *raison d’être*.³ However, it is the end of the last and the beginning of the new century which see the Union submerged in an omnipresent debate of unprecedented intensity on its underlying values, on ways to control the observance of these values and on the Union’s constitutional identity in general.

At last four factors can be cited for bringing discussion of values to a head: the drafting of the Charter of Fundamental Rights in 2000, the so-called Austrian crisis of the same year, the general turmoil in international politics following September 11 and, finally, the European Convention’s drafting of the European Union’s new constitutional treaty. This *quadriga* covers the entire range of ‘values’, from attempts to define a specific catalogue of fundamental ‘rights’ (within the Convention drafting the Charter) to a broader process of self-definition and identity building at EU level including also political issues such as the Union’s political objectives and its scope (within the Convention drafting the constitutional treaty). The question of how to react if a member state allegedly infringes (supposed) European values (which

¹ An earlier version of this paper has been published in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity* (EURAC Research, Bolzano/Bozen, 2003, out of print).

² Rocco Buttiglione – the designated Italian member of the new European Commission – had to withdraw his candidacy due to pressure from the European Parliament. The latter found the views of Buttiglione with regard to homosexuality (according to him a “sin”) and the role of women in society unacceptable and ‘un-European’. The event produced a debate on the edge between religious values and politics whose intensity was so far unknown in recent Europe. In the United States this sort of religion-driven conflicts in politics is rather usual. Compare in this context, e.g., the position of the Archbishop of Denver who said that voting for Kerry (who supports stem cell research or abortion rights) would be a sin that would have to be confessed before receiving communion (see Herald Tribune, 18 October 2004, at 8).

³ See Joseph H.H. Weiler, “Fin-de-siècle Europe: do the new clothes have an emperor?”, in Joseph H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, Cambridge, 1999), 258-261.

occurred in the Austrian crisis) oscillates between law and politics. And, finally, the value debate provoked at the global level by terrorist attacks raises political questions, such as how to design the transatlantic partnership and where to place Europe in the relationship between the no longer monolithic 'West' and the even less monolithic Islamic world.⁴

Of course, the value debate in Europe cannot be confined to these recent and prominent fora. Rather, every political system generates ongoing debate on values and tries to resolve conflicts which arise.⁵ These frictions and asymmetries call for replies by the Courts as well as the political arena. The (so far) unique establishment of political criteria for accession to the EU in the recent eastern enlargement demonstrates how values such as e.g. "respect for and the protection of minorities" are voiced at the political level but subsequently left to the legal system for further 'digestion'.⁶ In other cases, the question of common values arises when new areas of European legislative competence must be filled with concrete political content. This is happening in areas, such as e.g. the EU immigration policy.⁷ Yet, other debates arise from supposed or real legal friction between certain policy areas and the European Union's common market 'skeleton': the 'trade linkage problem' in the area of culture⁸ and the EU cinema policy⁹ are two examples. The *fora* and contexts hosting the European value debate are therefore countless – some, like the European Convention in Brussels, prominently exposed to the light of public attention; others, like local Court rooms, hidden away in the silent corners of the European political system.

⁴ An illustrative example for this new insecurity served the article "Der Glaube der Ungläubigen. Welche Werte hat der Westen?", 52 *Der Spiegel* (2001), 50-66.

⁵ For the phenomenon of multiculturalism see e.g. Cinzia Piciocchi, "Europe Faces Cultural Diversity: Towards a European Multicultural Model?", in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity* (EURAC Research, Bolzano/Bozen, 2003, out of print), 25-36, who argues that the latter provides a forced auto-definition to the single states.

⁶ Minority protection is a Copenhagen criterion but was not included – in contrast to all the other political criteria of Copenhagen – in the list of Art. 6 EU as established by the Treaty of Amsterdam. See on this e.g. Bruno de Witte, "Politics Versus Law in the EU's Approach to Ethnic Minorities", 4 *RSC Working Papers* (2000); Gabriel N. Toggenburg, "A Rough Orientation through a Delicate Relationship", in *European Integration Online Papers* (2000), at <http://eiop.or.at/eiop/texte/2000-016a.htm> and, on the Copenhagen criteria in general, Christophe Hillion, "The Copenhagen criteria and their progeny", in Christophe Hillion (ed.), *EU Enlargement. A Legal Approach* (Hart, Portland, 2004), 1-22.

⁷ See Maria Teresa Bia, "Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns", 2 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

⁸ See Rostam J. Neuwirth, "The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in the Light of the WTO", 4 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

⁹ See e.g. Anna Herold, "EU Film Policy: between Art and Commerce", 3 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

2. The Notion of ‘European Values’:

Founding Values, European Ideas and Common Legal Principles

As the ‘value debate’ came to prominence in public discourse in recent years, the notion of ‘European values’ has become epidemic in usage. At risk of oversimplification, it is here submitted that the discussion circulating around this foggy notion is usually based on one of the following three different preconceptions of what constitutes ‘European values’: Firstly, European values are often referred to as the political *movens* underlying the European Communities (‘founding values’). Secondly, the term ‘European values’ arises regularly in the debate on ‘European identity’.¹⁰ In this context, one refers to various ideological or anthroposophic stances as ‘European values’ (‘European ideas’). These European ideas try to sketch a hidden ideological agenda or a common cultural backbone for Europe and its integration process. Thirdly, the term ‘European values’ labels the legal *acquis communautaire* surrounding concepts such as respect for human rights and fundamental freedoms, liberty, democracy or rule of law. Since Maastricht, these common principles (‘common legal principles’) have been enshrined in the treaties, namely in Article 6 EU¹¹. The latter circle of values is nowadays the most prominent reference to values in the treaty. However, in this internal dimension, the treaty does not speak of ‘values’ but of ‘principles’. The notion of ‘values’ has so far been reserved to the realm of the Union’s external relations.¹²

