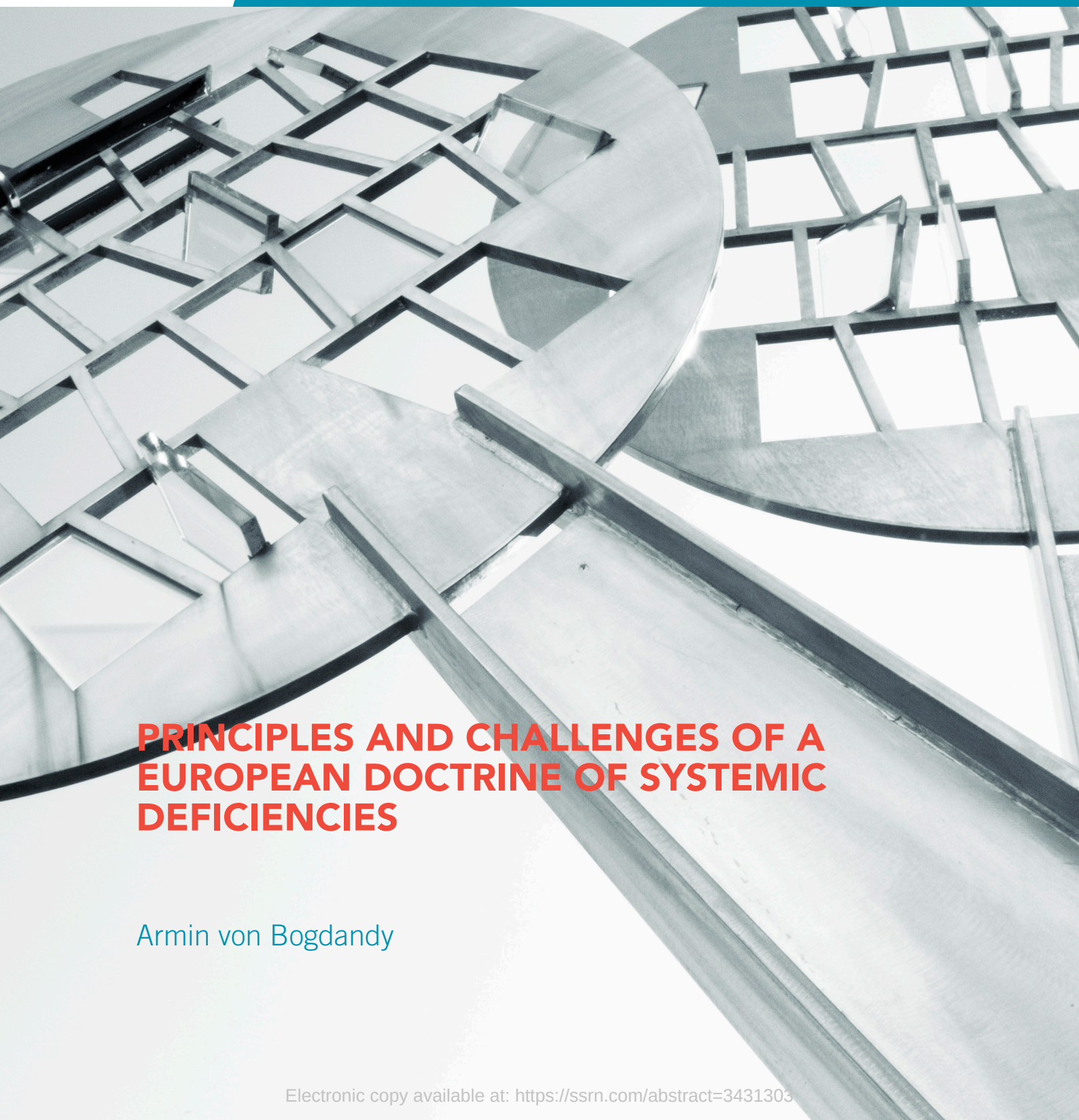
MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES | No. 2019-14



PRINCIPLES AND CHALLENGES OF A EUROPEAN DOCTRINE OF SYSTEMIC DEFICIENCIES

Armin von Bogdandy

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES
No. 2019-14

PRINCIPLES AND CHALLENGES OF A EUROPEAN DOCTRINE OF SYSTEMIC DEFICIENCIES

AUTHOR
Armin von Bogdandy

ABSTRACT

European constitutionalism is facing the decision whether it *comprises* illiberal democracies or whether it *fights* them. This article explores the latter path, which might lead to a 'tyranny of values': a defence of values that destroys the very values it aims to protect. It first explores the constitutional horizon of the question of whether one should intervene at all. The article then expounds the expression *systemic deficiency* as a legal key concept that informs all systemic deficiencies instruments, developing it from the interrelatedness of the legal orders of the European legal space. Such instruments must be coordinated, effective, and, not least, legitimate to avoid a tyranny of values. For this purpose, the third step develops a legal frame for pertinent instruments of European law, Member States' law and international law, consisting of the building blocks *legal basis*, *procedure*, *standards*, and *control*.

KEYWORDS:

European values, justiciability, systemic deficiencies, illiberal democracies, militant democracy, competence creep, fair proceeding

Principles and Challenges of a European Doctrine of Systemic Deficiencies

Armin von Bogdandy

European constitutionalism is facing the decision whether it *comprises* illiberal democracies or whether it *fights* them. This article explores the latter path, which might lead to a 'tyranny of values': a defence of values that destroys the very values it aims to protect. It first explores the constitutional horizon of the question of whether one should intervene at all. The article then expounds the expression *systemic deficiency* as a legal key concept that informs all systemic deficiencies instruments, developing it from the interrelatedness of the legal orders of the European legal space. Such instruments must be coordinated, effective, and, not least, legitimate to avoid a tyranny of values. For this purpose, the third step develops a legal frame for pertinent instruments of European law, Member States' law and international law, consisting of the building blocks *legal basis*, *procedure*, *standards*, and *control*.

Contents

1. The union of values

In 2007, the Treaty makers ennobled the former *fundamental principles* of the Treaty on European Union as European *values*. Respect for human dignity, freedom, democracy, equality, rule of law and the protection of human rights have henceforth transcended the sphere of ”merely” legal matters. They have been posited as widely shared and deeply rooted normative orientations and thus the true foundations of the common European house. This step was probably meant to tap a new source of legitimacy and stability.[1] Today, however, it feeds a perception of crises: when founding values appear weak or controversial, this can shake the entire house. The union of values might prove no less risky than the union of money.

The European values discourse has turned from self-assurance to crisis as its main subject.[2] At present, it is fed especially by measures with which governments modify controlling institutions and thus, according to widespread concerns, weaken them critically. Most consider the value of the rule of law to be endangered, but the values of democracy and of respect for human dignity

* Translated from German by Annika Müller. I would like to thank the *Dienstagsrunde*, in particular Dr. Laura Hering, Giacomo Rugge, Matthias Schmidt, and Dimitri Spieker, for their valuable critique and support. Unless stated otherwise, all quotes translated from German were translated by the author.
[1] On the pertinent considerations during the deliberations, Mandry, *Europa als Wertegemeinschaft. Eine theologisch-ethische Studie zum politischen Selbstverständnis der Europäischen Union*, (Nomos, 2009), p. 55 et seqq.; on the philosophic need, Joas, *Die Entstehung der Werte*, (Suhrkamp 1997).
[2] Huber, “Europäische Verfassungs- und Rechtsstaatlichkeit in Bedrängnis“, 56 Der Staat (2017), 389-414, at 389; Voßkuhle, *Die Idee der Europäischen Wertegemeinschaft*, (Verlag der Buchhandlung Klaus Bittner, 2018), p. 16 et seqq.

are no less at stake.[3] Indeed, political science sees such measures as symptomatic for illiberal democracies, i. e. for authoritarian tendencies.[4]

This article has been triggered by the remodelling of the Polish Judiciary since 2015.[5] However, the Polish developments are not isolated. Similar tendencies manifest in a series of EU Member States, especially in Hungary.[6] European constitutionalism is perhaps facing a 'constitutional moment'[7]: the decision whether it *comprises* illiberal democracies or whether it *fights* them. The first case would herald the end of the European Union's current self-understanding, as 'illiberal democracies' would co-inform the common values of Article 2 TEU in the future. The alternative path requires the Union to resist illiberal threats. To achieve this, European constitutionalism must draw and defend 'red lines', which would also imply a considerable constitutional development: European constitutionalism would gain in profile and develop elements of a militant democracy.

This article explores the latter path, which leads into unchartered waters.[8] The legality and the legitimacy of the European actions are disputed. Even the Council of the European Union considers one of the European Commission's instruments inadmissible.[9] Some voices, not least the European Parliament, regard European actions as too one-sided.[10] Others accuse the Union of

[3] The idea rests on Habermas, *Faktizität und Geltung*, (Suhrkamp, 1992), p. 109 et seqq.; similarly, Möllers and Schneider, *Demokratiesicherung in der Europäischen Union*, (Mohr Siebeck, 2018), p. 97 et seqq. Similarly Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, recital (3).

[4] Lauth and Sehring, "Putting Deficient Rechtsstaat on the Research Agenda: Reflections on Diminished Subtypes", 8 *Comparative Sociology* (2009), 165-201, at 165; Kailitz and Köllner, "Zur Autokratieforschung der Gegenwart: Klassifikatorische Vorschläge, theoretische Ansätze und analytische Dimensionen", 47 *Politische Vierteljahresschrift* (2012), 9-41, at 11; Merkel, "Vergleich politischer Systeme: Demokratien und Autokratien" in Schmidt, Wolf, Wurster (Eds), *Studienbuch Politikwissenschaft*, (Springer, 2013), pp. 207-236, at 223 et seqq.

[5] For an enumeration of particularly problematic measures, see Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, para. 6 et seqq.; on the context, Bachmann, "Zur Entwicklung der polnischen Demokratie", 10-11 *Aus Politik und Zeitgeschichte* (2018), 9-14, at 9 et seqq; Sadurski, *Poland's Constitutional Breakdown*, (Oxford University Press, 2019).

[6] Halmai, "Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective" in Kadelbach (Ed), *Verfassungskrisen in der Europäischen Union*, (Nomos 2018), pp. 85-104), at 85; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL). On Romania, see Venice Commission, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy (Oct. 22, 2018), CDL-AD(2018)017; European Parliament resolution of 13 November 2018 on the rule of law in Romania (2018/2844(RSP)).

[7] The concept was coined by Ackerman, *We the People, Volume 1: Foundations,* (Belknap Press of Harvard University Press, 1991), p. 6, though with a different thrust.

[8] Early Stein, "Die rechtlichen Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat" in Götz, Selmer, Wolfrum (Eds), *Liber amicorum Günther Jaenicke*, (Springer, 1998), pp. 871–898, at 873.

[9] Commission's Communication on a new EU Framework to strengthen the rule of law: - compatibility with the Treaties, 10296/14.

[10] Mendelski, "Das europäische Evaluierungsdefizit der Rechtsstaatlichkeit", 44 *Leviathan* (2016), 366-398, at 390; Franzius, *Der Kampf um Demokratie in Polen und Ungarn*, 71 DÖV (2018), 381-388, at 382 and 386; Resolution on

double standards, as it allegedly fails the same values which it demands its Members to respect.[11] Some hold the European Commission as generally "unsuited" as a guardian of liberal democracy.[12]

Some even detect in these unchartered waters what Carl Schmitt branded as the 'tyranny of values': a defence of values that destroys the very values it aims to protect.[13] In April 2017, the Polish ambassador in Berlin announced that Poland respects all European values and that there merely was "a problem of interpretation. Brussels is far too strongly informed by liberal left-wing ideology."[14] This positioning is symptomatic. As Uwe Volkmann observes, in today's European society there are "different worlds of values which only rotate around themselves and hardly ever touch one another"[15]. The predominance of one of these worlds is then quickly considered tyranny by the other.

Discussions about values often lack rationality.[16] Nevertheless, reason does have its place.[17] With this in mind, this article presents a principled reconstruction of the legal material in order to contribute to effective and legitimate action for defending European values.[18] It rests on the assumption that legal doctrine can provide for legitimacy even in deeply conflictual situations.[19]

In the first step, I will explore the constitutional horizon of the question of whether one should intervene in a case such as the Polish one (2.). Factors militating against such action are national democracy, the risk of failure, but also the possibility of an unwanted European state (2.1.), while considerations of the current constitutional self-understanding, Union citizenship and mutual trust speak in favour of such action (2.2.). In the second step (3.), I will expound the expression *systemic deficiency* as a legal key concept that informs all systemic deficiencies instruments. The term is developed from the interrelatedness of the legal orders of the European

---

the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 2018/2886(RSP), recital (K).

[11] Weiler, "Epilogue: living in a glass house: Europe, democracy and the rule of law" in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 313-326, at 326.

[12] Schorkopf, "Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?", 51 EuR (2016), 147-163, at 159; Janse, "Is the European Commission a credible guardian of the values?: A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", 17 *International Journal of Constitutional Law* (2019), 43-65, at 43.

