



EU law, ethics and health as a value

Seminar | Uppsala University | 17 February 2022



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EUROPEAN ASSOCIATION of HEALTH LAW

THE EAHL INTEREST GROUP ON SUPRANATIONAL BIOLAW

N.B. Please note that whenever appropriate, screenshots are linked to the relevant website.

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**Previous Chair:
EU & Ethics.**

2016 to 2019



**New Chair:
EU Values.**

2019 to 2022

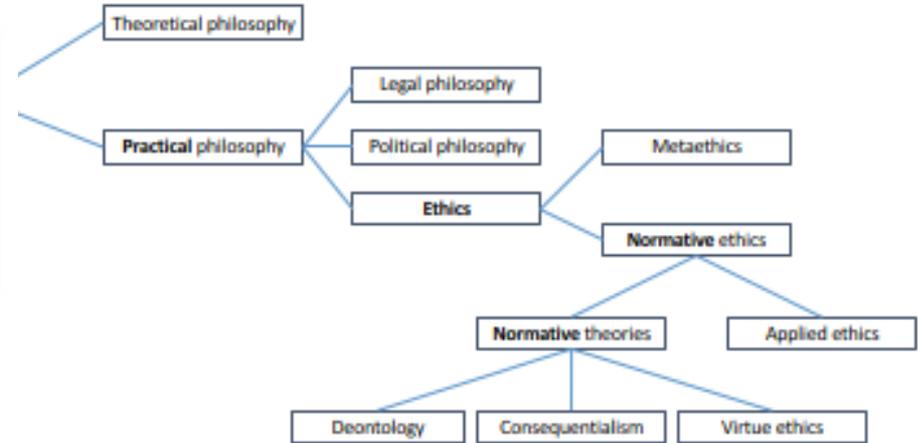
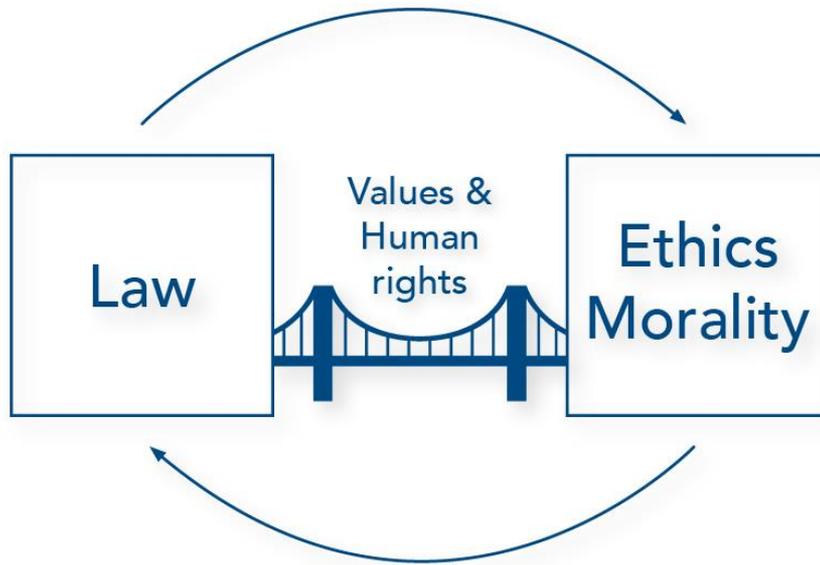


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Cf. Frischhut, M. (2019). *The Ethical Spirit of EU Law*. Cham: [Springer Int. Publishing](https://www.springer.com).