It is a commonplace that the Community began mainly as a community of economic interest, and only slowly developed into a community of values.¹³ However, it is also obvious that as early as 1957, the Preamble and Article 2

¹⁰ Just see as a prominent example the Charter of European Identity adopted by the “Kongreß der Europa-Union” in 1995 (the working group elaborating the Charter has been inspired by the speech to the European Parliament by Vaclav Havel on 8 March 1994). It says: “... Fundamental European values are based on tolerance, humanity and fraternity. Building on its historical roots in classical antiquity and Christianity, Europe further developed these values during the course of the Renaissance, the Humanist movement, and the Enlightenment, which led in turn to the development of democracy, the recognition of fundamental and human rights, and the rule of law” See at http://www.europa-web.de/europa/02wwwswwww/203chart/chart_gb.htm. Similar formulations can also be found in official EU documents. For a critical comment on the official promotion of an ‘European identity’ at EU level, see Bruno de Witte, “Building Europe’s image and identity”, in A. Rijksbaron, W.H. Roobol and M. Weisglas (eds.), *Europe from a Cultural Perspective* (Nijgh en Van Ditmar, Amsterdam, 1987), 132-139.

¹¹ Formerly Article F Treaty of European Union.

¹² Art. 11 para. 1 EU establishes as an objective of its foreign policy to “safeguard the common values” (see also Art. 27a para. 1 EU). The currently proposed constitutional treaty does however make use of the term ‘values’ not only in the preamble but also in the provision on the common legal principles, namely its Art. II-2 (“The Union’s values”). See the draft treaty establishing a Constitution for Europe in OJ C 169 (18 July 2003). The most recent version is a provisional consolidated version dating from 6 August 2004 (document CIG 87/04). Quotations below refer to that version.

¹³ It is misleading to see in this process of ‘value-isation’ a linear process of ‘federalisation’. The construction of a Community of values can be used by both sides – confederalist and federalists – alike. See Heinrich Schneider, „Die Europäische Union als Wertegemeinschaft auf der Suche nach sich selbst“, 1 *Die Union* (2000), 11-47, at 31-36.

of the treaty establishing the European Community invoked (at the very least) a trinity of values. These founding values consist, firstly, in the creation of a political area of freedom and international peace (as opposed to the experience made in the two World Wars); secondly, in the establishment of welfare-producing market economies (as opposed to the former command economies which existed throughout Eastern Europe under Communism) and; thirdly, maintaining a project which produces an ever higher degree of integration (as opposed to the experienced results of nationalism and isolationism) and thereby an “ever closer Union”.¹⁴ These founding values are political in nature, but also boil down to concrete treaty obligations - a fact which is especially obvious in the case of the EU’s commitment to the market economy.

The European ideas, on the contrary, point to commitments and convictions which can hardly be expressed in legal terms or identified in treaty provisions. Their legal validity is weak, and even their underlying political consensus is shaky. Therefore they can only partially fulfill their supposed aim, namely to equip the integration process with additional legitimacy. It remains difficult to define what is ‘European’ and what not. This despite the fact that in historical terms Europe was the only continent which was defined by its inhabitants and not by any (imperialistic) external influence.¹⁵ The normative doubts underlying the European ideas, however, do not abate their practical relevance, as can be observed in the political discussion surrounding the accession of Turkey.¹⁶ An illustrative example for the drawing of a European identity through European ideas is the perception of Europe as a community built on the three mountains of the *Acropolis*, the *Capitol* and *Golgotha*, representing, respectively, Greek cultural heritage, the Roman legal system and Christianity.¹⁷ Other parties stress that the Union builds on the remembrance and rejection of *shoa*, fascism and nazism as *lieux de memoire* of European integration.¹⁸ Still others focus on the ideas of the Enlightenment. Both the importance and the descriptive limits of European ideas are

¹⁴ Art. 2 TEC reads as follows: “The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it”. The preamble of the Treaty states that the founding fathers were committed to “strengthen peace and liberty” by “pooling their resources” and they call upon the other peoples of Europe who share their ideal to join in their efforts.

¹⁵ See Wulf Köpke, “Was ist Europa, wer Europäer?”, in *Das gemeinsame Haus Europa* (Museum für Völkerkunde Hamburg, 1999), 18-29, at 18.

¹⁶ Or consider for example the respectively different reception of slogans of political parties in Germany or Austria as against to lets say Belgium. Here one seems to be confronted with an asymmetric effect of anti-Nazism as *lieux de memoire* of European integration.

¹⁷ This concise metaphor seems to stem from the former German president Theodor Heuss. See for further elaboration Hans Graf Huyn, “Drei Hügel: Das Fundament Europas”, in Otto v. Habsburg et al. (eds.) *Grundwerte Europas* (Stocker Verlag, Graz, 1994), 9-38, at 21.