[13] Schmitt, *Die Tyrannei der Werte*. 3rd corrected ed., with an afterword by Christoph Schönberger, (Duncker & Humblot, 2011), p. 48 et seqq. The expression "tyranny of values" was first used by Hartmann, *Ethik*, (De Gruyter, 1926), p. 524 et seq.

[14] Quoted after Voßkuhle, op. cit. *supra* note 2, at 17.

[15] Volkmann, "Wertedämmerung", 72 *Merkur* (2018), 5-17, at 14.

[16] Cfr. only Frankenberg, "Angst im Rechtsstaat", 10 *Kritische Justiz* (1977), 353-374, at 353 et seqq.

[17] Hollerbach, "Auflösung der rechtstaatlichen Verfassung?", 85 AÖR (1960), 241-270, at 247 et seqq.

[18] This also holds in times of crises: Dyzenhaus, "State of Emergency", in Rosenfeld and Sajó (Eds), *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, 2012), pp. 442-460, at 443.

[19] Thus in rare unison Schmitt and Habermas: Schmitt, *Die Lage der europäischen Rechtswissenschaft*, (Internationaler Universitäts-Verlag, 1950); von Bogdandy, Habermas, "Discourse Theory and International Law: An Interview with Jürgen Habermas", Verfassungsblog (2013), <https://verfassungsblog.de/discourse-theory-and-international-law-an-interview-with-jurgen-habermas/> (last visited 29 Apr. 2019).

legal space: the qualification *systemically deficient* is of pivotal importance in an inflammatory communication between legal orders (3.2.) with which one legal order scolds or even sanctions another one (3.3.) because a serious illegality (3.4.) endangers cooperation (3.5.). Such challenge calls for instruments which are coordinated, effective, and legitimate. For this purpose, the third step develops a legal frame for pertinent instruments of European law, Member States' law and international law (4.1.), consisting of the building blocks *legal basis* (4.2.), *procedure* (4.3.), *standards* (4.4.), and *control* (4.5.).

2. The challenges from a constitutional perspective

2.1. Options

The European legal space requires that all institutions exercising public authority within its scope respect its fundamental values. Its legal orders have mutually committed themselves to a constitutional core.[20] This is expressed most clearly in Articles 2, 7, and 49 TEU, but national constitutional law sets out similar requirements.[21] These requirements are complemented by international law, especially Article 3 Statute of the Council of Europe as well as the ECHR.[22] These requirements may not be identical, given European constitutional pluralism, but they certainly rest on largely overlapping core values.[23]

At the same time, it is not clear whether and how public institutions are to defend these fundamental values. Article 7 TEU, which stipulates specific mechanisms, provides much discretion: the Union 'may', but is not bound to defend the European values against its Member States.[24] All the other instruments, too, leave ample scope.[25] There is legal room for considering various options.

From the perspective of Union law, a first option is to avoid any conflict, to do nothing, and—with liberal optimism—to trust into the self-healing powers of liberal constitutionalism. A second option would be to primarily address authoritarian tendencies in the Council of Europe, thus acknowledging the Council's special role regarding questions of Member State constitutional law.[26] This would relieve cooperation within the Union from this conflict. A third

[20] For an overview see von Bogdandy, "Common principles for a plurality of orders: A study on public authority in the European legal area", 12 I•CON (2014), 980-1007, at 980.
[21] BVerfGE 140, 317 – *Identitätskontrolle*; IEHC, The Minister for Justice and Equality -v- Celmer, [2018] 119 (2018).
[22] In detail Uerpmann-Wittzack, "The constitutional role of international law" in von Bogdandy and Bast (Eds), *Principles of European Constitutional Law*, 2nd rev. ed. (Hart/C.H. Beck/Nomos, 2009), pp. 131-167, at 131.
[23] Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14 *Gauweiler and Others*, ECLI:EU:C:2015:7, para 61.
[24] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the EU is based, COM(2003) 606 final, p. 6; Ruffert, "Art. 7 EUV", in Calliess and Ruffert (Eds), *EUV/AEUV*, 5th ed. (2016), pp. 166-174, para 8.
[25] However, there may also be constellations in which there is a duty to take action, Huber, op. cit. *supra* note 2, p. 389.
[26] Tuori, "From Copenhagen to Venice", in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 225-246, at 237. On the procedure under Art. 20 (c)

option for the Union is to adhere to the established scope of Union law und thus avoid the highly conflictual discussion about values. The Commission acted against Hungary in this sense: it brought the disempowerment of the judiciary to the CJEU as an inadmissible discrimination of elderly judges under the Anti-Discrimination Directive 2000/78.[27] As a fourth option, the Union could leave the issue to its Member States. The Member States in turn could act collectively, as in case of the sanctions against Austria,[28] or individually, e.g. by denying the Member State in question judicial cooperation or by utilising Article 259 TFEU.[29]

Exercising such discretion must be based on valid grounds.[30] The structuring of such grounds is a task of legal doctrine. While such a doctrine cannot recommend any specific outcome, it can rationalize matters. As is the case with most difficult decisions, there are valid reasons both for and against defending the Union's values.

2.2. Arguments against defending the Union's values

Powerful arguments suggest caution. One of these, much deployed by the Polish government, refers to the pair of democracy and national identity. Article 2 TEU states democracy as a fundamental value; Article 4 Para. 2 TEU protects the Member States' "national identities, inherent in their fundamental structures, political and constitutional". If a democratically elected governing majority modifies these fundamental political and constitutional structures—this most 'sacred' area of national sovereignty—there is strong reason to assume that neither the Union nor other Member States should intervene. From a comparative view, the situation in Poland or in Hungary is far less critical than the one in Russia or Turkey.[31] Furthermore, understanding the Union's values in an exacting manner would create the need to intervene in many Member States. This can hardly be the intention of the TEU.

Another valid argument is the consideration not to damage the Union. Articles 1 and 3 TEU task the Union to develop policies for the good of its citizens. Any attempt to force an elected government under a common constitution can easily result in explosive conflicts. They may even

---

Statute of the European Council, see Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der „europäischen Verfassungswerte"*, (Nomos 2005), p. 130 et seqq.

[27] CJEU, Case C-286/12 *Commission v. Hungary*, ECLI:EU:C:2012:687, para 24 et seqq.; critically Halmai, "The Early Retirement Age of the Hungarian Judges", in Nicola and Davies (Eds), *EU Law Stories*, (Cambridge University Press, 2017), pp. 471-488, at 471.

[28] On this Ahtisaari, Frowein, Oreja, *Report on the commitment of the Austrian Government to the common European values, adopted in Paris on 8 September 2000* (2000), para 116; Schorkopf, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, (Springer, 2002); Lachmayer, "Questioning the Basic Values—Austria and Jörg Haider", in Jabak and Kochenov (Eds.), *The Enforcement of EU Law and Values*, (Oxford University Press, 2017).

[29] BVerfGE, cited *supra* note 21; Hirsch Ballin, "Mutual Trust: The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review", in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 133-146, at 133; Kochenov, "Biting intergouvernmentalism: The case for the reinvention of Article 259 TFEU to make it a viable Rule of Law enforcement tool", 7 HJRL (2015), 153-174, at 153.

[30] Generally von Danwitz, *Europäisches Verwaltungsrecht*, (Springer, 2008), pp. 33 et seqq., 50 et seq., 71, 84, 87, 107 et seq., 361 et seqq.; Fraenkel-Haeberle, "Unbestimmte Rechtsbegriffe, technisches Ermessen und gerichtliche Nachprüfbarkeit", 58 DÖV (2005), 808-815, at 810 et seqq.

[31] Weiler op. cit. *supra* note 11, p. 314.

endanger the constitution itself.[32] One need only think of the escalation caused by the actions of the Spanish central state against the governing majority of Catalonia.[33] And European actions against the current governing majority in Poland lack important resources which supported the Spanish central state against the Catalonian government: a clear democratic mandate, a developed national consciousness, and the hard instrument of federal execution. Polish representatives have already declared that they consider European actions against their remodelling of the judiciary as illegitimate.[34] It appears possible that a European defence of values may fail, which might inflict lasting damage on the Union's authority and demonstrate the frailty of the foundations of the common European house. The Union is not built for such conflict: since its 'constitutional moment' of overcoming the French 'empty seat', the search for consensus is key to its operation.[35]

But success, too, might plunge the Union into serious trouble. If the Union prevails over the combative Polish government, this would imply an enormous proof of power. The Union would significantly gain in stature vis-à-vis its Member States should it succeed in transforming its instruments, so far widely considered as rather ineffective, into a kind of effective federal execution.[36] This could be regarded as a huge step towards the EU's becoming a federal state, since what the Union primarily lacks in this regard is precisely such power.[37] Such *Staatswerdung* could cause a backlash from many Member States, which might equally endanger the Union. For all these reasons, the Union's hesitations should not be misconceived as mere opportunism.[38]

2.3. Arguments in favour of defending the Union's values

At the same time, there are substantial legal grounds for the Union to defend European values. Three of them appear particularly pertinent: the European self-understanding as a community of values, Union citizenship and the principle of mutual trust.[39]

---

[32] Dyzenhaus op. cit. *supra* note 18; comparative Federalism is instructive in this respect, Möllers and Schneider, op. cit. *supra* note 3, p. 5 et seqq.

[33] García Morales, "Federal execution, Article 155 of the Spanish Constitution and the crisis in Catalonia", 73 ZöR (2018), pp. 791-830, at 791 et seqq.

[34] See the statement by Polish Prime Minister Mateusz Morawiecki, quoted after Steinbeis, "The Deed, not the Doer", Verfassungsblog (2018), <https://verfassungsblog.de/the-deed-not-the-doer/> (last visited 29 Apr. 2019) ; the Vice President of the Polish Constitutional Court has announced that he would consider any judgment of the Court of Justice of the European Union against Poland as illegitimate, see Muszyński, "Polski Trybunał w unijnej rzeczywistości. Rzeczpospolita", (2018), <https://www.rp.pl/Opinie/303229983-Polski-Trybunal-w-unijnej-rzeczywistosci---Mariusz-Muszynski-o-mocy-wyrokow-TSUE-w-Polsce.html>, (last visited 29 Apr. 2019).

[35] van Middelaar, *Vom Kontinent zur Union. Gegenwart und Geschichte des vereinten Europa*, (Suhrkamp, 2016), pp. 107 et seqq., 120.

[36] The Polish compliance with the interim measures ordered by the CJEU in Case C-619/18 *Commission v. Poland*, with regard to the Supreme Court might be an indication.

[37] See below, III.3.

[38] Cfr., e.g., Kochenov and Pech, "Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation", 54 JCMS (2016), 1062-1074, at 1062.

[39] On the legal grounds for intervention Closa, Kochenov, Weiler, "Reinforcing Rule Of Law Oversight In The European Union", *EUI Working Paper RSCAS 2014/25* (2014), pp. 5-7; Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means" in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 59-81, at 60-64.

A first reason for the Union to defend its values results from its self-understanding, stipulated in the Treaties, as a liberal-democratic peace project. According to Article 2 TEU, the Union has been 'founded' on the respect for these values. This applies not only to the Union's supranational institutions, but also to its Member States. Article 2 TEU expresses standards for *any* public action in the European legal space.[40] Respecting and promoting these values is the key requirement for membership, as stipulated in Article 49 TEU. The term 'value' underlines the character of these principles as "supreme and final normative grounds".[41] In Article 2 TEU, all Member States declare who they are and what they stand for; they articulate the deep logic of their institutional practice and the moral convictions of their citizens. In short: Article 2 TEU positivizes the Union's self-understanding as a community of values.

In the light of substantiated evidence that Polish measures violate European values, a European silence would speak volumes. It would question this very community: the common axiological basis would appear either as an unfounded illusion or as a foundation that includes developments such as the Polish ones. In both cases, the self-understanding cultivated so far would hardly prove sustainable. The distance to Trump's USA would diminish. The Union would face a severe identity crisis.