EU law | references to other disciplines

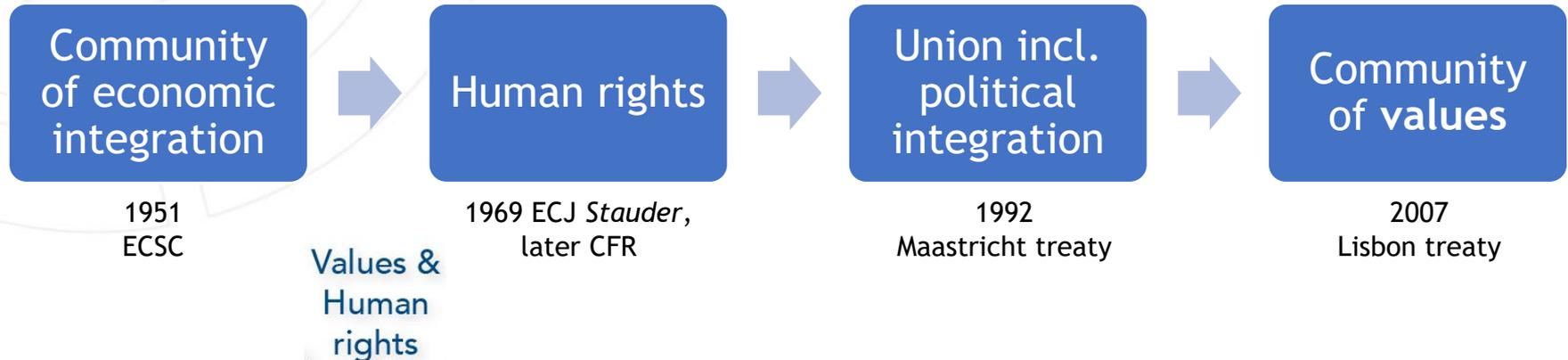


Source: Frischhut, M. (forthcoming). *The ethical spirit of EU values*.

Source: Frischhut, M. (2019). *The Ethical Spirit of EU Law*. Cham: [Springer International Publishing](https://www.springer.com) | p. 9.

EU law | historic development

Aim: to safeguard
peace



CFR = Charter of Fundamental Rights of the EU
ECJ = Court of Justice (EU), Luxembourg
ECSC = European Coal and Steel Community

Source: Frischhut, M. (forthcoming). *The ethical spirit of EU values*.

Common values

Article 2 Treaty on European Union (TEU)

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

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

Values &
Human
rights



Picture Source: The Economist, December 9th - 15th 2006 ([Link](#)).

Common values

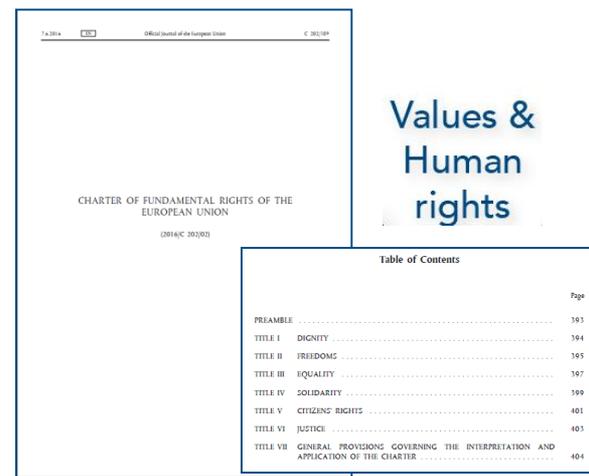
Article 2 TEU

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

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



Picture Source: The Economist, December 9th - 15th 2006 ([Link](#)).



Directive 2010/41/EU of 7 July 2010 on the application of the principle of **equal treatment** between **men and women** engaged in an activity in a **self-employed** capacity ([Link](#))

Existing legal framework at European level:

Grounds \ Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes + Equality body	Yes	Yes	Yes	Yes	Yes + 2006/54/EC
Education	Yes + Equality body	No	No	No	No	No
Goods and services	Yes + Equality body	No	No	No	No	Yes + 2004/113/EC
Social protection	Yes + Equality body	No	No	No	No	Yes + 2006/54/EC

Source: SEC(2008) 2181 final 2.7.2008, p. 3 ([Link](#))

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final 2.7.2008 ([Link](#))

Impact of EU law (excerpt)



1. Via **Human rights**: limited impact Art 35 CFR (mainly negative right, no real ‘added value’ due to ref. to nat. law)
 - **Evolution of human rights**: “Human rights represent universal imperatives, but they are **not static concepts**.” (Meier, Murphy & Gostin, 2020, p. 23)
 - **EU Charter as living instrument**: “[...] like the ECHR, the **Charter is a living instrument** which must be interpreted in the light of **present-day conditions** and of the ideas prevailing in democratic States today [...], with the result that regard must be had to **changes in values and ideas, both in terms of society and legislation**, in the Member States.” (ECJ, 2020, para 77) | referring to the UDHR as a “living document”: Meier, Murphy & Gostin, 2020, p. 39
 - **Future generations**: “The state's duty to protect, which follows from Article 2 (2) sentence 1 of the Basic Law [i.e. **right to life and physical integrity**], also includes the **obligation to protect** life and **health** from the dangers of **climate change**” | “The state is obliged to do this both for the people living today and under objective law **with regard to future generations**.” (BVerfG, 2021, para 148 | translation)

2. Via **Fundamental freedoms**: passive freedom of services (patient mobility), etc. | ECJ paving way of patients’ rights | public health as reason of justification

3. Via **Harmonization of national law** by way of EU directives, etc.
 - Anti-discrimination directives (see *supra*)
 - Cross-border healthcare (Directive 2011/24/EU), etc.