¹⁸ Wolfgang Schmale, *Geschichte Europas* (Böhlau Verlag, Wien, 2000), 287.

reflected in the role of ‘Christian values’, specifically the word ‘God’ played in the drafting of the Charter of fundamental rights¹⁹ and the constitutional treaty²⁰ respectively. Once one of the strongest unifying forces in Europe,²¹ churches and Christianity today encounter severe difficulty in building an all-embracing ideological mirror of European reality.²² Even in those cases where there is consensus on the overall acceptance of certain European ideas, one should be cautious not to confuse political affinities with legal obligations. A sort of European ideas were invoked, in the absence of any violation of clear principles, when the then new Austrian government was isolated from the other 14 member states in 2000. The result was the creation of new political as well as legal frictions.²³ Against this background, it is understandable that some maintain that “a modern state is supposed to be based on law, not on a

¹⁹ The preamble of the Charter starts saying that “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 ... “. See OJ 2000, (No. C 364), 18 December 2000, at 8. Note that (only) the German wording puts more emphasis on the religious dimension by using the phrasing “Bewußtsein ihres geistig-religiösen und sittlichen Erbes”. Stronger formulations such as “religious heritage” were objected by laical states such as France. See Matthias Triebel, “Kirche und Religion in der Grundrechtecharta der EU”, Nomok@non-Webdokument, para. 12, at <http://www.nomokanon.de/aufsaeetze/006.htm>.

²⁰ The latter does not contain now – despite several efforts in that direction direct reference to God or to Christianity. The proposed preamble mentions though “the values underlying humanism: equality of persons, freedom, respect for reason” and continues “[d]rawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law; Believing that reunited Europe intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world ... “. Moreover the preamble invokes the responsibility “towards future generations and the Earth”.

²¹ It should be borne in mind that the Christian Church not only provided medieval Europe with a uniform religion, but also with a uniform language, form of writing, educational system, etc. See e.g. Arnold Angenendt, “Die religiösen Wurzeln Europas”, in *Das gemeinsame Haus Europa* (Museum für Völkerkunde Hamburg, 1999), 481-488.

²² This however, does not mean that Christianity does not have a role to play in the context of European legitimacy. See Brent F. Nelsen, James L. Guth and Cleve R. Fraser, “Does Religion Matter? Christianity and Public Support for the European Union”, 2 *European Union Politics* (2001), 191-217. For the role religion plays in EU-law and on the question, whether and how one could (have) introduce(d) the notion of religion and god in the EU constitution see Gabriel N. Toggenburg, “Der (dritte) Weg zur (v)erfassbaren Religionsidee der EU”, 68 *Basler Schriften zur Europäischen Integration* (2004), 62-65, at <http://www.europa.unibas.ch/index.php?id=182&L=2>.

²³ See e.g. Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, “Constitutional Politics and the Embedded Acquis Communautaire: The Case of the EU Fourteen Against the Austrian Government”, 4 *Constitutionalism Web-Papers* (2000), at <http://les1.man.ac.uk/conweb/>. For a legal perspective see Matthew Happold, “Fourteen Against One: the EU Member States’s Response to Freedom Party Participation in the Austrian Government”, 49 *International and Comparative Law Quarterly* (2000), 953-963. A more EU law centred analysis together with further references can be found in Gabriel N. Toggenburg, “La crisi austriaca: delicati equilibri sospesi tra molte dimensioni”, 2 *Diritto pubblico comparato ed europeo* (2001), 735-756. Compare in this context also the report of the so called ‘Three Wise Men’, at <http://www.virtual-institute.de/en/Bericht-EU/index.cfm>.

set of substantive value commitments ... [and that] it does not demand agreement with the values which form the basis of its legal system".²⁴

This is, of course, different if we define 'values' as common legal principles. This notion is, legally speaking, the most relevant, and be focused on when talking about 'constitutional values'. These values not only express a common conviction of the Union, but also establish prominent legal guardrails for EU secondary law as well as for legislative and administrative action of the member states in the realm of EC law. The original Community Treaties contained no provisions relating to basic human rights or other legal values which are widely considered to be of practical and symbolic importance in modern, liberal, and democratic political systems.²⁵ This purely economic and utilitarian approach, which was taken due to the failure (and perceived unfeasibility) of establishing a political European Union at the earlier stages of European integration, was then counterbalanced by the jurisdiction of the European Court of Justice. Inspired by the constitutional traditions common to the member states, the Court held that "fundamental human rights [are] enshrined in the general principles of Community law".²⁶ In the late seventies and eighties, this set of European values was increasingly invoked, even being mentioned in declarations issued by the institutions of the European Community.²⁷ The Parliament, especially, was active in pressing towards the inclusion of value-oriented provisions in the Treaties. In 1978, even the European Council confirmed (in its Declaration of Copenhagen) that human rights and democracy would be "essential elements of membership of the European Communities".²⁸ Finally, when the young, still fragile, post-dictatorial democracies of Greece (1981), Portugal and Spain (1987) acceded to the EU, the Single European Act of 1986 introduced a reference to the principles of democracy and human rights as common principles all Parties are attached to.²⁹ In 1992, against the background of the end of the Cold War, the fall of the Berlin wall and the declared intention of a dozen of fresh post-dictatorial democracies to accede to the Union, the Maastricht Treaty

²⁴ Robert Spaemann, "The Dictatorship of Values", 25 *Transit* (2003), at <http://www.iwm.at/t-25xtb.htm>.