Another legal ground results from the Union's mandate to protect all individuals in the European legal space, which includes protecting Polish citizens against their own government.[42] The CJEU says that "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[43] The CJEU's *LM (Deficiencies in the system of justice)* judgement, which deals precisely with the Polish measures, posits the fundamental right to a fair trial and an impartial court (Article 47 Para. 2 CFR) as a key for establishing a violation of the rule of law as stipulated in Article 2 TEU.[44] With this logic, presumably *any* violation of a value can be tried in court.[45] This is a kind of 'reverse' *Solange* doctrine: outside the scope of application of the Charter of Fundamental Rights, Member States remain autonomous with respect to fundamental rights, *as long as* they guarantee the standard of Article 2 TEU.[46] If this

[40] In detail von Bogdandy, "Constitutional Principles" in von Bogdandy and Bast (Eds), *Principles of European Constitutional Law. Modern Studies in European Law,* (Hart Publishing, 2010), pp. 11-52, at 13 et seqq.
[41] Luhmann, Gibt es in unserer Gesellschaft noch unverzichtbare Normen?, (C.F. Müller, 1993), p. 19; cfr. also Habermas op. cit. *supra* note 3, p. 311 et seqq.
[42] Franzius, op. cit. *supra* note 10, p. 384.
[43] CJEU, Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, para. 42.
[44] CJEU, Case C-216/18 PPU *Minister for Justice and Equality*, ECLI:EU:C:2018:586. The term 'deficiency' can be found in the case's denomination by the Attorney General as well as in the press release, CJEU, Press Release No. 113/18. In detail von Bogdandy and Spieker, "Countering the Judicial Silencing of Critics. Article 2 TEU values, criminal liability and Reverse Solange", *MPIL Reseach Paper* 2019-08.
[45] Spieker, "From Moral Values to Legal Obligations – On How to Activate the Union's Common Values in the EU Rule of Law Crisis", 24 *MPIL Research Paper* (2018), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249021> (last visited 29 Apr. 2019); Schmidt and Bogdanowicz, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", 55 CML Rev. (2018), 1061-1100, at 1090.
[46] In detail von Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei, Smrkol, "Reverse Solange – Protecting the essence of fundamental rights against EU Member States", 49 CML Rev. (2012), 489-519, at 489; von Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei, Smrkol, "A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine" in von Bogdandy and Sonnevend (Eds) *Constitutional Crisis in the*

standard is undercut, all public institutions in the European legal space must enforce the essence of the Union's fundamental rights against any measures of the Member State concerned.[47]

The Union's steps against Poland are important not only on a normative, but also on a cognitive level.[48] Such steps disprove the assumption that all Polish citizens stand with the governing majority. Indeed, many Polish citizens fight for liberal democracy in their country.[49] In doing so, they refer to their status as citizens of the Union, as is shown by the European flag accompanying government-critical demonstrations. For Union citizenship, this might be a historic moment: it gains genuine political weight.

A third reason for the Union to defend its values is the principle of mutual trust. In the *LM (Deficiencies in the system of justice)* judgement, the Court made a clear point: measures like the Polish ones endanger the fundamental structure of the Union because they undermine mutual trust, without which vital areas of European cooperation cease to function.[50] The principle of mutual trust states: all Member States *must trust* that all Member States respect Union law and its fundamental rights in particular.[51] The status quo of integration can hardly be maintained without mutual trust.[52] But such trust requires defending the values on which it stands.[53]

European Constitutional Area. Theory Law and Politics in Hungary and Romania, (C.H. Beck/Hart/Nomos, 2015), pp. 248-267, at 235; von Bogdandy and Spieker, "Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values", Verfassungsblog (2019), <https://verfassungsblog.de/countering-the-judicial-silencing-of-critics-novel-ways-to-enforce-european-values/> (last visited 29 Apr. 2019).

[47] On this cfr., e.g., the contributions in Steinbeis, Kemmerer, Möllers, *Gebändigte Macht: Verfassung im europäischen Nationalstaat*, (Nomos, 2015); Croon-Gestefeld, "Reverse Solange – Union Citizenship as a Detour on the Route to European Rights Protection Against National Infringements", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights*, (Cambridge University Press, 2017), at 371; Blauberger, "Europäischer Schutz gegen nationale Demokratiedefizite?", 44 Leviathan (2016), 280-302, at 280; Russo, "La cittadinanza 'sostanziale' dell'UE alla luce della proposta del gruppo di Heidelberg: verso una 'reverse Solange'?", federalismi.it (2014); Voßkuhle, "The Cooperation Between European Courts: The Verbund of European Courts and its Legal Toolbox" in Rosas, Levits, Bot (Eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, (Asser Press, 2013), pp. 81-98, at 94-97; Kochenov, "On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed", 33 *Polish Yearbook of International Law* (2013), 145-170, at 145

[48] Mälksoo, "The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe", 15 *European Journal of International Relations* (2009), 653-680, at 653.

[49] The current governing majority only received 37.58% of all votes cast, with a voter turnout of 50.92 %.

[50] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality*, cited *supra* note 44, para. 35. In detail, Regan, "The role of the principles of mutual trust and mutual recognition in EU law", *Il Diritto dell'Unione Europea* (2018), 231-248, at 231.

[51] CJEU, Avis 2/13 *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, para. 191; Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", 54 CML Rev. (2017), 805-840, at 805.

[52] CJEU, Case C-411/10, *N.S. and Others*, ECLI:EU:C:2011:865, para 83; in detail von Bogdandy, " Ways to frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace", 14 *European Constitutional Law Review* (2018), 657-699.

[53] CJEU, Case C-578/16 PPU, *C.K. and Others*, ECLI:EU:C:2017:127, para 95.

3. 'Systemic deficiency' as a key concept

3.1. Forming a concept

Developing the term *systemic deficiency* into a legal concept might help with Europe's travails.[54] Many institutions use this expression (or a related one such as *structural, general* or *systematic deficiencies, problems, flaws* or *weaknesses*)[55] to identify constellations which put European values into question.[56] In most cases, the term refers to developments in the Member States. Aside from authoritarian tendencies, systemic deficiencies can be found in the widespread non-application of European refugee law,[57] especially in inhumane treatment of refugees,[58] in the rejection of cooperation requested under Union law,[59] and in widespread corruption.[60] But the term also fits the criticism of the Union's measures, when, e.g., the actions of the Commission against Poland are qualified as an "inconsistent evaluation of the rule of law"[61] or as an expression of "liberal left-wing ideology"[62].

The term *systemic deficiency* is by no means exclusive to the EU. The European Court of Human Rights (ECtHR) refers to *systemic* problems in the states party to the European Convention on Human Rights (ECHR).[63] It has used the expression for justifying its pilot judgement procedure.[64] The Court, but also the Committee of Ministers, uses the term "systemic" or "structural" problem to distinguish "minor" violations from serious ones which require

[54] Franzius, op. cit. *supra* note 10, p. 383 et seqq.; Schorkopf, op. cit. *supra* note 12, p. 156.
[55] Cfr., e.g., Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final; COM(2018) 324 final, cited *supra* note 3; Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L180/31, art. 3.
[56] von Bogdandy and Ioannidis, "Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens", 74 ZaöRV (2014), 283-328, at 293.
[57] Editorial Comments, "The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems", 53 CML Rev. (2016), 597–606, at 597.
[58] CJEU, *N.S. and Others*, cited *supra* note 52, para 83; now Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L180/31.
[59] Weller, „Mutual trust: in search of the future of European Union private international law", 11/1 *Journal of Private International Law* (2015), 64-102, at 64.
[60] von Bogdandy and Ioannidis, op. cit. *supra* note 56.
[61] Mendelski op. cit. *supra* note 10, p. 372.
[62] As stated by the Polish ambassador in Germany, Voßkuhle op. cit. *supra* note 2, p. 17.
[63] Cfr., e.g., ECtHR, *M.S.S. v. Belgium and Greece,* cited *supra* note 55.
[64] Czepek, "The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court of Human Rights". 20 *International Community Law Review* (2018), 347-373, at 347 et seqq.

"structural" measures for redress, i.e. measures modifying national institutions.[65] In the UN system, the Human Rights Council may suspend membership in case of systematic violations.[66]

Given the various contexts of use, the term *systemic deficiency* (or a similar expression) cannot always carry an identical meaning. Yet, legal and pragmatic considerations call for keeping the variety of meanings within a corridor, especially between the closely connected legal orders of the European legal space. That is why the expression is developed here as a concept of European law. To this end, I will connect the characteristics of the phenomena with the general use of the term, the relevant constitutional frame as well as the legal regimes of the pertinent instruments.[67] The aim is to promote legitimacy and efficiency in defending European values.

As German scholarship is sometimes mistrusted for its conceptual spill, I would like to clarify three points. One must avoid reification: the question is when a concrete situation should be qualified as *systemically deficient*, not what the abstract idea of a *systemic deficiency* might consist of. Secondly, the political aspects of concept formation are to be disclosed. Such conceptual work is no glass bead game but impacts on the sphere of power. Thirdly, conceptual work can never determine when a concrete situation should be qualified as *systemically deficient*.[68] Such qualification requires a *comprehensive assessment* of measures, situations and political statements, which a legal concept can only frame.

Four characteristics are of key importance. The concept *systemic deficiency* denotes an inflammatory communication between the legal orders of the European legal space (2.). By means of this communication, one legal order impacts on another one (3) because the former perceives a breach of the law (4) which is of such magnitude as to endanger cooperation (5.). The vanishing point of the concept formation is the interrelatedness of the legal orders constituting the European legal space.[69]

3.2. Intersystemic and inflammatory communication

Firstly, speaking of a *systemic deficiency* usually means expressing the opinion that another legal order has significantly changed for the worse.

---

[65] Cfr. Leach, Hardman, Stephenson, Blitz, *Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and their Impact at National Level*, (Intersentia, 2010); Susi, "The Definition of a 'Structural Problem' in the Case-Law of the European Court of Human Rights since 2010", 55 *German Yearbook of International Law* (2012), 386-419, at 413 et seqq.

[66] Resolution adopted by the General Assembly on 15 March 2006 (A/RES/60/251): "the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights".

[67] In detail, Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*, (Suhrkamp, 2000), p. 119.

[68] Analogously Thiery, Sehring, Muno, "Wie misst man Recht? – Möglichkeiten und Grenzen der Messung von Rechtsstaatlichkeit", in Estermann (Ed), *Interdisziplinäre Rechtsforschung zwischen Rechtswirklichkeit, Rechtsanalyse und Rechtsgestaltung*, (Orlux Verlag, 2009), pp. 211-230, at 141; similarly Merkel et al., "Der transformationstheoretische Kontext", in Merkel, Puhle et al. (Eds), *Defekte Demokratien, Band 1: Theorie*, (VS Verl. für Sozialwiss., 2003), pp. 19-37, at 19 et seqq., 30 et seqq.

[69] This concept is based on an earlier study which deals with deficiencies in the *rule of law* in particular, von Bogdandy and Ioannidis, op. cit. *supra* note 56. Compared to that study, the intersystemic dimension has advanced, and the concept has been expanded to include all values of Article 2 TEU.

In the European legal space, the term *systemic deficiency* mainly refers to a communication not *within* a legal order, but *between* legal orders. In our case, this mainly means speaking about Poland from the outside. At issue is a communication between public bodies of different legal orders, which, however, form an institutionalized network, or association. The German term of art is *Verbund*; Article 1 of the Treaty on European Union uses the term *union*, with a small letter "u". One needs to see this *intersystemic* dimension when something is termed *systemically deficient*.

The European *Verbund* is characterized by a connection between its constitutive legal orders that is, on the one hand, very close, as has recently been proven by Brexit. On the other hand, these various orders do not form a common legal order.[70] Now, in most cases, organs of *one* legal order denote the behaviour of organs of *another* legal order as *systemically deficient*. Consequently, in the European legal space, *systemically deficient* is a description from the outside. It represents an *inter*systemic, not *intra*systemic communication.[71]

And it is inflammatory talk. The communication is not just about any kind of behaviour, but a behaviour that is assumed to be *particularly problematic*—in many cases: a violation of fundamental values. It contains a serious reproach and is thus *prone to escalation*. It holds considerable potential for conflict within a setting that, according to the basic logic of the European legal space, relies on close and trustful cooperation.[72] It runs transversely to the general communication style, which aims at consensus. The legal regimes of pertinent instruments must cater for that with adequate procedures and prerequisites.

3.3. Semantic authority

The need for such legal regimes is stressed by the concept's *second* characteristic: denoting something as a *systemic deficiency* often implies exercising *public authority*.

[70] Huber, op. cit. *supra* note 2, p. 401; Mayer and Heinig, "Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?", 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2016), 7-130; further, Röben, "Constitutionalism of Inverse Hierarchy: The Case of the European Union", *Jean Monnet Working Paper* 8/03 (2003); Maduro, „Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Walker (Ed.), *Sovereignty in Transition*, (Hart Publishing, 2003), at 502.

[71] This is not always the case. Differently, e.g., Regulation (EU, Euratom) 2018/673 amending Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations (2018) OJ L114I/1, recital (12), art. 3 and art. 10. They stipulate that for a political party or foundation to be recognized on a European level and to receive public funding from the general budget of the Union, this party or foundation must, inter alia, respect the values of Art. 2 TEU. Should the party or foundation manifestly and seriously violate these values in its programme or activities, it can be deleted from the register and thus lose access to European public funding.

[72] This is the basic motive of the concept of the *Verbund*. On this, Burchardt, *Die Rangfrage im europäischen Normenverbund: Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht*, (Mohr Siebeck, 2015), p. 196 et seqq.; Thym, "Zustand und Zukunft der Europarechtswissenschaft in Deutschland", 50 EuR (2015), 671-702, at 699 et seq.; Weber, "Formen Europas. Rechtsdeutung, Sinnfrage und Narrativ im Rechtsdiskurs um die Gestalt der Europäischen Union", 55 *Der Staat* (2016), 151-179, at 163 et seqq.