BVerfG = German Constitutional Court, Karlsruhe
 UDHR = Universal Declaration of Human Rights

Source: Mason Meier, B., Murphy, T., & Gostin, L. O. (2020). The Birth and Development of Human Rights for Health. In L. O. Gostin & B. M. Meier (Eds.), *Foundations of Global Health & Human Rights* (23-43). Oxford University Press.

Source: ECJ judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031 ([Link](#)).

Source: BVerfG order of 24 March 2021, *Constitutional complaints against the Climate Protection Act partially successful*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 ([Link](#)).

Values and principles | terminology

Values:

- “values are the **basic attitudes** of people who stand out due to their special firmness, conviction of correctness and emotional foundation” (DiFabio, 2004, p. 3, translation)
- Whoever in a discussion “goes further enters a taboo area, leaves the secure basic **consensus of society**” (DiFabio, 2004, p. 3, translation)
- “It is important to emphasise that **values are more abstract** than principles, as the former **lack** specific limitations, in particular with regard to specific **legal consequences** and **addressees**” (Frischhut, 2019, p. 16; referring to Reimer, 2003, p. 209)

Principles:

- “principles are **legal norms** laying down essential elements of a legal order” (Bogdandy, 2003, p. 10)
- Principles “refer to general propositions **from which rules might derive** [and] relate to certain standards that might be based in law or practice, which contribute to forming a framework for decision-making and action” (Williams, 2009, p. 559)

Sources:

- Bogdandy, A. v. (2003). *Doctrine of Principles*. Jean Monnet Working Paper Series No. 9/03.
- Di Fabio, U. (2004). Grundrechte als Werteordnung. *Juristenzeitung (JZ)*, 59 (1), 1-8 (3).
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(Specific) Health values and principles

22.6.2006

EN

Official Journal of the European Union

C 146/1

I

(Information)

COUNCIL

“2006 Council Conclusions may help shape the interpretation of fundamental rights in the context of EU health law” (Ruijter, 2017, p. 486; cf. also 2019, p. 188)

Council Conclusions on Common values and principles in European Union Health Systems

(2006/C 146/01)

- **Overreaching values:**

universality, access to good quality care, equity, and solidarity

specific

general

- **Operating principles:**

quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy and confidentiality

Cf. Ruijter, A. de. (2017). The impediment of health laws' values in the constitutional setting of the EU. In T. K. Hervey, C. Young, & L. E. Bishop (Eds.), *Research Handbook on EU Health Law and Policy* (pp. 479-495). Edward Elgar Publishing. | Ruijter, A. de. (2019). *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*. OUP.

Source: Council Conclusions on Common values and principles in European Union Health Systems, [OJ 2006 C 146/1](#).

(Specific) Health values and principles

Common Values and Principles

The health systems of the European Union are a central part of Europe's high levels of social protection, and contribute to social cohesion and social justice as well as to sustainable development.

The overarching values of universality, access to good quality care, equity, and solidarity have been widely accepted in the work of the different EU institutions. Together they constitute a set of values that are shared across Europe. Universality

EU motto: united
in diversity

- “[This **statement** by the **25 Health Ministers**] also explains that the practical ways in which these **values and principles** become a **reality** in the health systems of the EU **vary significantly** between Member States, and will continue to do so. In particular, decisions about the **basket of healthcare** to which citizens are entitled and the mechanisms used to **finance and deliver** that healthcare, such as the extent to which it is appropriate to rely on market mechanisms and competitive pressures to manage health systems must be **taken in the national context.**”
- **Universality:** “means that no-one is barred access to health care”
- **Equity:** “relates to **equal access** according to need, **regardless of** ethnicity, gender, age, social status or ability to pay”; non-discrimination (EU principle & common value)
- **Solidarity:** “is closely linked to the **financial arrangement** of our national health systems and the need to ensure **accessibility to all**”; cf. AAAQ (Availability, Accessibility, Acceptability, Quality), CESCR General Comment No. 14, para 12

Source: Council Conclusions on Common values and principles in European Union Health Systems, [OJ 2006 C 146/1](#).

