

Fundamentals on Defending European Values

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Armin von Bogdandy Di 12 Nov 2019

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What is at stake

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.

Today, however, this step feeds a perception of a deep crisis: when founding values appear weak or controversial, the entire house may crumble. The union of values might prove no less risky than the union of money. At present, this perception is fed especially by measures with which governments intervene with independent institutions and, thus, according to widespread concerns, weaken them critically. Hungary and Poland provide the most blatant examples. Most consider the value of the rule of law to be endangered, but the values of democracy and human rights are no less at stake. Indeed, political science qualifies such measures restricting control of the governing majority as symptomatic for illiberal democracies, i. e. for authoritarian tendencies.

European constitutionalism is perhaps facing a ‘constitutional moment’. The European Union has to decide whether it *comprises* illiberal democracies or whether it *fights* them. The first case would allow ‘illiberal democracies’ to co-inform the interpretation of the common values, heralding the end of the European Union’s current self-understanding. 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. Its eventual move into the latter direction is deeply controversial. Some even recall what Carl Schmitt characterised as the ‘tyranny of values’: a defence of values which destroys the very values it aims to protect.

To act or not to act

The European legal space requires that all public institutions within its scope respect its fundamental values. Its legal orders have mutually committed to a constitutional core. At the same time, the law leaves open whether and how public institutions are to defend these values across borders. Various options can be found and constitutional arguments speak both for and against defending the Union’s values.

Powerful arguments suggest caution. One of those arguments calls for respecting domestic democracy and national identity. Another valid argument is the consideration not to damage the Union. Any attempt to force an elected government under a common constitution can easily result in explosive conflicts, just look at Spain. It seems 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 very foundations of the common European house.

But success, too, might plunge the Union into serious trouble. If the Union prevails over a combative Polish government, this would imply an enormous proof of power. It 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 trenchant federal execution. This might trigger fierce reactions.

At the same time, there are substantial legal grounds for the Union to defend European values. Three arguments appear particularly pertinent. A first reason results from the Union's self-understanding as a liberal-democratic peace project as we know it. A second reason lies in the Union's mandate to protect all individuals in the European legal space. This includes protecting Polish citizens against their own government when the latter turns repressive. Union citizenship finds a fundamental political dimension. A third reason is the principle of mutual trust. In the LM (Deficiencies in the system of justice) judgement, the Court made it clear that: measures such as 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.

Fundamentals of *systemic deficiencies*

Such problems are often framed as *systemic deficiencies*. Indeed, this concept helps to better understand fundamental legal issues when it comes to defending European values. Four elements are key.

Firstly, speaking of a *systemic deficiency* usually means expressing the opinion that another legal order has significantly changed for the worse. 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 Hungary or Poland from the outside. And it is inflammatory talk. The communication is not just about any kind of behaviour, but one that is assumed to be *particularly problematic*: a violation of fundamental values. Referring to systemic deficiencies contains a serious reproach and is thus *prone to escalation*. It holds considerable potential for conflict within a setting which, according to the basic logic of the European legal space, relies on close and trustful cooperation. 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.

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

public authority. When invoking the language of *systemic deficiencies*, the speaker usually does not only utter an opinion, but aims at counteracting and, if possible, eliminating measures of the other party. In other words, if a public institution of one legal order qualifies the actions of another legal order as *systemically deficient*, it deliberately creates pressure to eliminate the deficiency. The qualification as *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.

Public authority is also exercised if this qualification as *systemically deficient* only results in a “soft” measure, such as a bad grading in the EU Justice Scoreboard. 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. Measures damaging a state’s reputation cannot stand in a legal vacuum, but have to be legitimized by a corresponding legal regime.

The **third** element is *a breach of law*. This requirement is concealed by the term *value* as values are normally standards beyond the law. However, 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 to be applied by public institutions in procedures established by law. The interpretation and application of Article 2 TEU must therefore follow the standards of legal reasoning; political, ethical or moral rationalizations are not at place.

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. The TEU itself provides an indication: Article 7 Para. 1 TEU refers to a “serious breach”, Article 7 Para. 2 TEU to a “serious and persistent breach”. A systemic deficiency with regard to the rule of law might lie in widespread corruption that questions the implementation of Union law to such an extent that it ceases to stabilize expectations in a Member State. Since the Union is a union of law, such characteristics call the entire enterprise into question. The same holds true when the national courts no longer effectively exercise any checks on the government, or when elections turn unfair. On a horizontal level, there is a systemic deficiency for instance, when a Member State cannot surrender a person to another Member State because that would result in a serious conflict with fundamental rights. The vanishing point for understanding systemic deficiencies is the interrelatedness of the legal orders constituting the European legal space.

Fundamentals of legitimate action

All things considered, the need is for constructing legal regimes which augment legitimacy without foregoing the effectiveness of any European action. This applies to all instruments that might be used to defend European values. These are of diverse legal

nature: political, administrative and judicial, binding and non-binding. The most important building blocks are permissibility, procedure, and a logic for substantiating the material standard.