When talking of *systemic deficiencies*, the speaker usually aims at counteracting and, if possible, eliminating them. If a public institution of one legal order qualifies the actions of another legal order as *systemically deficient*, it opposes a certain behaviour of the other legal order's institutions and creates pressure to eliminate the deficiency. The qualification *systemically deficient* can result in legal sanctions, e.g. suspending voting rights (Article 7 Para.2 TEU), imposing financial penalties (Article 260 TFEU), or discontinuing of judicial cooperation[73]. Such pressure should be qualified as exercising public authority.[74] Although the Union is not a state, there is hardly any doubt nowadays that it exercises public authority.

Public authority is also exercised if this qualification as *systemically deficient* only results in a "soft" measure, such as a corresponding grading in the EU Justice Scoreboard[75], or a recommendation of the Commission. Such qualification diminishes the reputation of the state concerned, which affects the domestic standing of a governing majority and its position in European as well as international relations.[76] Measures damaging a state's reputation cannot stand in a legal vacuum, but have to be legitimized by a legal regime, as has been confirmed by the reactions to the Justice Scoreboard or the Commission's Rule of Law Framework.[77]

The same holds true for similar measures by Member States, such as the refusal of judicial cooperation or actions like those taken against Austria in 2000. Intra-European relations are too complex to be framed only by the international principle of non-intervention. Measures taken by Member States defending European values need a common regime that responds to the logic of the common legal space.

3.4. A breach of law

The *third* characteristic is *a breach of law*. This is concealed both by the term *deficiency* and by the term *value*.

It is common to contrast values with law, with the consequence that Article 2 stipulates normative, but non-legal guidelines.[78] Therefore, a *deficiency of values* would not require a *breach of law*, according to the dualism of values and the law. The Commission strives to

[73] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality*, cited *supra* note 44.
[74] On this broad concept of public authority, see von Bogdandy, "Common principles for a plurality of orders: A study on public authority in the European legal area", I•CON 12:980-1007; in detail Goldmann, *Internationale öffentliche Gewalt: Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung*, (Springer, 2015).
[75] Communication from the European Commission to the European Parliament, the Council and the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The 2015 EU Justice Scoreboard, COM(2015) 116 final.
[76] In detail, Guzmán, *How International Law Works: A Rational Choice Theory*, (Oxford University Press, 2008); Goldmann, op. cit. *supra* note 74, pp. 7 et seq., 337 et seqq.
[77] COM(2014) 158 final, cited *supra* note 55 ; critically on the Justice Score Board e.g. Kern, "Deutschland: Licht und Schatten – einige Bemerkungen zum EU Justice Scoreboard 2015", 13 *Zeitschrift für das Privatrecht der Europäischen Union* (2016), 108-115, at 111: "All this considered, the Scoreboard certainly cannot be taken seriously from the perspective of scholarship, neither by sociologists nor by legal scolars" (own translation); on the legal framework, cfr. *supra* note 9.
[78] Habermas, op. cit. *supra* note 3.

distinguish between *law* and *value*: "The Commission, beyond (!) its task to ensure the respect of EU law, is also responsible (…) for guaranteeing the common values of the Union."[79]

This differentiation is hardly convincing. The values of Article 2 TEU are laid down in the Treaty on European Union, a legal text, and not only in the declaratory part, i.e. the preamble, but also in the operative part. They are conceived to be binding and are applied by public institutions in procedures established by law, as stated in Articles 3, 7, or 13 TEU.[80] Violating these values can result in sanctions, which are equally stipulated in the TEU. Whichever concept of the law is used:[81] the values of Article 2 TEU are a part of Union law.

Further arguments confirm this qualification. The values *democracy* and *rule of law* demand to enact normative requirements that public institutions can enforce in the form of law. This is a safeguard of freedom.[82] Otherwise, the systemic deficiencies instruments could enforce extra-legal political moral, technocratic *best practice* or ideologies of *good governance* without such standards' having to pass through the legitimating filters of democracy and rule of law.[83] By the same token, the interpretation and application of Article 2 TEU must follow the standards of judicial reasoning.

The values of Article 2 TEU qualify as fundamental legal principles.[84] Article 6 para. 1 TEU in the version of the Treaty of Amsterdam of 1997 has attributed them this legal nature, and there is no reason to assume that the Treaty maker intended to reduce their normative relevance with the Treaty of Lisbon in 2007. Consequently, the legal concept of systemic deficiency requires a breach of law. It is in this sense that the CJEU, whose task is to preserve the *law* (Article 19 Para. 1 TEU), uses these values in its judgements.[85]

The instruments of Article 7 TEU speak of a "breach".[86] *Illegality*, however, is a necessary characteristic under all instruments in order to qualify something as systemically deficient. Certainly, for some instruments, the *risk* of a breach is sufficient. Article 7 allows for acting in case of a "clear risk", and according to the *Rule of Law Framework*, the Commission can issue a rule of law recommendation "if it finds that there is objective evidence of a systemic threat and

[79] Commission Recommendation (EU) 2018/103 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (2017) OJ L17/50, recital (3).
[80] Voßkuhle, op. cit. *supra* note 2; Becker, "Artikel 7", in Becker, Hatje, Schoo, Schwarze (Eds), *EU-Kommentar*, 4th ed. (Nomos, 2019), para 48; in detail Rötting, *Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union*, (Springer, 2009), pp. 93 et seqq., 231 et seqq.
[81] Cfr., e.g., Röhl and Röhl, *Allgemeine Rechtslehre*. 3rd ed., (Verlag Franz Vahlen, 2008), para 50.
[82] A classic on this, Hegel, *Grundlinien der Philosophie des Rechts* (1821), para 3.
[83] On the problematic tension between Art. 7 TEU and the value of the rule of law, see Niedobitek, "Right and duty to pursue the "wrongdoer" and a possible abuse of Art. 7 TEU", in Hatje and Tichy (Eds.), *Liability of Member States for the Violation of Fundamental Values of the European Union* (EuR supplement 1/2018), 233-243, at 233 (241).
[84] See von Bogdandy, op. cit. *supra* note 40.
[85] Cfr. only CJEU, Case C-216/18 PPU, *Minister for Justice and Equality*, cited *supra* note 44, para 35.
[86] In detail, Dumbrovsky, "Beyond Voting Rights Suspension. Tailored Sanctions as Democracy Catalyst under Article 7 TEU", in Hatje and Tichy (Eds.), *Liability of Member States for the Violation of Fundamental Values of the European Union* (EuR supplement 1/2018), 201-228, at 203; Serini, *Sanktionen der Europäischen Union bei Verstoß eines Mitgliedstaats gegen das Demokratie- oder Rechtstaatsprinzip*, (Duncker & Humblot, 2009), p. 122 et seq.; Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV*, (Duncker & Humblot, 2000), p. 147.

that the authorities of that Member State are not taking appropriate action to redress it."[87] Some monitoring instruments go even further: the Justice Scoreboard continuously examines the judiciary in all Member States and issues assessments.

This appears legitimate. No constitution condemns its institutions to passivity in face of looming danger. Action prior to a violation of law is admissible especially when the danger is considerable, as in the case of authoritarian tendencies. Considerations of supporting mutual trust in the European legal space[88] provides another reason for taking actions prior to a violation of fundamental values.

3.5. Systemic

A *systemic deficiency* is not caused by just any breach of law. The term denotes only *particularly problematic* situations, which is the concept's *fourth* characteristic. Article 7 Para. 1 TEU refers to a "serious breach", Article 7 Para. 2 TEU to a "serious and persistent breach". This high threshold of primary law is due to the considerations developed above under 2.2 and therefore relevant to all pertinent instruments. Indeed, the LM judgement on discontinuing judicial cooperation is linked to the Commission's qualifications under Article 7 Para 1 TEU.[89] The Rule of Law Framework, too, requires "cases where the mechanisms established at national level to secure the rule of law cease to operate effectively".[90] This excludes isolated violations of fundamental rights or individual miscarriages of justice.[91]

In order to identify such situations, several expressions are used: *general*,[92] *structural*,[93] or *essential*[94]. The most frequent term, however, is *systemic*: it seems to capture best such situations, to distinguish them from "normal" violations and to establish an overall context of understanding.

A "normal" violation of law is characterized by the fact that it can be processed as a matter of routine. It does not question a legal order.[95] All situations referred to as *systemically*, *structurally* or *generally deficient* share the aspect of being perceived beyond this normal sphere. This does not mean that they amount to a state of emergency, i.e. coups d'état, armed rebellion or the looming collapse of public order. However, systemic deficiencies are perceived as crises, i.e. as challenges to an existing order without a safe remedy. Said crises must not necessarily impact on

[87] COM(2014) 158 final, cited *supra* note 55, p. 8; on this, Brauneck, "Rettet die EU den Rechtsstaat in Polen?", 37 *Neue Zeitschrift für Verwaltungsrecht*:1423-1429 (2018), p. 1428.
[88] See above, 2.1.
[89] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44.
[90] COM(2014) 158 final, cited *supra* note 55, p. 5.
[91] COM(2014) 158 final, cited *supra* note 55, p. 6 et seq.
[92] COM(2018) 324 final, cited *supra* note 3, art. 2.
[93] Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism, COM(2012) 411 final, p. 5; ECtHR, *Vassilios Athanasiou and Others v. Greece*, Judgment of 21 December 2010, Application No. 50973/08; cfr. also the pilot judgements in ECtHR, *Michelioudakis v. Greece*, Judgment of 3 April 2012, Application No. 54447/10 and ECtHR, *Glykantzi v. Greece*, Judgment of 30 October 2012, Application No. 40150/09.
[94] CJEU, Case C-455/15 PPU, *P,* cited *supra* note 73, para 39.
[95] von Bogdandy and Ioannidis, op. cit. *supra* note 56, p. 298 et seqq.

the entire legal order, but can be limited to single areas, such as cooperation in European refugee law.

The expression *systemic* is mainly found in the communication between the legal orders of the European legal space. It refers to the specific interrelatedness of these legal orders. Using the expression *systemic*, a legal order articulates that a situation under another legal order endangers the interrelatedness and cooperation.

In everyday language use, following its biological origins, *systemic* means *concerning the entire organism*. Antonyms are *isolated*, *single*, *local*, and *random*. Consequently, the legal term usually denotes phenomena of illegality that either occur on a regular basis, are widespread or deep-rooted, or have been commanded by high authorities as an expression of a political stance. Phenomena of this kind do not appear as isolated cases, but rather as *characteristics* of a system. The Commission refers to a „widespread or recurrent practice or omission, or measure"[96] and excludes isolated violations of fundamental rights and miscarriages of justice from the scope of application of the Rule of Law Framework.[97] Similarly, the CJEU uses *systemic* and *general* as synonyms.[98] Yet an isolated phenomenon, such as breaking a taboo with a single case of torture, can indicate a systemic deficiency, especially when it is not met with an adequate institutional reaction. Here, too, a system failure looms large.

This perspective of the association, the *Verbund*, suggests presuming a *systemic deficiency* particularly when phenomena of illegality in one legal order impair the functioning of another system.[99] Systems are often considered systemically deficient when they do not provide their services to other related systems. The expression assumes this meaning not only with regard to European values. A fine example is provided by the regulation (EU) 1092/2010 on the macro-prudential supervision of the European Union and on the creation of the European Systemic Risk Board (ESRB).[100] Its Article 2(c) defines a 'systemic risk' as a "risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy".

Consequently, a systemic deficiency with regard to the rule of law lies in widespread corruption that questions the implementation of Union law to such an extent that it ceases to stabilize expectations in a Member State.[101] Since the Union is a union of law, such characteristics call the entire enterprise into question. The same holds true when the national courts do no longer

[96] COM(2018) 324 final, cited *supra* note 3, art. 2.
[97] COM(2014) 158 final, cited *supra* note 55, p. 6 et seq.
[98] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44; CJEU Case C-404/15, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, paras. 89, 93, 104.
[99] Kleinow, *Systemrelevante Finanzinstitute. Systemrisiko und Regulierung im europäischen Kontext*, (Springer, 2016), p. 19 et seq.
[100] Eling and Pankoke, "Systemic Risk in the Insurance Sector – What Do We Know?", *Working Papers on Risk Management and Insurance No. 124* (2014), <https://www.ivw.unisg.ch/~/media/internet/content/dateien/instituteundcenters/ivw/wps/wp124.pdf> (last visited 29 Apr. 2019; Gurlit, "Instrumente makroprudenzieller Bankenaufsicht – unter besonderer Berücksichtigung zusätzlicher Kapitalanforderungen", 69 *Zeitschrift für Wirtschafts- und Bankenrecht* (2015), 1257-1264, at 1217 et seqq.
[101] In detail von Bogdandy and Ioannidis, op. cit. *supra* note 56, p. 287 et seqq.

effectively control the government. On a horizontal level, there is a systemic deficiency when a Member State cannot surrender a person to another Member State because that would result in a serious conflict with fundamental rights of its own constitution.[102]

4. A legal regime for deficiency instruments

4.1. The toolbox

Many instruments might be used to defend European values. They are of diverse legal nature (political, administrative and judicial, binding and non-binding), they pertain to different legal orders and they are applied by different, sometimes even competing institutions, such as a constitutional court and the CJEU. That calls for a coordinating legal doctrine comprehending several legal orders.