CESCR = Committee on Economic,
Social and Cultural Rights

(Specific) Health values and principles

Common Values and Principles

Beneath these overarching values, there is also a set of **operating principles** that are shared across the European Union, in the sense that all EU citizens would expect to find them, and structures to support them in a health system anywhere in the EU. These include:

- **Quality:** “continuous **training** of healthcare **staff** based on clearly defined **national standards** and ensuring that staff have access to advice about **best practice** in quality”
- **Safety:** “monitoring of risk factors and adequate, **training** for health **professional**”
- **Care that is based on evidence and ethics:** “**Demographic challenges** and **new medical technologies** can give rise to difficult questions (of ethics and affordability), which all EU Member States must answer. Ensuring that care systems are evidence-based is **essential**, both **for providing high-quality treatment, and ensuring sustainability** over the long term.”
- **Patient involvement:** transparency, information, consent
- **Redress**
- **Privacy and confidentiality**

Source: Council Conclusions on Common values and principles in European Union Health Systems, [OJ 2006 C 146/1](#).



EU values, principles & ethics (excerpt)

Trust (as an overarching goal)

General field

Health field (additionally)

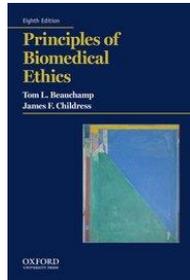
more abstract

Common values (Art 2 TEU):

- human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights
- pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men

Health values (2006):
universality, access to good quality care, equity, and solidarity

more concrete



principles of biomedical ethics':

- respect for autonomy
- nonmaleficence
- beneficence
- justice

legal principles:

- non-discrimination
- privacy
- traceability
- transparency
- responsibility
- proportionality & balance
- precaution
- solidarity

Beauchamp, T. L., & Childress, J. F. (2019).
Principles of biomedical ethics (Eighth edition).
 Oxford University Press.

Operating principles (2006):
quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy and confidentiality

(other) law as minimum standard (e.g. General Data Protection Regulation, [GDPR](#))

Cf. Frischhut, M. (2020). EU Values and Ethical Principles for AI and Robotics with Special Consideration of the Health Sector. In M. Hengstschläger & Austrian Council for Research and Technology Development (Eds.), *Digital Transformation and Ethics* (pp. 244-274). Ecowin. | Frischhut, M. (2019). *The Ethical Spirit of EU Law*. Cham: [Springer International Publishing](#).



Example of solidarity

Trust (as an overarching goal)

General field

Health field (additionally)

Common values (Art 2 TEU):

- human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights
- pluralism, non-discrimination, tolerance, justice, **solidarity** and equality between women and men

Health values (2006):
universality, access to good quality care, equity, and **solidarity**

“Solidarity is an enacted commitment to carry ‘costs’ (financial, social, emotional or otherwise) to assist others with whom a person or persons recognise similarity in a relevant respect.”
(Prainsack & Buyx, 2017, p. 52)

“redistribution and risk pooling” (Ruijter et al., 2020, p. 6)

“COVAX Initiative [...] principles as well as operational tools for the distribution of vaccines against COVID-19 [...] **sustainable solidarity balancing** competing interests might provide an idea for how to deal with other challenges, such as climate change” (Bogdandy & Villarreal, 2021, p. 116); see also Emanuel et al., 2020

legal principles:

- non-discrimination
- privacy
- traceability
- transparency
- responsibility
- proportionality & balance
- precaution
- **solidarity**