²⁵ See Paul Craig and Grainne de Burca, *EU Law* (Oxford University Press, Oxford, 2nd ed. 1998), 296-298.

²⁶ See e.g. the case Stauder (ECJ, Case 29/69 *Stauder v. City of Ulm*, 1969, E.C.R 419, para. 7 at 425). See on this *saga* Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (eds.), *The EU and Human Rights* (Oxford University Press, Oxford, 1999), 859-897.

²⁷ See Amaryllis Verhoeven, "How Democratic Need European Union Members Be? Some thoughts after Amsterdam", 23 *European Law Review* (1998), 217-234.

²⁸ Bull. E.C. 3-1978, at 5.

²⁹ The Preamble of the Single European Act stated that the Parties are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the convention for the protection of human rights and fundamental freedoms and the European social charter, notably freedom, equality and social justice", see OJ No. L 169 (29 June 1987), 2.

established the “principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” as principles “which are common to the member states”.³⁰ Furthermore, the Union itself is also required to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states “as general principles of Community law”.³¹ These legal principles are today referred to as the constitutional principles of the European Union.³² Finally, the establishment of a Charter of Fundamental Rights of the European Union gave a new dimension to the debate on European values and will, if enacted, put flesh on the bones of the idea of a legal heritage consisting of common European values.³³

3. Communities of Shared Values: The Quest for Homogeneity

Communities identify themselves through their common features, such as shared values. This social cohesion requires the maintenance of a certain (if modest) degree of homogeneity which these communities aim to preserve. Their success in fulfilling this aim also depends on the legal means at their disposal to control such homogeneity. European ideas, founding values and common legal principles differ regarding the mechanisms they have available for maintaining such ‘homogeneity’.³⁴

Consensus on common European ideas is very much left to silent political influence rather than legal control. Variations in the conception of European ideas are definitively below the threshold of any *legal* mechanism of control, and are to be seen as independent expressions of the member states’ “Europa-und Weltanschauung”. The idea that the European Community could or should guarantee the universal acceptance of these opaque European ideas

³⁰ Then Article F para. 2 TEU, now Article 6 para. 1 EU.

³¹ Article 6 para. 2 EU.

³² See e.g. Thorsten Kingreen and Adelheid Puttler, “Artikel 6”, in Christian Callies and Matthias Ruffert (eds.), *Kommentar zum EU-Vertrag und EG-Vertrag* (Luchterhand, Neuwied, 1999), at para. 52.

³³ Note that the Charter forms part II of the proposed Constitution and will enter into force only with the latter.

³⁴ I am speaking in the course of this article of ‘homogeneity’ in a very wide sense and am thereby not presupposing that there would be something like a ‘principle’ of homogeneity in EU constitutional law – a presupposition which has been rightly refused, see Armin von Bogdandy, *Europäische Prinzipienlehre, Europäisches Verfassungsrecht* (Springer, Berlin, 2003), 149-203, at 190. The notion of ‘homogeneity’ has developed especially in the German literature on the mechanism contained in Art. 7 EU, see esp. Frank Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Artikel 6 Abs. 1 und Artikel 7 EUV* (Duncker and Humblot, Berlin, 2000). This usage has encountered also criticism, see Schmitt von Sydow, “Liberté, démocratie, droits fondamentaux et Etat de droit: analyse de manquement aux principes de l’Union”, *Revue de Droit de l’Union Européenne* (2001), 285-325, at 288 and 289. However, looking at the Art. 7 mechanism as mean of ‘homogeneity control’ does not necessarily imply to qualify the Union as a federal state. See in this respect e.g. Manfred Zuleeg, “Die föderativen Grundsätze der Europäischen Union”, *39 Neue Juristische Wochenschrift* (2000), 2846-2851 who speaks of a “Verfassungsaufsicht” and “Gemeinschaftsaufsicht” in the context of Art. 7 EU.

amongst the EU member states and its citizens contradicts the very idea of a modern and secular entity based on freedom.³⁵

On the contrary, homogeneity-control in the community of values based on the founding values could build on clear legal obligations and instruments in the economic field. The “principle of an open market economy with free competition”³⁶ is embedded in countless specific duties and corresponding ‘fundamental freedoms’ such as the right to free movement in the Treaty-*corpus*. In this sense, it may be much more ‘legal’ than the values which we have labeled above as common legal principles such as democracy or the respect for human rights. The observance of the rules establishing a functioning and competitive market system is severely controlled by the Commission and the Court. Moreover, this rigid system has also contributed to the fulfilment of other founding values which are not legal in nature (namely welfare and peace), thereby confirming the thesis of functionalism of integration that mobility of goods and services also provides for the mobility of ideas and identities, thereby promoting tolerance, closeness and peace³⁷ as side-effects. By establishing the principles of direct effect and the supremacy of EC law, the ECJ kept the integration process on track toward the last founding commitment: the establishment of an ‘ever closer Union’.³⁸ With respect to the Common Market, one can conclude that the founding values are equipped with the most far-reaching means of ‘homogeneity control’. However, it should not be forgotten that the defense of this prominent founding value can easily conflict with constitutional values at the national level, such as the protection of minorities, consumer protection or the preservation of cultural diversity. Such values may or may not be part of the common legal principles recognised at the EU level. Consequently, the resulting value conflicts may be of either a vertical (EU-value versus member state value) or horizontal nature (EU value versus EU value).³⁹

³⁵ Admittedly, also the guarantee of what we have called common legal principles has its limits. Firstly because of reasons of competencies (see below), secondly (but this applies only *in extremis*) due to the famous ‘Böckenförde Dilemma’ (“Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann”). See Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit* (Suhrkamp, Frankfurt a. M., 1976).