Such a doctrine should not to force the different instruments into a Procrustean bed. Instead, it should elaborate their diversity while indicating how to connect them as part of a functional tool box. Coordinated actions are more promising, whereas uncoordinated ones might be counterproductive. In more general terms: a clear and univocal reaction of the many European voices is essential for the protection of the Union's values.

Instruments of Union law are at the centre of attention.[103] This is justified insofar as action by the Union reduces the pressure on Member States to take steps on an individual level: the latter, e.g. a reprisal, can be even more explosive than pressure by the Union.[104] Among the instruments of the political institutions, measures taken under Article 7 TEU, the Commission's Rule of Law Framework and the rule of law dialogue of the Council are at the forefront.[105] The Commission's Justice Scoreboard 2018 has become a supervisory instrument, too,[106] as has the Commission's Country Report on Poland within the framework of the European Semester.[107] Regarding some

[102] Cfr. sources cited in *supra* note 21.
[103] For an overview see Closa, Kochenov, Weiler, op. cit. *supra* note 39, as well as the accounts given in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016); Jakab and Kochenov (Eds), *Protecting European Values*, (Oxford University Press, 2017).
[104] Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?", 21 ELJ (2015), 141-160, at 145.
[105] Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law (16134/14).
[106] Cfr., recently, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The 2018 EU Justice Scoreboad, COM(2018) 364 final, p. 4 et seqq. On the Justice Scoreboard, Dori, "The EU Justice Scoreboard – Judicial Evaluation as a new Governance Tool", 2 *MPILux Working Paper* (2015), <http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool.pdf> (last visited 29 Apr. 2019); Jakab and Lorincz, "International Indices as Models for the Rule of Law Scoreboard of the European Union: Methodological Issues", *MPIL Research Paper No. 2017-21*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032501> (last visited 29 Apr. 2019).
[107] Country Report Poland 2018 accompanying the document Communication from the Commission to the European Parliament, the Council, the European Central Bank and the Eurogroup: 2018 European Semester: Assessment of

Member States, the Union disposes of additional instruments. The Cooperation and Verification Mechanism in the Treaties of Accession with Bulgaria and Romania is meant to "see the two countries develop the effective administrative and judicial systems needed".[108] The Treaty of Accession with Croatia contains a similar instrument.[109] Further instruments are being planned: the Commission wants to make funding subject to respecting EU values[110] and to launch an "EU Justice, Rights and Values Fund" with an overall budget allocation of 947 million Euro.[111] In the framework of the European Parliament, there are the instrument of a plenary debate, the law on sanctioning radical political parties,[112] as well as disciplining instruments within Europe's political alliances.[113]

Then there are the courts.[114] Unlike political bodies, they cannot avoid making decisions. The CJEU can be called upon to decide via the infringement and the preliminary ruling procedures; both can lead to severe financial sanctions. Furthermore, the CJEU can support actions of political institutions: an important example for this is the role it attributes to the qualifications made in the Commission's proposal to institute a procedure under Article 7 TEU.[115] Accordingly, such a proposal is sensible even when the Council and the European Council are unlikely to act.

The Union's institutions apart, those of the Member States can also defend European values. In this context, the tool box of international law is to be considered, from retaliatory measures to the mechanisms of the Vienna Convention on the Law of Treaties[116] to the extreme option of an

---

progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011, SWD(2018) 219 final, pp. 3, 29.

[108] Cfr. the corresponding reports by the Commission, most recently Report from the Commission to the European Parliament and the Council, On Progress in Bulgaria under the Cooperation and Verification, COM(2018) 850 final; Vachudova, "Why Improve EU Oversight of Rule of Law", in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 270-289, at 270; Carp, "The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism", 10 *Utrecht Law Review* (2014), 1-16, at 1.

[109] Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (2012) OJ L112/21, art. 36. In detail, Łazowski, "European Union do not Worry, Croatia is Behind you: A Commentary on the Seventh Accession Treaty", 8 *Croatian Yearbook of European Law* (2012), 1-39, pp. 33-36.

[110] COM(2018) 324 final, cited *supra* note 3, art. 2. On this, see also Halmai, "The Possibility and Desirability of Rule of Law Conditionality", 11 HJRL (2018), 171-188.

[111] Annex to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A modern budget for a Union that protects, empowers and defends: The multiannual financial framework for 2021-2027, COM(2018) 321 final, p. 48.

[112] Regulation (EU, Euratom) 1141/2014 on the statute and funding of European political parties and European political foundations (2014) OJ L317/1, art. 3 and art. 6.

[113] Art. 9 European People's Party Statutes, e.g., permits the exclusion of both individual and Member State political parties, but does not define a reason for exclusion. Similar provisions are contained in art. 16 Satutes of the Alliance of Liberals and Democrats for Europe Party.

[114] On this, see in particular Huber, op. cit. *supra* note 2, p. 409 et seqq.

[115] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, paras 69 et seqq.

[116] On this, see Binder, *Die Grenzen der Vertragstreue im Völkerrecht*, (Springer, 2013).

eventual humanitarian intervention.[117] The governments of the Member States can coordinate such international instruments, as was the case against Austria in 2000.[118] They could also consider, and threaten, to advance integration among themselves, excluding the countries that do not conform with the values.[119]

Member State courts, too, dispose of relevant instruments. They can defend European values against the own state in the light of a "reverse Solange" doctrine[120] or against another Member State in the light of a "horizontal Solange" doctrine.[121] The CJEU can support them in this via preliminary rulings. An important question is to what extent national courts can proceed independently from Union law on such matters.[122]

Other pertinent measures are those of the Council of Europe, especially recommendations issued by its political institutions or by the Commission for Democracy through Law (Venice Commission), as well as decisions of the ECtHR.[123] While the Council of Europe far exceeds the EU-centred European legal space, its relevance inside the European legal space flows from Article 6 Para. 3 TEU, Article 52 Para. 3 and Article 53 of the CFR. On an operative level, there is a close institutional connection.[124]

Given that this legal framework comprises instruments of Union law, international law and the law of the Member States, it pertains to European law and not simply to Union law, international or domestic law alone.[125] In the tradition of public law thinking, such a doctrinal framework is to contribute to legal instruments promoting their legitimacy as well as their efficacy. Its most important building blocks are legal basis (4.2.), procedure (4.3.), the material standard (4.4.), and control (4.5.).

---

[117] Crawford, "Overview of Part Three of the Articles on State Responsibility", in Crawford, Pellet, Olleson (Eds), *The Law of International State Responsibility*, (Oxford University Press, 2013), pp. 931-940, at 931; International Law Association, *Final Report on Aggression and the Use of Force* (2018), <http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf> (last visited 29 Apr. 2019), p. 20 et seqq.

[118] In detail, see Schorkopf, op. cit. *supra* note 28, p. 77.

[119] Franzius, op. cit. *supra* note 10, p. 388.

[120] On this, see above, 2.3. See also the presently pending references on a preliminary ruling in the cases *Miasto Łowicz v Skarb Państwa – Wojewoda Łódzki* (C-558/18); *Prokuratura Okręgowa w Płocku v VX, WW, XV* (C-563/18); *Prokuratura Rejonowa w Słubicach* (C-623/18).

[121] See in particular Canor, "My brother's keeper? Horizontal solange: 'An ever closer distrust among the peoples of Europe'", 50 CML Rev. (2013), 383-422; a first case of application is the judgment of the Irish High Court in the *Celmer* case, see IEHC, *supra* note 21.

[122] As indicated in BVerfGE 140, 317 – *Identitätskontrolle*.

[123] Cfr., on the Venice Commission, Nergelius, "The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania", in von Bogdandy and Sonnevend (Eds), *Constitutional Crisis in the European Constitutional Area*, (C.H. Beck/Hart, 2015), pp. 291-308, at 291; Grabenwarter, "Die Herausbildung europäischer Verfassungsstandards in der Venedig-Kommission", 66 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2018), 21-41, at 21.

[124] On this, von Bogdandy, " The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship ", 19/2 EJIL, 241-275, at 69 et seqq.

[125] On this understanding of European law, see in detail already Mosler, "Begriff und Gegenstand des Europarechts", 28 ZaöRV (1968), 481-502, at 481 et seqq.; von Bogdandy, " European Law Beyond 'Ever Closer Union' Repositioning the Concept, its Thrust and the EJC's Comparative Methodology ", 22/4 European Law Journal (2016), 519-538.

4.2. Questions of competence

Any qualification as *systemically deficient* is prone to escalation. Therefore, it should be in the hands of institutions that can shoulder such a responsibility and manage conflicts. The first aspect responding to this concern is the requirement of a legal basis, in many cases even the need of a specific competence.[126] Thus, the first building block of any instrument dealing with *systemic deficiencies* is to verify whether its adoption and use are supported by a legal basis.

4.2.1. Article 7 TEU in the order of competences

Article 7 TEU plays a key role here. It might even stipulate an exclusive competence to defend EU values. In that case, all other measures by other Union organs or Member State institutions would become inadmissible. The defence of the values would be completely under the control of the governments of the Member States, united in the Union's institutions. Responsibility would be crystal clear. The drawback is that Article 7 TEU is extremely difficult to use, which gives rise to the question of additional instruments. But it is not only consequentialist considerations, but also doctrinal ones speaking against interpreting Article 7 TEU as an exclusive competence.

A first issue is whether Article 7 TEU prohibits pertinent measures by Member States. Article 3 TFEU does not enlist Article 7 TEU. Article 4 TFEU, which enumerates the main areas of shared responsibilities, does not feature Article 7 TEU either. However, it lists the space of freedom, security and law. Hence, there could be an argument to assume precedence of measures of Union law vis-à-vis a defence by Member States. The CJEU's case-law pointed in this direction, especially in the *Melloni* case.[127]

Yet, since the German Federal Constitutional Court emphasized its competence to identity protection and the defence of values in its decision on 15 December 2015 (Identity Review I),[128] the CJEU has acknowledged that European law leaves room for the national defence of fundamental principles.[129] Since the European values of Article 2 TEU and the identity-informing fundamental principles of the Member State constitutions widely overlap,[130] neither the competences of Article 7 TEU nor other instruments of Union law block Member State institutions from defending European values, according to this case-law. This corresponds to the logic of the European legal space not to monopolize a central question such as value defence in one institution. The considerable need for coordination must be met with other means.[131]

---

[126] Bast, *Grundbegriffe der Handlungsformen der EU*, (Springer, 2006), p. 30 et seqq.; Bast, "Art. 5 EUV", in Grabitz, Hilf, Nettesheim (Eds), *Das Recht der Europäischen Union*, (C.H. Beck, 2018), para 13 et seqq.
[127] CJEU, Case C-399/11 *Melloni*, ECLI:EU:C:2013:107.
[128] BVerfGE 140, 317 – *Identitätskontrolle*.
[129] At least within the scope of fundamental rights, CJEU, Case C-404/15, *Aranyosi and Căldăraru,* cited *supra* note 98.
[130] Cfr. Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14, *Gauweiler and Others*, cited *supra* note 23.
[131] On this 4.3 and 4.4.

With a view to actions taken by the Union, Article 7 TEU does not contain an explicit statement as to whether other Union institutions may defend European values using other instruments. The general rules apply. It is well-established that a specific procedure designed to deal with a certain problem does not exclude developing other instruments,[132] a core statement since the *Van Gen en Loos* judgement.[133] Accordingly, it is, in principle, admissible to develop new instruments[134], such as the Commission's Rule of Law Framework, or the Justice Score Board.

Nevertheless, Article 7 TEU plays a role. Its wording, the inclusion of the European Council and the extremely laborious procedure in Article 7 TEU indicate that it stipulates the most *intensive* form of defence of values. Therefore, the Union lacks any competence for developing stronger instruments. Hence, the expulsion of a Member State[135] or the dismissal of its government, an instrument the Spanish government used against the Catalan government, are off limits.[136] All instruments complementing those of Article 7 TEU in defending the values of Article 2 TEU must be less severe.[137]

4.2.2. Instruments of secondary law

So far, action under Article 7 TEU is paralyzed by the Council and the European Council. Can other institutions defend the values via other instruments? As has been shown, Article 7 TEU does not prohibit other instruments. But any new instrument needs an appropriate legal basis. This requirement results from the necessity to legitimize any action of public authorities, including 'soft' measures.[138] A new instrument might even need a specific competence.[139]

With a view to the European Parliament, its general tasks allow it to discuss any systemic deficiencies in the Member States,[140] and it has done so for a long time. Its resolutions have gained public attention. However, they have not had much impact yet.