Operating principles (2006):
quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy and confidentiality

more abstract

more concrete

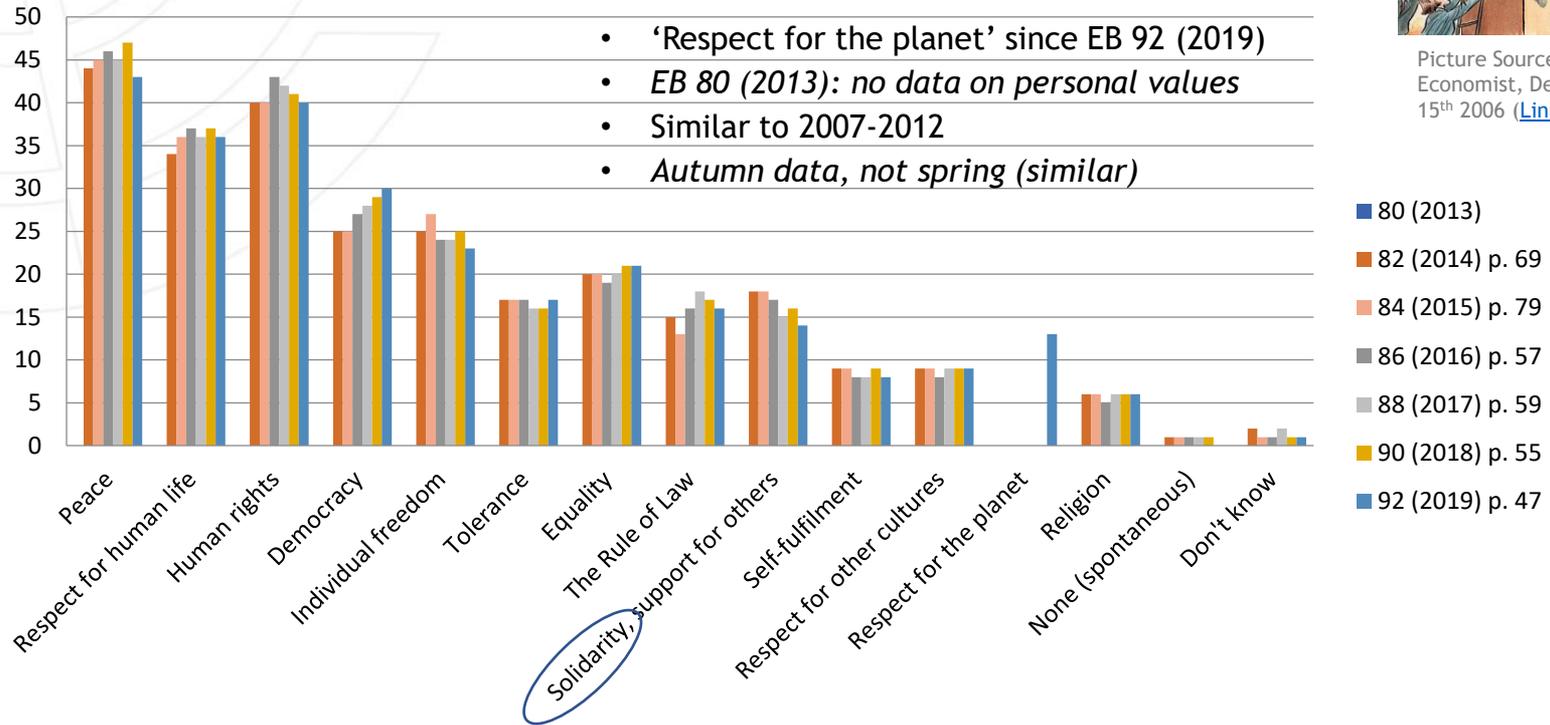
Source: Bogdandy, A. v., & Villarreal, P. A. (2021). The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative. *Heidelberg Journal of International Law*, 81(1), 89-116. <https://doi.org/10.17104/0044-2348-2021-1-89>.

Source: Prainsack, B., & Buyx, A. (2017). *Solidarity in Biomedicine and Beyond*. Cambridge University Press.

Source: Ruijter, A. de, Beetsma, R. M. W. J., Burgoon, B., Nicoli, F., & Vandenbroucke, F. (April 2020). *EU Solidarity and Policy in Fighting Infectious Diseases: State of Play, Obstacles, Citizen Preferences and Ways Forward: CESifo Working Papers*.