³⁶ Art. 4 para. 1 EC.

³⁷ “If goods do not cross borders, soldiers will” is a well known saying in this respect.

³⁸ This third foundational value has been labelled by Weiler as “ideal of supranationalism”, see Weiler, “Fin-de-siècle ...”, 246 or by Toniatti as “principio di integrazione”, see Roberto Toniatti, “La carta e i ‘valori superiori’ dell’ordinamento comunitario”, in Roberto Toniatti (ed.), *Diritto, diritti, giurisdizione* (Cedam, Padova, 2002), 7-29, at 22.

³⁹ See on this Bruno de Witte, “Community Law and National Constitutional Values”, in 2 *Legal issues of European integration* (1991), 1-22. For analyses on the conflicts arising between the Common Market and, e.g., the ‘right to life of the unborn’, the right of association or minority rights see respectively: Diarmud Rossa Phelan, “Right to life of the unborn v. promotion of trade in service: The European Court of Justice and the normative shaping of the European Union”, in 5 *The Modern Law Review* (1992), 670-689; Matej Avbelj, “European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movement of Goods”, 4 *Jean Monnet Working Paper* (2004), at <http://www.jeanmonnetprogram.org/papers/index.html>; Gabriel

Turning to the common legal principles, it must be stressed that it has not only been established by the Court that the community is based on these legal principles; it was also the Court which first provided a rough control –(*vis-à-vis* the Community and then, to a certain degree, the member states) of the respect of these values. However, when protecting fundamental rights in the member states, the Court soon found itself knocking at the “fundamental boundaries”⁴⁰ of the competences of the Communities, the sovereignty of the member states, and thereby also the limits of such a homogeneity control itself. Therefore, this control *vis-à-vis* the member states remained piecemeal and subsidiary⁴¹. In 1992, however, the treaty of Maastricht took up the substance of the Court’s case law on common legal principles and enshrined them in primary law (then Article F para. 2 TEU). Then, in 1997, the Treaty of Amsterdam introduced, with Article 7 EU, a procedure providing for political control of these fundamental values at the European level. Thereby, the evolution of legal standards within the Court was complemented by a revolution in the political control of these standards, and it became possible for the Council of the EU to react on a political level to the “existence of a serious and persistent breach by a member state of principles mentioned in Article 6 (1)” by suspending certain rights deriving from EU membership, including voting rights in the Council (Article 7 EU). After the experience of the Austrian crisis, the Intergovernmental Conference leading to the treaty of Nice fine-tuned this mechanism of European control in 2001, and subjects it, if only partially, to legal review by the Court.⁴² The treaty now provides even a possibility for the Union to react when facing “a clear risk of a serious breach” of the principles enshrined in Article 6⁴³ by a member state.

The existence of this (largely symbolic) political sanctioning procedure, however, does not remove the fact that doubts remain concerning the extent

N. Toggenburg, “Diritto comunitario e tutela delle minoranze nella provincia di Bolzano. Due aspetti inconciliabili di un (unico) sistema?”, in Joseph Marko, Sergio Ortino and Francesco Palermo (eds.), *L’ordinamento speciale della Provincia autonoma di Bolzano* (Cedam, Verona, 2001), 139-194, at 164-194.

⁴⁰ Compare Joseph H. H. Weiler, “Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space”, in Weiler, *The Constitution of Europe ...*, 102-129.

⁴¹ Note that the content of fundamental values standard used in the framework of ‘political conditionality’ of eastern enlargement covered also areas outside the scope of the EU’s internal competence such as minority rights, children rights or prison conditions establishing thereby a ‘double standard’. The aim should be to strike a middle way between the two extremes: the detailed and overall monitoring *vis-à-vis* candidate states and the piecemeal and very subsidiary control *vis-à-vis* the member states. See Bruno de Witte and Gabriel N. Toggenburg, “Human Rights and EU-Membership”, in Steven Peers and Angela Ward (eds.), *The EU Charter of Fundamental Rights* (Hart, Oxford, 2004), 59-82.

⁴² Compare 46 lit.e EU. For more details on the new procedure see e.g. de Witte and Toggenburg, “Human Rights and EU-Membership” ..., at 79-81.

⁴³ Article 7 para. 1 EU. See in detail on Art. 7 Schorkopf, *Homogenität in der Europäischen Union ...*, or Von Sydow, *La Liberté, démocratie, droits fondamentaux ...*, 285-326.

of these shared values underlying the member states' systems.⁴⁴ Moreover, the legal control of the common principles in the framework of the Court's jurisdiction is highly eclectic, and the access of individuals to the Court of Justice is very limited in general. All this makes it difficult to induce a collective feeling of belonging to a value community of 450 million people. Nevertheless, recent developments in the field of human rights show that there may be ways to give life to a situation which is approaching such a scenario. Whereas the Charter of Fundamental rights will make the European 'bill of rights' more visible to the EU-citizens, therefore rendering it a potential part of the European consciousness, new ways of monitoring human rights may render the idea of common European values a more clear-cut and practical notion.⁴⁵ The prospective of a proper EU agency on human rights⁴⁶ or, even more important, a proper EU policy in the area of human rights, can add a new dimension to the foggy notion of a 'Community of values'.