Measures taken by the other institutions could yield more powerful results, which is why the law is more demanding than with respect to the European Parliament, as has been shown by developments in other fields. The CJEU has declared Commission Communications invalid due

[132] Bast (2006), op. cit. *supra* note 126, pp. 60-63.
[133] CJEU, Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1, para 26.
[134] Bast (2006), op. cit. *supra* note 126, pp. 42-67. Cfr. also Brauneck, "Gefährdung des EU-Haushalts durch rechtsstaatliche Mängel in den Mitgliedstaaten?", 54 EuR (2019), 37-61, at 37 and 59.
[135] On this, see the proposal by Stein op. cit. *supra* note 8, p. 890; Blagoev, "Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?", 16 *Tilburg Law Review* (2011), 191-237, at 191.
[136] Recently in Spain under Article 155 Spanish Constitution. On this, García Morales, op. cit. *supra* note 33.
[137] In this sense also CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44; see also below, 4.4.
[138] Cfr. above, 3.3. See, also, Nettesheim, "Art. 288 AEUV" in Grabitz, Hilf, Nettesheim (Eds), *Das Recht der Europäischen Union*, (C.H. Beck, 2018), para 200; Senden, *Soft Law in European Community Law*, (Hart, 2004), p. 478 et seqq. On the legal boundaries, von Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei, Smrkol (2015), op. cit. *supra* note 46, pp. 273-275.
[139] In detail Bast (2006), op. cit. *supra* note 126, para 23 et seqq.
[140] Bast (2006), op. cit. *supra* note 126, para 28.

to lack of competence(!).[141] The Court's requirement of a legal basis is particularly striking in the OMT procedure, whose subject was the mere announcement of a new instrument for purchasing bonds by ECB president Mario Draghi.[142]

The Council has disputed the power of the Commission to establish the rule of law mechanism;[143] here, the general problem comes to the fore. However, the admissibility of this mechanism flows from the Commission's right to make requests under Article 7 TEU as well as its general role of a guardian of the Treaties according to Article 17 Para. 1 TEU. On that basis, the Commission can also examine whether the Member States respect the values of Article 2 TEU. The competence to issuing corresponding recommendations follows from Article 292 para. 4 TFEU.[144] These considerations also support the Justice Score Board.

Similar questions have emerged in the Council of Europe. One need only think of the sanctions imposed by its Parliamentary Assembly against Russian parliamentarians since the annexation of the Crimea.[145] Another example are the opinions from the Venice Commission issued without a request from the Convention state concerned.[146] All these measures constitute reactions to systemic problems and can be treated analogously to the considerations on the instrument tool box of Union law.

4.2.3. The justiciability of the values

The defence of values by political institutions has not been very effective so far. As so often in the history of integration, the question arises whether the judiciary can compensate for this. For the CJEU, this is a question of its powers within the procedures of the Articles 257, 258 and 267 TFEU. Article 7 TEU does not block these procedures; Article 269 TFEU only determines that the Court cannot review the material prerequisites of Article 7 TEU. Given the lack of any

[141] CJEU, Case C-57/95 *France v. Commission*, ECLI :EU:C:1997:164; CJEU, Case C-233/02, *France v. Commission*, ECLI:EU:C:2004:173, para. 40; Opinion of Advocate General Michal Bobek in CJEU, Case C-16/16 P *Commission v. Belgium*, ECLI:EU:C:2017:959.

[142] Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14, *Gauweiler and Others,* cited *supra* note 23.

[143] Commission's Communication (10296/14), cited *supra* note 9.

[144] Giegerich, "Verfassungshomogenität, Verfassungsautonomie und Verfassungsaufsicht in der EU: Zum 'neuen Rechtsstaatsmechanismus' der Europäischen Kommission" in Calliess (Ed) *Herausforderungen an Staat und Verfassung: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, (Nomos, 2015), pp. 499-542, at 535-536; Toggenburg, "Was soll die EU können dürfen, um die EU-Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedstaaten zu schützen? Ausblick auf eine neue Europäische Rechtsstaatshygiene", *ÖGfE Policy Brief* (2013), <https://oegfe.at/wordpress/wp-content/uploads/2015/07/OEGfE_Policy_Brief-2013.10.pdf> (last visited 29 Apr. 2019).

[145] Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, Resolution 1990 (2014) Final version, as well as the extension through: Challenge, on substantive grounds, of the still unratified credentials of the delegation of the Russian Federation, Resolution 2034 (2015) Final version; Steininger, "Managing the Backlash? The PACE and the Question of Participation Rights for Russia", Verfassungsblog (2018), <https://verfassungsblog.de/managing-the-backlash-the-pace-and-the-question-of-participation-rights-for-russia/> (last visited 29 Apr. 2019); Henderson, "Russia's Recent Dealings with the Council of Europe and European Court of Human Rights", 24 *European Public Law* (2018), 393-402, at 393.

[146] von Bogdandy and Sonnevend (Eds), *Constitutional Crisis in the European Constitutional Area*, (C.H. Beck/Hart/Nomos, 2015).

explicit ban and CJEU's general role in the *union of law,* there is good reason to assume that values can play a role in procedures under the Articles 257, 258 and 267 TFEU.[147]

The actual crux is the justiciability of the values of Article 2 TEU. The term *value* can be interpreted as the Treaty makers' attributing a vagueness to Article 2 TEU that excludes judicial application.[148] Arguments relating to the separation of powers might support this. The judicial application of values would immensely extend the courts' sphere of power to highly political conflicts.[149] All of this can be avoided by considering the values not to be justiciable.

However, the Commission and the CJEU have legally and credibly condensed the values of Article 2 TEU so that they have become accessible to judicial decision making, the value of the rule of law being at the centre. The most important path to condensing the values lies in connecting these values to fundamental rights and the well-established principles of the common constitutional traditions.[150] The effort has proven successful: even from the Polish "White paper on the reform of the Polish judiciary"–which presents the highly controversial changes in the Polish judiciary as conforming to the values–one can gather that European values have come to permit concrete legal assessment.[151]

Among the pertinent acts of the Commission, its Rule of Law Framework as well as its opinions and recommendations on Poland are of particular importance.[152] Another milestone is its first proposal for action under Article 7 Para. 1 TEU.[153] Then there are the Justice Score Board and the recent Country Report on Poland in the European Semester.[154] The Commission's proposal on "generalised deficiencies as regards the rule of law" even contains a legal definition of

[147] In detail, Schmidt and Bogdanowicz, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", 55 CML Rev. (2018), 1061-1100, at 1069-1073; Hilf and Schorkopf, "Art. 2 EUV", in Grabitz, Hilf, Nettesheim (Eds), *Das Recht der Europäischen Union*, (C.H. Beck, 2017), para 46; Hillion, op. cit. *supra* note 39, p. 59; Franzius, op. cit. *supra* note 10, at 381 and 386; a different attitude is expressed by Levits, "Die Europäische Union als Wertegemeinschaft", in Jaeger (Ed.), *Europa 4.0*, (Jan Sramek Verlag KG, 2018), at 239 (262); Nicolisi, "The Contribution of the Court of Justice to the Codification of the Founding Values of the European Union", 51 Rev.der.com.Eur. (2015), 613-643, at 643; Martenczuk, "Art. 7 EUV und der Rechtsstaatsrahmen als Instrument der Wahrung der Grundwerte der Union", in Kadelbach (Ed.), *Verfassungskrisen in der Europäischen Union*, (Nomos, 2018), at 41 (46)

[148] Kochenov and Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", 11 EuConst (2018), 512-540, at 512 (520); Nicolisi, op. cit. *supra* note 147, at 643.

[149] On the German discussion, Schmitt, op. cit. *supra* note 13; Böckenförde, "Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik", 29 *Der Staat* (1990)*,* 1-31, at 25.

[150] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44. On the common constitutional traditions, see Cassese, "The 'Constitutional Traditions Common to the Member States' of the European Union", *Rivista Trimestrale di Diritto Pubblico* (2017) 939-948, at 939 et seqq.; Graziadei and de Caria, "The 'Constitutional Traditions Common to the Member States' in the Case-Law of the European Court of Justice. Judicial Dialogue at its Finest", *Rivista Trimestrale di Diritto Pubblico* 949-971 (2017), p. 949 et seqq.

[151] Chancellery of the Prime Minister of Poland, "White Paper on the Reform of the Polish Judiciary" (2018), <https://www.premier.gov.pl/files/files/white_paper_en_full.pdf> (last visited 29 Apr. 2019), para 166.

[152] The acts in question are: Commission Opinion of 1.6.2016, regarding the Rule of Law in Poland, C(2016) 3500 final; recently Commission Recommendation (EU) 2018/103, cited *supra* note 79.

[153] See *supra* note 5.

[154] Country Report Poland 2018, cited *supra* note 107, pp. 3, 29.

"generalised deficiencies".[155] Further operationalization can be found in the "Justice, Rights and Values" fund.[156]

Two judgements by the CJEU from 2018 are leading the way for the judicial operationalization of the value of the rule of law. In the case *Associação Sindical dos Juízes Portugueses* (*ASJP*), the Court inferred standards for the independence of Member State judges from Article 19 TEU.[157] In the *LM* (*Deficiencies in the system of justice*) case, it enabled individuals to defend European values.[158] The case dealt with the protection of the separation of powers via an independent judiciary, and it accomplished this via the fundamental right to an impartial court and to a fair trial. The Court's approach is reminiscent of the German Federal Constitutional Court's Maastricht decision, which also made a fundamental principle (democracy) justiciable via an individual right (right to vote, Article 38 Para. 1 of German Basic Law).[159] Since the *LM* case, the "vigilance of individuals concerned to protect their rights" has also protected European values.[160]

Accordingly, the courts, including Member State courts, can decide on the values of Article 2 TEU.[161] The values have become directly applicable.[162] This expansion of judicial competence mirrors the importance of the values (2.3) and the judiciary's general role in the European legal space. By now, there is a judicial line of defence beyond the political rationality of Article 7 TEU.

4.2.4. The role of constitutional courts

The direct applicability of European values means that constitutional courts, too, can defend them. However, in many Member States, Union law is not a *standard* of constitutional review, according to most constitutional courts concerned.[163] Some reasons for this reticence are of a rather more legal nature, especially the fact that Union law lacks constitutional rank in the

[155] COM(2018) 324 final, cited *supra* note 3, art. 2.
[156] Annex to COM(2018) 321 final, cited *supra* note 111, p. 48.
[157] CJEU, Case C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.
[158] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para. 47 et seqq.
[159] BVerfGE, 123, 267 – *Lissabon*; BVerfGE, 89, 155 – *Maastricht*; see, critically, Nettesheim, "Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BverfG", 62 *Neue juristische Wochenschrift* (2009), 2867-2869, at 2869.
[160] CJEU, Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen,* cited *supra* note 133.
[161] See, especially, CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses,* cited *supra* note 157; CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44; now also CJEU, Case C-619/18 R, *Commission/Poland*, EU:C:2019:531, marginal no. 47; GA Tanchev, Opinion in Case C-192/18 – *Commission/Poland*, marginal no. 71; GA Tanchev, Opinion in Case C-585/18, C-624/18, C-625/18 – *Krajowa Rada Sądownictwa (Indépendance de la chambre disciplinaire de la Cour suprême*, marginal no. 77.
[162] von Bogdandy and Spieker, op. cit. *supra* note 46; in general Wohlfahrt, *Die Vermutung unmittelbarer Wirkung des Unionsrecht,* (Springer, 2015).
[163] In detail, Paris, "Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review", 24 MJ (2017), 792-821, at 798 et seqq.; Mengozzi, "A European Partnership of Courts. Judicial Dialogue between the EU Court of Justice and National Constitutional Courts", *Il Diritto dell'Unione Europea* (2015) 701-720, at 707; Lacchi, "Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU", 16 GLJ (2015), 1663-1700, at 1663.

domestic sphere. Other considerations are of a more political nature, in particular the consideration that the constitutional courts' abstention from applying Union law facilitates a division of tasks that reduces conflicts between the CJEU and the constitutional courts.[164]

These arguments meet with objections. There is enough interpretive scope to include Union law into the purview of constitutional courts.[165] Substantively, such a step would result in a more effective implementation of Union law. Moreover, it would strengthen the constitutional courts themselves: they could take a more active role in interpreting Union law and shaping the European legal space.[166]

4.3. Procedure

The pivotal point of the CJEU's *LM* (*Deficiencies in the system of justice*) judgement is the fundamental right to a fair trial, Article 47 Para. 2 CFR. It expresses a general legal principle which, in the European legal space, protects not only individuals, but also public authorities.[167] Moreover, it applies not only in judicial procedures, but whenever a legal subject is faced with the exercise of public authority,[168] especially when substantial interests are at stake.[169] This is the case with conflicts about a systemic deficiency: the interests in question here are the national reputation, the interest of prosecution, the effective functioning of the national judiciary, financial interests as well as the participation in institutions of the Union. A fair procedure is important not only for the legitimacy of any specific decision, but also for general cohesion in Europe.[170]