Eurobarometer | Personal values

Personal values of Europeans

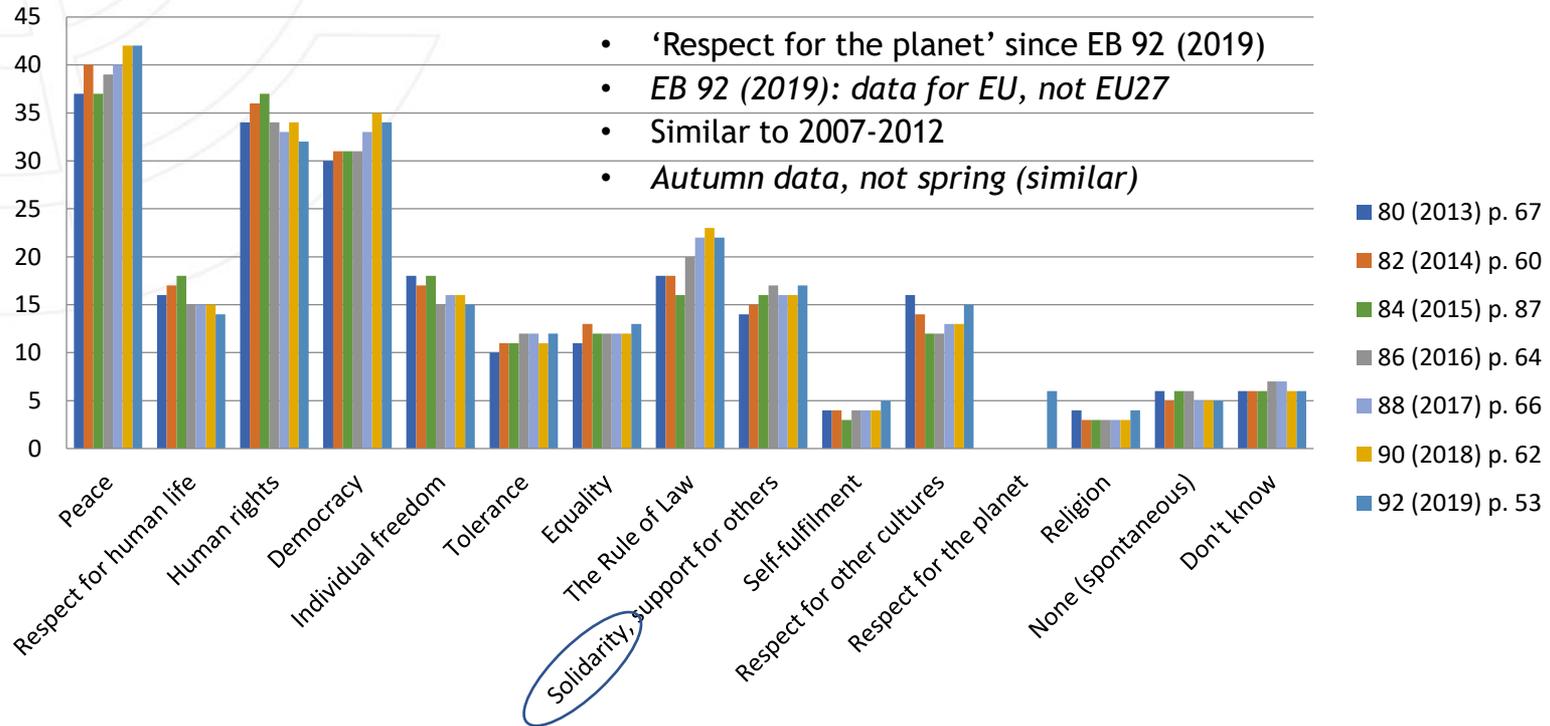


Picture Source: The Economist, December 9th - 15th 2006 ([Link](#))

Sources: Eurobarometer [EB] 82 (2014) p. 69; Eurobarometer 84 (2015) p. 79; Eurobarometer 86 (2016) p. 57; Eurobarometer 88 (2017) p. 59; Eurobarometer 90 (2018) p. 55; Eurobarometer 92 (2019) p. 47. All: "European Citizenship".

Eurobarometer | Values EU

Values representing the EU



Sources: Eurobarometer 80 (2013) p. 67; Eurobarometer 82 (2014) p. 60; Eurobarometer 84 (2015) p. 87; Eurobarometer 86 (2016) p. 64; Eurobarometer 88 (2017) p. 66; Eurobarometer 90 (2018) p. 62; Eurobarometer 92 (2019) p. 53 | N.B. EU, not EU27. All: "European Citizenship".