4. The Case of (Cultural) Diversity

Based on the above, it would follow that the Union is influenced and characterised by various circles of values such as founding values, European ideas and common legal principles. The degree of consensus within various European societies regarding these values differs, as does the means to control their observance. Even in the more solid area of common legal principles, the respective homogeneity remains piecemeal. In light of the debate on values, the *Staatenverbund* European Union is best described as a Union which, politically speaking, lacks an overall consensus on values and, legally speaking, is characterised by a plurality of constitutional players, layers and values. The value debate is thereby characterised by a great diversity (of opinion).

⁴⁴ Taking Berlusconi's Italy as an example one might e.g. raise the question whether an open, independent and diverse system of public media is a basic feature all member states should be equipped with or whether this important element of a functioning democracy is something left entirely to the states discretion. Compare Christoph Palme, "Das Berlusconi-Regime im Lichte des EU-Rechts", 4 *Blätter für deutsche und internationale Politik* (2003), 456-464, at 456. See also the Parliament report "on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights", A5- 0230/2004, at <http://www.europarl.eu.int/activities/archive/reports/search/go.do>.

⁴⁵ In September 2002, shortly before its Eastern enlargement the Union has created a new model of monitoring human rights performance within the Union, namely the EU Network of Independent Experts on Fundamental Rights. See http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm. Note that the network firstly has a mere monitoring function (also the Parliament and the Council are issuing human rights reports on an annual basis) and is not entrusted with any sort of judicial or political review. Secondly, the network is a phenomenon of 'outsourcing'. Experts have been entrusted by one single EU-institution, namely the Commission to report on the situation in the member states. The latter are not obliged to cooperate and the mandate could be revoked at any moment.

⁴⁶ Recently it has been proposed to engage an EU institution, namely the EU Monitoring Centre on Racism and Xenophobia (EUMC) in order to build up a proper EU human rights agency. See Paragraph 3 of Conclusions of the Representatives of Member States, 13 December 2003, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/78398.pdf. In this context the Commission launched a public consultation process (see COM (2004) 693 final, 25 October 2004).

While ‘diversity’ can hence be used to describe the nature of the debate on European values, it is sometimes also included itself among these values. Those elements of EU constitutional law which aim to preserve national identities (and therefore national cultures) and which foster the polycentric and horizontal characteristics of the Union have been perceived as an expression of an overall principle of diversity. Such ‘diversity-friendly’ elements include the principle of subsidiarity,⁴⁷ the principle of enumerated powers, the treaty revision procedure in Article 48 EU (which builds on the consensus of the member states), aspects of the institutional asset of the Union (like the strong role of the Council) to mention a few. But as is apparent from these examples, diversity is seen here as a structural mechanism rather than as a substantial value. Moreover, diversity in this context is perceived as diversity *between* the member states only, thus ignoring the question of where to locate diversity *within* the member states in the European debate on values. It is assumed here that such an approach to ‘diversity’ does not need recourse to any compelling original EU principle or value of diversity.⁴⁸

However, it can be hardly ignored that the treaty of Maastricht introduced a general, transversal sort of ‘cultural diversity impact clause’ in Article 151 para. 4 EC. It establishes the obligation of the Community to “take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures”. This commitment to diversity has been confirmed by the Charter of Fundamental Rights, which states in its Article 22 that “[t]he Union shall respect cultural, religious and linguistic diversity”.⁴⁹ There are two ways how

⁴⁷ There is for example an obvious interaction between diversity and the principle of subsidiarity. One can therefore hope that respecting the principle of subsidiarity (which the draft constitutional treaty strengthens both in its substantial and procedural aspects) will also favour the maintainance of European diversity. A recent example shows how the legislator takes both diversity and the principle of subsidiarity into account. According to the Commission decision of 5 September 2003 on the use of colour photographs or other illustrations as health warnings on tobacco packages (see OJ L 226, 10 September 2003, 24-26) it is up to the member states to decide whether or not to have warning (i.e. shocking) colour photographs on tobacco products. Moreover, those member States which decide to adhere to the picture-option have - “given the cultural diversity existing across the European Union” - a choice amongst several colour photographs or other illustrations.

⁴⁸ See in this respect also von Bogdandy, *Europäische Prinzipienlehre ...*, 197.

⁴⁹ This recent EU engagement in the field of cultural diversity shows also an external component. The Culture Ministers meeting in Thessaloniki in May 2003 stated that “Europe as a continent of culture can neither accept the threat of cultural homogeneity, nor the threat of the clash of civilisations. The European answer to all this is to insist on safeguarding and promoting cultural diversity.” Moreover, the European Commission recently issued its Communication Towards an International Instrument on Cultural Diversity of 27 August 2003, COM(2003) 520 final, in which it underlines the intention that the EC should play an active role in the forthcoming UNESCO General Conference, notably with regards to exploratory discussions concerning the drawing-up of an international standard-setting instrument on cultural diversity. A certain caution towards international instruments in the field can also be detected in the article on the common commercial policy as proposed in the draft constitutional treaty which states that the Council shall act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing “the Union’s cultural and linguistic diversity” (Art III-315 para. 4 lit a).

to interpret the wording of this diversity commitment. Either all this is meant only to protect (and, if necessary promote) the diversity *between* the member states and therefore to reinforce Art. 6 para. 1 EU (also originated in the Maastricht treaty) which obliges the Union to “respect the national identities of its member states”. Such an exclusive (or defensive) reading builds on a state-centred view, and equates ‘diversity’ with the possibility of the states to resist any tendency of European harmonization which might alter their identities, and their autonomy to define whether, how and to what extent they want to be internally ‘diverse’.