Of the many procedural questions, only two will be addressed here. The first one concerns political and administrative procedures. A point of criticism regarding the measures taken by the Commission and the European Parliament is that their motivation is not the defence of Union values, but the sanctioning of an EU-critical stance. To prove this point, it is said that measures

[164] See Paris, op. cit. *supra* note 163, p. 814.
[165] In detail Paris, op. cit. *supra* note 163, p. 809 et seq.; Griebel, "Europäische Grundrechte als Prüfungsmaßstab der Verfassungsbeschwerde", DVBL (2014), 204-211, at 204; Bäcker, "Das Grundgesetz als Implementationsgarant der Unionsgrundrechte", 50 EuR (2015). 389-414, at 411.
[166] On this discussion, Voßkuhle, "Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund", 6 EuConst (2010), 175-198, at 175 and 197; Komárek, "Why National Constitutional Courts Should not Embrace EU Fundamental Rights" in: de Vries, Bernitz, Weatherill (Eds), *The EU Charter of Fundamental Rights as Binding Instruments*, (Hart, 2015), pp. 75-92, at 75; Thym, "Vereinigt die Grundrechte!", 70 JZ (2015), 53-63, at 56.
[167] Jarass, "Art. 47 GRCh" in Jarass (Ed), *Charta der Grundrechte der EU*, 3rd ed. (C.H. Beck, 2016), pp. 405-427, para 12.
[168] In this respect, Art. 47 of the Charter transcends Art. 6 ECHR; see also Alber, "Art. 47" in Stern and Sachs (Eds), *Europäische Grundrechte-Charta*, (C.H. Beck, 2016), pp. 699-730, para 10. On the validity of art. 47 para. 2 CFR also from an administrative procedural level, Nowak, "Europäisches Verwaltungsrecht und Grundrechte" in Terhechte (Ed), *Verwaltungsrecht der Europäischen Union*, (Nomos, 2011), pp. 519-584, para 44.
[169] On the spill-over effects over administrative procedure, cfr. Jarass, op. cit. *supra* note 167.
[170] Luhmann, *Legitimation durch Verfahren*, 2nd ed. (Suhrkamp, 1975), pp. 34 et seq., 48 et seq., 116-20; this was also an insight from the Eurozone crisis, Farahat and Krenn, "Der Europäische Gerichtshof in der Eurokrise: eine konflikttheoretische Perspektive", 57 *Der Staat* (2018), 357-385, at 384.

comparable to the Polish ones, when taken by EU-friendly governments, do not elicit any reaction.[171] Hence, the two institutions are accused of politically misusing their powers.

As described above (2.1), there is room for discretion when deciding whether to initiate a procedure. The accusation is thus to be dealt with under the doctrine on discretion. This doctrine does, however, not limit parliamentary debate: indeed, it is a general principle that parliaments enjoy full freedom of what to debate.[172] By contrast, the European Commission faces limits.[173] If it uses an instrument of supervision to sanction an integration-critical general attitude, this would amount to an illegal use of discretion. But to identify such improper use, hard evidence is needed. To date, the Commission's actions seem justified by the extraordinary severity of the situations at hand.[174]

With regard to judicial procedures, the core question is as to whether Member State courts have to refer a case to the CJEU if its subject is a possible systemic deficiency in another Member State. A national court can treat such a deficiency both in the light of the European values, as did the Irish High Court in the *Celmer* case,[175] and in the light of the fundamental principles of the national constitution, as in the case "Identity review I" of the German Federal Constitutional Court.[176] The German Court has been much criticized for not having made a preliminary reference.[177]

The general question of a constitutional court's obligation to make such a reference has extensively been discussed.[178] When it comes to *systemic deficiencies*, such a referral to the CJEU is of particular importance for hedging the relationship between the Member States in question. Only a procedure before the CJEU allows for defending European values in a process which respects the very rule of law because it requires a fair procedure. The Member State concerned must be involved. A national court can hardly provide the government of another state with adequate participation. A procedure before the CJEU appears to provide the only orderly

[171] Mendelski, op. cit. *supra* note 10.
[172] CJEU, Case C–230/81 *Luxemburg v. Parliament*, ECLI:EU:C:1983:32, para. 39; Bast (2006), op. cit. *supra* note 126, para 28.
[173] Bleckmann, *Ermessensfehlerlehre: Völker- und Europarecht, vergleichendes Verwaltungsrecht*, (Heymanns, 1997), p. 59 et seqq.
[174] In detail, Hoffmeister, "Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels" in von Bogdandy and Sonnevend (Eds), *Constitutional Crisis in the European Constitutional Area*, (C.H. Beck/Hart/Nomos, 2015), pp. 195-233, at 195 et seqq.
[175] IEHC, cited *supra* note 21.
[176] BVerfGE 140, 317 – *Identitätskontrolle*.
[177] On the criticism, Burchardt, op. cit. *supra* note 72, p. 527 et seqq.; Schönberger, "Anmerkung", 71 JZ (2016), 422-424, at 422; Nettesheim, "Anmerkung", 71 JZ (2016), 424-428, at 424; Sauer, "'Solange' geht in Altersteilzeit – Der unbedingte Vorrang der Menschenwürde vor dem Unionsrecht", 69 *Neue juristische Wochenschrift* (2016), 1134-1138, at 1134; Classen, "Zu wenig, zu fundamentalistisch – zur grundrechtlichen Kontrolle 'unionsrechtlich determinierter' nationaler Hoheitsakte", 51 EuR (2016), 304-312, at 304; Nowag, "EU law, constitutional identity, and human dignity: A toxic mix? Bundesverfassungsgericht: Mr R.", 53 CML Rev. (2016), 1441-1453, at 1450 et seqq.; Rugge, "Bundesverfassungsgericht e Corte di Giustizia dell'UE: quale futuro per il dialogo sul rispetto dell'identità nazionale?", *Il Diritto dell'Unione Europea* (2016) 789-812, at 789.
[178] On this, see Paris, op. cit. *supra* note 163.

way of deciding critical questions of a systemic deficiency in another legal order. There is, moreover, the consideration that "Europe should speak with one voice". Even if national courts refer to *principles of national identity* instead of *European values*, such national principles can be defended better in the framework of European values.[179]

4.4. Material standards

All *systemic deficiency* instruments contain elements describing a particularly problematic situation (3.5). Therefore, similar questions of interpretation and application arise. Three questions will be discussed: the interpretive condensing of the intersystemic requirements (4.4.1), the importance of a comprehensive and moreover collective assessment (4.4.2) as well as the question of how concrete a violation must be (4.4.3).

4.4.1. Red lines

As doctrinal treaties, handbooks and commentaries on German Basic Law show, many important features of a constitution, even of an entire legal order, can be inferred from principles such as human dignity, rule of law and democracy. To this end, German doctrine considers these principles as "laws of construction"[180] and even "optimization requirements"[181], thereby justifying a scholarship that has something to say on almost any important issue as well as a judiciary that is happy in its sweeping law-making role.

This cannot be a model for dealing with the values of Article 2 TEU, particularly insofar as they apply to the Member States' legal orders. By using the term *value* in Article 2 TEU, the Treaty makers imply that its provisions are to be understood as vague and, thus, open.[182] And this openness is not an authorization for the Union's institutions to gradually outline an ever more detailed common constitutional law. While Article 2 TEU has become directly applicable (see above, 4.2.), this does not change the fact that it should not develop into a homogeneity clause similar to Article 28 German Basic Law or Article IV Sec. 4 and Articles XIII to XV of the US Constitution.[183] That would force the constitutional autonomy of the Member States into a far too narrow corridor,[184] going against European constitutional pluralism.

The diversity of Member State constitutions, protected by Union law, is enormous: republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, Westminster democracies and consociational democracies, democracies with strong or weak party structures, with strong or weak societal institutions, unitarian or federal orders, strong, weak or lacking constitutional courts, markedly different degrees of judicial self-organization and considerably diverging content and degree of protection of fundamental rights, not least

[179] In detail, Spieker, op. cit. *supra* note 45, p. 22 et seq.
[180] Dreier, "Art. 20 (Einführung)" in Dreier (Ed), *Grundgesetz-Kommentar*, 3rd ed., (Mohr Siebeck, 2015), pp. 1-10, paras 5, 8 et seq.; Reimer, *Verfassungsprinzipien*, (Duncker & Humblot, 2001), p. 26 et seqq.
[181] Schulze-Fielitz, "Art. 20 Abs. 2 Satz 2 und Abs. 3 (Rechtsstaat)" in Dreier (Ed), *Grundgesetz-Kommentar, Band 2,* 3rd ed. (Mohr Siebeck, 2015), pp. 186-291, para 44.
[182] Openness is a pivotal point of Schmitt's criticism, Schmitt, op. cit. *supra* note 13, pp. 23, 53 et seq.; he refers to the "terror of the direct and automatic enactment of values".
[183] On this, see Giegerich, op. cit. *supra* note 144, p. 499 et seq.
[184] For a comparative view, Palermo, Kösserl (2017), p. 321 et seqq.

anarcho-syndicalist, Catholic, civic, laic, Ottoman, post-colonial, Protestant, socialist, or statist constitutional traditions. Developing the values of Article 2 TEU to a kind of DNA of all law in the European legal space, let alone as optimization requirements which allow for meticulous control of Member State law, would be incompatible with this diversity.

The constitutional considerations (2.) resulted in the conclusion that the instruments for fighting systemic deficiencies serve the cause of ensuring essentials of the European association (*Verbund*), in particular its self-understanding as a community of values, the core of fundamental rights, and the principle of mutual trust, but nothing more. This explains the values' vagueness as well as the extremely high hurdles in Article 7 TEU. The logic of restraint extends to the entire tool box. Consequently, the values are to be interpreted such as to only prohibit particularly problematic measures, without indicating a "right way", let alone stipulating the basic organization of Member State institutions. In this sense, they do not constitute "laws of construction", but rather "red lines". [185]

The Commission's, the EP's and CJEU's decisions can be understood in this light. The logic of red lines explains their reasoning, which may appear rather "thin" and therefore little convincing at first sight. In most cases, the pertinent value is illustrated only in a general manner, with reference to principles[186]; but there is only little interpretive development in view of the matter concerned. The central aspect is *what cannot be tolerated*. While the lack of interpretive development limits the persuasive power of the judgement, it is by this abstaining that interpretative standards which could considerably limit the Member States' constitutional autonomy can be avoided.[187]

In the seminal *Aranyosi e Căldăraru* judgement, the Court refers only to absolute rights, especially to the prohibition of inhuman treatment,[188] i.e. to norms which are part of the core of European self-understanding.[189] In the *LM* (*Deficiencies in the system of justice*) judgement, the CJEU states that the newly established disciplinary chamber is problematic, given its appearance as an instrument to cow judges.[190] The judgement outlines further "red lines" by referring to the qualifications on Poland made in the Commission proposal under Article 7 TEU. Of course, the Court does not treat the proposal as a source of law. Nevertheless, the "information (…) is particularly relevant" and thus serves to assess the Polish measures.[191] This Commission proposal concretely articulates which measures are incompatible with the values and must therefore be revoked as they have crossed "red lines".

---

[185] In detail, von Bogdandy, Bogdanovic, Canor, Schmidt, Taborowski, "Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines", 55 CML Rev. (2018), 983-995, at 963.

[186] Cfr., in particular, COM(2017) 835 final, cited *supra* note 5, para 6 et seqq., and CJEU, Case C-216/18 PPU, *Minister for Justice and Equality*, cited *supra* note 44, paras 62-67. At the same time, it should be underlined that the *LM* judgement provides much more justification than the similarly seminal CJEU, Case C-34/09, *Ruiz Zambrano*, cited *supra* note 43.

[187] On this way of forming standards, Lepsius, "Die maßstabsetzende Gewalt" in Jestaedt, Lepsius, Möllers, Schönberger (Eds), *Das entgrenzte Gericht*, (Suhrkamp, 2011), pp. 159-280, at 182 et seqq.; von Bogdandy and Venzke, *In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens*, (Suhrkamp, 2014), p. 254 et seqq.

[188] CJEU, Case C-404/15, *Aranyosi and Căldăraru,* cited *supra* note 98.

[189] Grabenwarter, "Konventionswidrigkeit der Auslieferung bei drohender Todesstrafe – Fall Soering", 70 *Neue juristische Wochenschrift* (2017), 3052, at 3052.

[190] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para 67.

[191] Ibid., para 61.

This logic of "red lines" is not totally averse to building doctrine. It is perfectly imaginable to develop a doctrine of "red lines" by means of the time-tested mechanisms of abstraction and decontextualization.[192] This doctrine could provide indications on how to rebut the presumption, founded in Article 48 TEU, that a Member State complies with European values. Such a doctrine, however, is fundamentally different from a conventional constitutional doctrine of principles that aims at developing from principles an "overall structure" for the entire legal order.[193] It would rather have to follow the logic of "negative dialectics", which is characterized by the very fact of not specifying what the ideal situation should look like, but rather what must not be.