Animal welfare, a new value

- Judgment of 17.12.2020, [C-336/19](#), *Centraal Israëlitisch Consistorie van België and Others* (GC) | **no animal slaughter without stunning (and reversible stunning)** | Belgium
 - Relevant EU law: Regulation (EC) No 1099/2009 | Art 10 CFR (& Art 20-22 CFR) | Art 13 TFEU
 - Religion(s): Islam and Judaism (“Jewish and Muslim believers”) (para 14)
 - Legal issue: validity of Article 4(4) of Council Regulation (EC) No 1099/2009
- Judgment of 26.2.2019, [C-497/17](#), *Œuvre d’assistance aux bêtes d’abattoirs* (GC): **halal and organic farming** | France | **Biltgen** (*not rapporteur*)
 - Relevant EU law: Regulation (EC) No 1099/2009; Regulation (EC) No 834/2007 & Regulation (EC) No 889/2008 | not CFR | Art 13 TFEU
 - Religion: Islam
 - Legal issue: question of EU Organic logo for products from animals slaughtered without first being stunned (para 35)
- Judgment of 29.5.2018, [C-426/16](#), *Liga van Moskeeën* (GC): **location of religious slaughter** | Belgium
 - Relevant EU law: Regulation (EC) No 1099/2009; Regulation (EC) No 853/2004 | Art 10 CFR | Art 13 TFEU
 - Religion: Islam (Muslim Feast of Sacrifice, para 10)
 - Legal issue: location of slaughtering and validity of Regulation (EC) No 1099/2009
- Relevant EU law
 - Council Regulation (EC) No [1099/2009](#) protection animals at time of killing
 - Regulation (EC) No [853/2004](#) hygiene rules for food of animal origin
 - Council Regulation (EC) No [834/2007](#) on organic production and labelling of organic products [...] Commission Implem. Regulation (EC) No [889/2008](#) on organic production and labelling of organic products

GC = Grand Chamber

Animal welfare, a new value

- Judgment of 17.12.2020, [C-336/19](#), *Centraal Israëlitisch Consistorie van België and Others* (GC) | **no animal slaughter without stunning (and reversible stunning)** | Belgium
 - 1. EU values **outside Art 2 TEU** (i.e. Art 13 TFEU) | mentioned in Regulation, accepted by Court (in this 3rd case)
 - 2. Values **entitling** not humans, but **animals**
 - 3. Balancing between various values at **national** level
 - 4. Charter as **living instrument**, changes in "values and ideas", concerning society and legislation
- Evolution:
 - In Jippes “the Court declined the invitation to recognize animal welfare as a general principle of law” (Tridimas, 2006, p. 27, with further references)
- ‘One health’ & ‘planetary health’:
 - “In its most comprehensive form, [the **One Health** approach] extends to fostering the health of **humans, animals** and their shared **environments**” | “The OH approach to disease is grounded in a well-established scientific fact: that the health of humans, animals and the environment are **interdependent**.” (c.f. Johnson & Degeling, 2019, p. 239)
 - E.g. in the field of AMR: “maximise coordinated efforts between the human health sector and the veterinary sector in the fight against AMR” ([OJ 2012 C 211/2](#), pt. 13; see also [OJ 2016 C 269/26](#))
 - “**Planetary health** is grounded in the understanding that the achievement of the highest attainable standard of health is dependent on the flourishing of the natural environment, recognizing that many impacts on human health directly arise from human-caused disruptions to the Earth’s natural systems” (Phelan, 2020, p. 433)

Sources: Johnson, J., & Degeling, C. (2019). Does One Health require a novel ethical framework? *Journal of Medical Ethics*, 45(4), 239-243. <https://doi.org/10.1136/medethics-2018-105043>. | Phelan, A. (2020). The Environment, a Changing Climate, and Planetary Health. In L. O. Gostin & B. M. Meier (Eds.), *Foundations of Global Health & Human Rights* (417-438). Oxford University Press. | Tridimas, T. (2006). *The General Principles of EU Law* (2nd edition). Oxford University Press.