A second, alternative perception would look at European diversity as plurality *within* the member states. Diversity would then include the question of whether, where and how to accommodate *intra-state* diversity. This inclusive (or offensive) view of diversity goes beyond the identity-based perceptions, needs and concerns of the member states themselves. Politically speaking, this reading of diversity might be perceived as the opening of a Pandora’s box, as the diversity/uniformity ‘sluice’, traditionally left up to the member states, would become, to certain degree, a *condominium* of the Union and the member states. Indeed, prominent authors have already equated the obligation to respect Art. 22 of the Charter to the obligation of protecting minorities within the single EU member states.⁵⁰ It remains doubtful, however, that the EU’s commitment to ‘diversity’ will translate so easily into a founding norm for minority protection applicable across the Union.⁵¹

These two faces of the janus-headed notion of ‘diversity’ show that at the level of the EU, cultural diversity can be classified as a ‘self-restrictive value’. Placing too much emphasis on the inclusive reading of diversity creates a tension with the diverging national identities of the member states, and therefore with (an exclusive reading of) diversity itself. Whoever argues, for example, for an EU involvement in the definition and the perception of minorities calls for a Union which provides ‘one fits all’ solutions, and therefore risks reducing the very diversity amongst the member states’

⁵⁰ The EU network of independent experts in fundamental rights has stated in its report in 2002 that the state of ratification of the two main instruments of the Council of Europe in the field of minority protection by the EU member state “gives a first indication of the willingness of the Member States to respect the right enshrined in Article 22 of the Charter”. See the “Report on the situation of fundamental rights in the European Union and its member states in 2002”, 174, at http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm. Critical in this respect Bruno de Witte, “The Constitutional Resources for an EU Minority Protection Policy”, in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union, The way forward* (LGI Books, Budapest, 2004), 109-124, at 115, also available at <http://lqi.osi.hu/publications.php>.

⁵¹ Compare in this context de Witte, “The Constitutional Resources ...”, 115, who points to formal arguments raising severe doubts, whether international instruments of minority protection are relevant to the interpretation of Article 22 of the Charter.

respective approaches in this policy field.⁵² On the other hand, placing too much emphasis on the exclusive reading of diversity would ignore various forms of ethnic, linguistic and cultural diversity within the single member states and create a tension with (an inclusive reading of) diversity itself.⁵³ Those who argue, for the exclusion of minority languages or cultures in certain EC funding schemes, for example, might very well protect certain national preferences, but fail to foster the sort of diversity within the member states which contributes to European diversity in general.

Looking at the newly proposed European Constitution, the notion of ‘diversity’ does not become much clearer. The constitution does not formally list “diversity” as a value the Union is founded on (Art. I-8 para. 3) but as an EU objective (Art. I-3 para. 3).⁵⁴ The wording remains vague. Whereas the other objectives clearly point to active EU engagement in the field at stake (“promote,” “offer,” “work for,” “combat,” “contribute and uphold”) “cultural and linguistic diversity” is the odd one out, since the Union’s “objective” is merely that it “shall respect” such diversity.⁵⁵ Moreover, where the Constitution uses the term ‘diversity’, it seems primarily to address the peculiarities or circumstances of member states which should be taken into account.⁵⁶ Nevertheless, the level of reference is not necessarily the national level, but can very well be the regional or local level.⁵⁷ The Constitution also makes clear that national identities are co-composed by regional, i.e. subnational identities.⁵⁸ So, at best, the signals are ambivalent. Neither does the most prominent reference to diversity within the new constitution provide a clear reply: the introduction of the catchphrase “Unity in diversity” not only as part of the preamble,⁵⁹ but also as the sole official motto of the Union, is of

⁵² See more in detail Gabriel N. Toggenburg, “Minority Protection in a Supranational Context: Limitations and Opportunities”, in Gabriel N. Toggenburg (ed.), *Minority Protection ...*, 1-36, at 9-16.

⁵³ See more in detail on this Gabriel N. Toggenburg, “Unity in Diversity: Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo”, in Roberto Toniatti, Marco Dani and Francesco Palermo, *An Ever More Complex Union - the Regional Variable as Missing Link in the European Constitution* (Nomos, Baden Baden, 2004), 27-56.

⁵⁴ The Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced” (Art. I-3).

⁵⁵ See more in detail Bruno de Witte, “The Value of Cultural Diversity”, in Miriam Aziz and Susan Millns, *Values in the Constitution of Europe* (Aldershot, Dartmouth, forthcoming).

⁵⁶ See e.g. Art I-48 on the social partners which says that “the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems”. Compare also Art. III-282 par.1 on educational policy which provides that the Union “shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity”.

⁵⁷ See e.g. Art. III-233 (on environment) or Art. III-280 (on culture). See more in detail on this Toggenburg, “Unity in Diversity: Searching for the Regional Dimension ...”, 27-56.