4.4.2. The comprehensive and collective assessment

Most institutions base the determination that a value has been violated on a *comprehensive assessment*. The analysis of the Commission's and the CJEU's pertinent decisions shows that they consider a series of facts to this end, often described in detail, in the light of principles that remain abstract.[194] Such an application, which essentially consists in a comprehensive assessment of developments, events, measures and political statements, is an exercise in discretion and hence inevitably evaluative, and in that sense political. This easily gives rise to the accusation that the decisions are biased or motivated by illicit considerations.[195]

Yet, this practice of assessing is justified by three aspects. Firstly, it is the inevitable consequence of the restrained interpretation, which in turn is justified by the constitutional considerations described in the preceding passage. Secondly, the practice responds to the specific problems of legally capturing authoritarian tendencies. Thirdly, it must be taken into account that the comprehensive assessment is often based on similar perceptions of other institutions and thus takes place collectively (*Einschätzungsverbund*).

The central role of a comprehensive assessment is justified by the very nature of *systemic deficiencies*. Usually, the law is applied to a single action or measure. This mode fails with regard to authoritarian developments, as in most cases only a series of actions and measures *in their entirety* will reach the critical threshold. The actions and measures, taken individually, can often be plausibly justified.[196] The Polish government defends its judicial reforms by means of a

[192] Jestaedt, "Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist" in Jestaedt, Lepsius, Möllers, Schönberger (Eds), *Das entgrenzte Gericht*, (Suhrkamp, 2011), pp. 77-158, at 77.
[193] Schuppert and Bumke, *Die Konstitutionalisierung der Rechtsordnung*, (Nomos, 2000), pp. 28, 39; on "guiding principles", Volkmann, op. cit. *supra* note 15, p. 67 et seqq.
[194] COM(2017) 835 final, cited *supra* note 5, paras 109, 173; CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para 68.
[195] See above, 4.3.
[196] Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions" in Closa and Kochenov (Eds), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), pp. 105-132, at 105. Nevertheless, some Polish measures against the country's own constitutional court appear as rather clear cases, cfr. Iustitia, "Response to the White Paper Compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to the European Commission" (2018), <http://www.statewatch.org/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf> (last visited 29 Apr. 2019); Gersdorf, "Opinion on the White Paper on the Reform of the Polish judiciary" (2018),

legal comparison with "unsuspicious" countries.[197] In order to establish a "clear risk of a serious breach" of Article 2 TEU, a comprehensive view of all measures taken by the Polish government with regard to the judiciary is needed, with due consideration of the general political and social conditions of the country. One needs to assess the actions against the judiciary in the context of the actions against other controlling institutions, mainly the parliamentary opposition, the media, science, and NGOs.[198]

A third aspect contributing to the legitimacy of a comprehensive assessment lies in basing it on concurrent evaluations of other independent institutions, institutions with a recognized authority in questions of values. Put in the words of the network logic of the systemic deficiency (3.2.): regular application takes place in an *Einschätzungsverbund,* i.e., the comprehensive assessment of all circumstances must be widely shared. The more institutions perceive a substantial problem, the stronger the evidence for a systemic deficiency.

It is noteworthy that when it comes to systemic deficiencies, interpretation and application are not presented as being autonomous, but as part of a collective assessment involving many institutions of various legal orders. The Commission and the CJEU, but also many other institutions, recur to other authoritative sources when dealing with such questions, in particular to judgements of the ECtHR and opinions of the Venice Commission.[199] Evaluations of international bodies as well as civic organizations are also significant.[200] In the light of the cherished autonomy of Union law, it appears especially noteworthy that the Commission and the Court give much weight to evaluations under the national legal order concerned; such evaluations even enjoy particular relevance. In the Polish case, an important point is that authoritative Polish voices consider the governing majority's reforms as deeply unconstitutional.[201] Thus, a situation or measure is more likely to qualify as *systemically deficient* the more institutions of the various legal orders share this qualification.

Such a comprehensive assessment is also important in other respects. One need only think of the accusation that the Union itself does not meet the requirements that it demands Poland to fulfil.[202] Certainly, the possibility of the CJEU's judges to be re-elected does not meet the

---

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Supreme%20Court%20-%20Opinion%20on%20the%20white%20paper%20on%20the%20Reform%20of%20the%20Polish%20Judiciary.pdf> (last visited 29 Apr. 2019); Venice Commission, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Opinion no. 833/2015, CDL-AD(2016)001, paras 126, 137, 138.

[197] Chancellery of the Prime Minister of Poland, cited *supra* note 151.

[198] This logic of the comprehensive assessment is by no means restricted to the values. The process of establishing a systemic deficiency in the banking sector is similar, cfr. Regulation (EU) on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (2010) OJ L331/1.

[199] Cfr. COM(2017) 835 final, cited *supra* note 5, paras 18, 32, 95, 116 et seqq.; CJEU, Case C-404/1, *Aranyosi and Căldăraru,* cited *supra* note 98, para 90; Opinion of Advocate General Tanchev in CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para 10.

[200] COM(2017) 835 final, cited *supra* note 5, paras 33, 63, 76, 80, 82.

[201] COM(2017) 835 final, cited *supra* note 5, paras 19, 21, 29, 81, 83, 86; cfr. in particular Iustitia, cited *supra* note 196); Gersdorf, op. cit. *supra* note 196.

[202] Cfr. Weiler, op. cit. *supra* note 11.

highest standards of judicial independence. However, in pertinent research, it is undisputed that the CJEU is an independent court.[203]

4.4.3. On concreteness

The political institutions usually assess a general situation and decide whether there is a general risk for the values, for example by the Polish remodelling of its judiciary since 2015. For the courts, the question arises whether such abstract risk is enough for a judicial decision, or whether a risk would have to materialise concretely in the case at hand in order to be relevant. In the LM case, the subject was if an Irish court must refuse to surrender an individual to Poland under a European arrest warrant notwithstanding the general remodelling of the Polish judiciary. The CJEU answered that the national court must verify in a two-step procedure (1.) whether there is a systemic deficiency in Poland and (2.) if there are "substantial grounds for believing that the individual concerned will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial"[204]. This corresponds to the two-step reviewing scheme for intersystemic constitutional conflicts as established by the German Federal Constitutional Court in its *Solange II* decision.[205]

This two-step review helps to distinguish the legal procedure from the political one under Article 7 TEU. It thus contributes to justifying the CJEU's decision.[206] However, it meets with considerable doubts. Since the measures of the Polish government undermine the independence of the entire Polish judiciary, any case runs the risk of being decided by a compromised judge at some point. Moreover, the CJEU's stipulation that Member State judges must review the independence of their Polish colleagues[207] appears hardly feasible.[208] At least there is a reversal of the burden of proof: in case of a (general) systemic deficiency, it is the Member State in question to give evidence that there is no concrete risk for the individual concerned.[209]

4.5. Control

The last building block of the legal regimes of systemic deficiencies instruments is the issue of legal protection. It deals with the question of whether and how the instruments' lawfulness as well as the lawfulness of their use can be judicially reviewed. Such review is a core aspect of the European rule of law: the control of public authority by independent and impartial courts is sometimes even considered the crowning element of the rule of law.[210] Article 269 TFEU therefore describes an exception that is to be interpreted narrowly.

---

[203] Krenn, "Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success", 19 GLJ (2018), 2007-2030, at 2024.
[204] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para. 75. On this, von Bogdandy, Bogdanovicz, Canor, Schmidt, Taborowski, op. cit. *supra* note 185, p. 983.
[205] BVerfGE 73, 339 – *Solange II*.
[206] Cfr. above, 4.2.
[207] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para 77 et seq.
[208] Wendel, "Rechtsstaatlichkeitsaufsicht und gegenseitiges Vertrauen", EuR 2019, 111-132, at 111; Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to Independence of Domestic Judges", 14 EuConst (2018), 792-813, at 792; Bárd and van Ballegooij, "Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM", 9 NJECL (2018), at 353.
[209] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality,* cited *supra* note 44, para 78.
[210] Cfr. CJEU, Case C-294/83 *Les Verts v. Parliament*, ECLI:EU:C:1986:166.

Self-evident as this principle might appear, its application is problematic with regard to instruments that do not yield a legal consequence; the protection by the CJEU has long been fragmentary and uncertain in this respect. It appears anything but certain that a Member State can take legal action against a recommendation of the Commission in the framework of the rule of law procedure or against a classification in the Justice Score Board that damages its reputation. Yet, the more recent case-law of the CJEU is expanding judicial control with regard to such measures.[211] This should make control possible at least when a recommendation of the Commission results in indirect legal consequences, e.g. when it provides a basis for assuming a systemic deficiency.[212] However, there is need for more legal protection, e.g. against recommendations damaging a Member State's reputation. [213]

Another challenge is how to coordinate judicial control between the various legal orders of the European legal space. This leads again to Article 267 TFEU (see above 4.3.). There is an urgent need for such coordination when defending European values or their equivalents in the national constitutions. The coordination and control of national courts is primarily a task of the CJEU. Yet this does not imply that the CJEU itself is beyond control: it remains subject to the general mechanisms, which assume particular importance with regard to this explosive question. In this respect, the multilevel cooperation of the European courts might find here its finest hour.[214]

5. A tyranny of values?

To many people, the European institutions appear distant and foreign. If they urge or even try to force democratically elected governments to revise important political projects, invoking European values, they run the risk of being rejected as self-important, arbitrary and illegitimate actors. The same holds when other Member States insist on values.

Just thumping on the lawfulness of such actions is hardly an appropriate response to accusations of moving towards a tyranny of values. "Being right" is not sufficient. Rather, in order to credibly defend European values, one must make use of fair procedures to convincingly show a broad European public what the values require, why they have been violated and what needs to be done. A systemic deficiency doctrine should help to accomplish this task.

The union of values is as risky as the union of money. This sinister statement does, however, also contain some hope; after all, Europe was able to manage the latter's severe crisis. The European idea is more resilient than many people might assume. Of course, any action is fraught with

[211] CJEU, Case C-16/16 P *Belgium v. Commission*, ECLI:EU:C:2018:79, para. 44; CJEU, Case C-258/14, *Florescu and Others*, ECLI:EU:C:2017:448, para 30; CJEU, Case C-207/01 *Altair Chimica*, ECLI:EU:C:2003:451, para 41; Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14, *Gauweiler and Others,* cited *supra* note 23, para 27 et seqq.; Gundel, "Rechtsschutz gegen Empfehlungen der EU-Kommission? Anmerkung zum Urteil des EuGH (GK) v. 20.2.2018, Rs. C-16/16 P (Belgien/Kommission)", 53 EuR (2018), 593-605, p. 593; Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik*, (Mohr Siebeck, 2013), p. 103

[212] In detail, see above, 4.4.1.

[213] This results from the considerations at 3.3.

[214] Voßkuhle, op. cit. *supra* note 2; Huber, op. cit. *supra* note 2, p. 389.

uncertainties. In the end, no legal order can fully guarantee its own basis.[215] However, this insight does not advocate passivity. Indeed, European resilience can tap a particularly strong source in this respect: the rejection of tyranny after manifold terrible experiences.[216]

[215] See Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation" in Böckenförde (Ed), *Recht, Staat, Freiheit*, (Suhrkamp, 2006), pp. 92-114, at 92, 112; on this dictum, Müller, "What the dictum really meant – and what it might mean for us", 25 *Constellations* (2018), 196-206, at 196; Stein, "The Böckenförde Dictum—On the topicality of a liberal formula", 7/1 *Oxford Journal of Law and Religion* (2018), 97–108, at 97; Dirsch, "»...lebt von Voraussetzungen, die er selbst nicht garantieren kann«. Lesarten und Interpretationsprobleme der Böckenförde-Doktrin als eines kanonisierten Theorems der deutschen Staatsrechtslehre", 56 *Zeitschrift für Politik* (2009), 123-141, at 123; Habermas, "Vorpolitische Grundlagen des demokratischen Rechtsstaates" in Habermas and Ratzinger (Eds), *Dialektik der Säkularisierung. Über Vernunft und Religion*, (Verlag Herder, 2007), pp. 15-38, at 15.

[216] Seminally Loewenstein, "Militant Democracy and Fundamental Rights", 31 *American Political Science Review* (1937), 417-432, at 417; Schorkopf, op. cit. *supra* note 28, p. 119 et seqq.; Müller, "The EU as a militant democracy, or: are there limits to Constitutional mutations within EU member States?", 165 *Revista de Estudios Políticos* (2014), 141-162, at 141.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

Art in architecture, MPIL, Heidelberg

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Im Neuenheimer Feld 535
D-69120 Heidelberg
Tel.: +49 (0)6221 482 - 1
Fax: +49 (0)6221 482 - 288

www.mpil.de
SSRN@mpil.de