Public health | Step-by-step approach | excerpt

- 18.4.1951 | Treaty establishing the European **Coal and Steel** Community ([Link](#))
 - Health only as a reason of justification
- 25.3.1957 | Treaty establishing the European **Economic Community** ([Link](#))
 - Health only as a reason of justification and “*hygiène du travail*” (**workplace health**); see also 1986 Single European Act ([Link](#)): Art 118a para 1, “health and safety of workers”
- Since 1984 **informal meetings** of Health Ministers (Lurger, 2018, p. 1675)
- 1984 | *Spinelli-draft* | *Draft Treaty Establishing the European Union*, [OJ 1984 C 77/33](#)
 - Art 56 ‘**Social and health policy**’, “the coordination of mutual aid in the event of **epidemics** or disasters”
- Pre-Maastricht, the ‘**soft law era**’: resolutions on Cancer prevention ([OJ 1985 C 336/11](#)), AIDS ([OJ 1986 C 184/21](#)), drug abuse ([OJ 1989 C 185/1](#)); however, also **hard law based on other** (i.e economic) competences
- 7.2.1992 | Treaty on European Union, Maastricht ([Link](#))
 - **Distinct sectoral policy** competence, Art 129 ‘Public Health’
- **Follow-up:** 27.5.1993, Council (etc.), [OJ 1993 C 174/1](#) | 19.11.1993, European Parliament, [OJ 1993 C 329/375](#) | 24.11.1993, Commission, [COM\(1993\) 559 final](#)
- 1994 | *Herman-draft* | *Resolution on the Constitution of the European Union*, [OJ 1994 C 61/155](#)
 - **Values:** “values shared by its peoples, in particular freedom, equality, **solidarity**, **human dignity**, democracy, respect for human rights and the rule of law”
- 2.10.1997 | Amsterdam Treaty ([Link](#)): slight strengthening due to BSE crisis (1996), e.g. quality and safety standards in the field of organs, blood, etc. | however, also emphasizing **responsibilities of MS** for organisation & delivery of health services & medical care
- 26.2.2001 | Nice Treaty ([Link](#)): no changes (Lurger, 2018, p. 1675) | 29.10.2004 | Constitutional Treaty ([Link](#)): **would have strengthened** “monitoring, early warning of and combating serious cross-border threats to health” (i.e. competence for harmonization)
- 13.12.2007 | Lisbon Treaty ([Link](#)): clarifications (different types of competences, OMC) and add. competences (medicinal products & devices for medical use)

BSE = Bovine Spongiform Encephalopathy
 OMC = Open Method of Coordination
 MS = Member State(s)

Cf. Lurger, B. (2018). Art 168 AEUV. In R. Streinz (Ed.), *EUV/AEUV* (3rd ed., pp. 1671-1690). C.H. Beck.

Summary

- EU law in the field of public health has **evolved step-by-step**, with some more ambitious approaches (cf. 1984 *Spinelli-draft*, 1994 *Herman-draft*) often not implemented immediately, such as the 1952 proposal (by French health minister *Paul Ribeyre*) for a ‘European Health Community’ (Parsons, 2003, p. 86).
- As I have argued elsewhere, more abstract **values** (both general and health specific ones) shall be supplemented by more concrete (legal and ethical) **principles**, as legal principles can have legal consequences and addressees (on the value-conform interpretation of EU law, see Potacs 2016).
- This evolutionary approach is also true for **human rights**, part of the EU’s values and one of the three ways (besides the economic fundamental freedoms and harmonization of national law) in which EU law can have an impact at national level; cf. the EU Charter as a ‘**living instrument**’.
- The example of **solidarity** (value and legal principle) reveals the manifold dimensions that values can have. Here, within a society, within the EU, but also beyond the EU, as seen in the case of the current pandemic and COVAX.
- Based on ‘animal welfare’ as a new value, one can argue that **health** is also a **value** in itself, especially against the background of the ‘one health’ and the ‘planetary health’ approaches and the intertwined **relationship** of the **environment, animals and humans** (cf. discussions at last ‘Health in Europe’ seminar, Oct. 21st, 2021).

Cf. Potacs, M. (2016). Wertkonforme Auslegung des Unionsrechts? *Europarecht*, 51(2), 164-176.

Cf. Parsons, C. (2003). *A Certain Idea of Europe. Cornell studies in political economy*. Cornell University Press.

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https://www.instagram.com/markus_frischhut



<https://www.linkedin.com/in/mafrischhut/>



<https://twitter.com/mafrischhut>



<https://jeanmonnet.mci.edu>

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Dr. Markus Frischhut, LL.M.

Jean Monnet Chair “EU Values & DIGitalization for our CommuNITY (DIGNITY)”
Professor & Study Coordinator European Union Law

Universitaetsstrasse 15, 6020 Innsbruck, Austria

Phone: +43 512 2070 -3632, Fax: -3699

<mailto:markus.frischhut@mci.edu>, www.mci.edu