⁵⁸ See e.g. Art. I-5 para. 1 which foresees that the Union shall “respect national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” (compare also para. 3 of the preamble of the Charter in part II of the Constitution).

⁵⁹ “Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny, convinced that, thus ‘united in its diversity’, Europe offers them the best chance

no substantial help.⁶⁰ It seems, rather, that what has been solemnly put on a pedestal is not much more than a cosmetic combination of two already existing and interacting constitutional principles, namely the ‘Wesensgehaltsgarantie’ (as contained in Article 6 para. 3 EU) and the principle of loyal co-operation (as contained in Article 10 EC). Nevertheless, the pairing of these two principles in a formalized, i.e. constitutionally verbalized ‘symbol’ is useful and important insofar as it underlines the ongoing and symbiotic tightrope walk between integration and autonomy, thereby seeking to leave room for both European dedication as well as national (p)reservation. In any case, one can conclude that the *primary* scope of the European constitutional motto differs from the constitutional motto of South Africa or Indonesia, which is also “unity in diversity”. Whereas these two states refer with this motto to their *subnational* diversity (due to the countless ethnic and linguistic groups living within these states), the European Union seems rather to express a concern about national cultures. Every further step of integration has to take into account the ‘caveat’ of not endangering diversity amongst the member states. In this rather cautious attitude *vis-à-vis* integration, the EU-motto forms an antipode to the constitutional motto of another state, namely the US, whose motto is “E pluribus unum”.

Now, this may sound like constitutional estheticism to some, and I suppose, they are right. Whether or not diversity of cultures becomes a self-standing value in Europe beyond the self-defense of its various ‘state-cultures’ is up to the concrete in- and output at the level of EU politics. It remains to be seen whether ‘European dedication’ will confront the states with perceptions of diversity which no longer lie solely in their hands. Modest tendencies in this direction can already be identified. The Charter clearly refers to the protection of diversity within member states when prohibiting discrimination based on language or the membership of a national minority group. A recent set of directives specifically provides ‘the Union’s’⁶¹ third country nationals with certain rights enabling them to better integrate with their host societies (the member states).⁶² Various “EU-constitutional resources” such as Article

of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope”.

⁶⁰ See Art I-8 of the constitutional treaty which lists under “[t]he symbols of the Union” the European flag, the anthem of van Beethoven and says in para. 3 - shortly before mentioning the common currency and the Europe day - that “[t]he motto of the Union shall be: ‘United in diversity’”. Only in the last hours of the European Convention the motto found its way into this prominent provision.

⁶¹ Are the TCN a ‘Community minority’? Or - even more far reaching - are all subnational ethnic groups living on EU territory minorities ‘of’ (instead of merely ‘in’) the Union? For reflection on these questions: Gabriel N. Toggenburg, “Minorities ‘...’ the European Union: is the missing link an ‘of’ or a ‘within’?”, 25 (3) *Journal of European Integration* (2003), 273-284.

⁶² See in this respect, e.g. Steve Peers, “ ‘New’ Minorities: What Status for Third-Country Nationals in the EU System?”, in Toggenburg (ed.), *Minority Protection ...*, 149-162, 149.

151 EC allow for the protection and (to a certain degree) promotion of diversity within member states, for example, fostering minorities or regional cultures.⁶³ Countless statements in political declarations (like the Laeken declaration)⁶⁴ and in legal documents (such as the adapted value provision in the constitutional treaty)⁶⁵ paint the picture of a Union calling for tolerant, diverse and pluralistic societies in the member states. Legally speaking, none of this merits already speaking of a constitutional value which could prescribe the substance of 'diversity-to-be' within EU member states.

It remains to be seen how the EU reacts to the phenomenon of immigration⁶⁶, and whether, more generally speaking, myths such as the invocation of trade-offs between cultural diversity and promoting development will have a dominant influence amongst Europe's political elite.⁶⁷ Only the future can show whether the states will remain the dominant masters of the national diversity/unity 'sluice' in the EU constitutional framework. One should not forget that the 'value-prescription' is a two-way process within the Union.⁶⁸ Article 6 establishes those values as constitutional values of the Union which are 'common to the member states' and which therefore originate at state level. But with the EU, for the first time in the history of international relations, it seems as if an international organisation is developing and implementing its own views on values independently from its 'founding fathers'. It remains to be seen what this sort of 'inverted prescription' will mean for diversity at the member state level.

⁶³ See in detail de Witte, "The Constitutional Resources ...", at 108.

⁶⁴ "... Europe as the continent of human values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law ...": from the Laeken declaration "on the future of the European Union", European Council, December 2001.

⁶⁵ The new EU constitution complements the current wording of Art. 6 para. 1 EU with the following passus: "in a society of pluralism, tolerance, justice, solidarity and non-discrimination".

⁶⁶ Compare e.g. Catherine Wihtol de Wenten, "Europe: The New Melting Pot?", in Janina W. Dacyl and Charles Westin, *Governance of Cultural Diversity* (CEIFO publications, Edsbruk, 2000), 37-61.

⁶⁷ UNDP, *The Human Development Report 2004*, Cultural liberty in today's diverse world (UNDP, New York, 2004), 4, at <http://hdr.undp.org/>.

⁶⁸ See Toniatti, "La carta e i 'valori superiori' ... ", 23, speaks of "una sorta di inversione di direzione della prescrittività".

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