As any qualification as *systemically deficient* is prone to escalation, any such action should be in the hands of institutions that can shoulder such a responsibility and manage conflicts. Article 7 TEU plays a key role in this regard. It might be understood as limiting any defence of European values to its highly demanding procedures, culminating in the need of a unanimous decision by the European Council. If Article 7 TEU were to be understood as the only legal tool for defending the Article 2 values, all other measures by other Union organs would become impermissible. The defence of the values would be completely under the control of the national governments, united in the Union's institutions. Responsibility would be crystal clear. The important drawback, however, is that Article 7 TEU is extremely difficult to use, leaving European values with little protection.

This explains the search for additional instruments. Indeed, it is well-established under Union law that a specific procedure designed to deal with a certain problem does not exclude developing other instruments, an accepted doctrine since the *Van Gend en Loos* judgement. Accordingly, it is, in principle, permissible to develop new instruments, such as the Commission's Rule of Law Framework, or using the EU budget to defend EU values. However, any new instrument needs an appropriate legal basis. This requirement results from the necessity to legitimize any action of public authorities, including 'soft' measures. 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.

The judicial operationalization of European values

The defence of values by political institutions has not been very effective so far. As so often in the history of integration, the judiciary might compensate for this. Given the CJEU's general role in the *union of law*, there is a presumption that values can play a role in procedures under the Articles 257, 258 and 267 TFEU. However, the issue of **justiciability** of values is sensitive. For a long time, many considered the values beyond the Court's reach.

In two judgements from 2018, however, the CJEU decided for the judicial operationalization of the rule of law value. In the case *Associação Sindical dos Juizes Portugueses (ASJP)*, the Court inferred standards for the independence of all national judges from Article 19 TEU interpreted in light of Article 2 TEU. In the *LM (Deficiencies in the system of justice)* case, it even enabled individuals to defend European values. The case dealt with the protection of the separation of powers via the essence of the fundamental right to an impartial court and to a fair trial. This expansion of judicial competence mirrors the importance of the values 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. Even a criminal sentence might serve as an instrument to defend European values.

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 far broader general legal principle which, in the European legal space, protects not only individuals, but also public authorities. Moreover, it applies not only in judicial **procedures**, but whenever a legal subject is faced with the exercise of public authority, especially when substantial interests are at stake. This is the case with respect to conflicts concerning the nature and consequences of 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 participation in the 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.

It is crucial, therefore, that national courts including constitutional courts, must refer any such case to the CJEU as this is the only forum where the foreign government can get a fair hearing. In the context of such procedures, national courts should frame the relevant case not as an issue of national identity, but as an issue of European values. For liberal Europe to stand, it needs to speak with one voice.

Fundamentals of interpretation and application

By using the term 'value' in Article 2 TEU, the Treaty makers imply that the provision is to be understood as vague and open. Importantly however, this openness cannot be invoked as an authorization for the Union's institutions to gradually outline an ever more detailed common constitutional frame for the Member States. Such an understanding would force their constitutional autonomy into a far too narrow corridor, going against European constitutional pluralism. Developing the values of Article 2 TEU into the DNA of the European legal space would be incompatible with the diversity protected by Article 4 TEU.

With regard to the *interpretation* of Article 2 TEU, this implies the following: The instruments for fighting systemic deficiencies may only serve the cause of ensuring the *fundamentals* of the European legal space, in particular the union's 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. This logic of restraint extends to the entire toolbox. Consequently, the values are to be interpreted such as to only prohibit particularly problematic measures, but without indicating a 'right way', let alone stipulating the basic organization of Member State institutions. In this sense, European values are not be understood as Alexy's 'optimization requirements', but rather as '*red lines*'.

With regard to the *application* of Article 2 TEU, the above constitutional considerations imply the following: The determination that a value has been violated can and even

should rest on a *comprehensive assessment*, with all the problems that this involves. Indeed, the Commission's and the CJEU's pertinent decisions mostly consider a series of facts in the light of principles that remain abstract. 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 such decisions are biased or motivated by illicit considerations.

Yet, this practice is justified. Firstly, it is the inevitable consequence of the restrained interpretation, which in turn is justified by the constitutional considerations described above. Secondly, the practice responds to the specific problems of legally capturing authoritarian tendencies. 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 by comparison with some legal order which is 'beyond doubt'.

A promising way to fend off the critique that such comprehensive assessment is biased, is to support the assessment with concurrent evaluations by other independent institutions, institutions with a recognized authority concerning questions of values. And indeed, this is what the Union's institutions mostly do. To put it in the words of the network logic of the systemic deficiency: the regular application takes place in an *Einschätzungsverbund*, i.e., showing that the comprehensive assessment of all circumstances is widely shared. The more institutions perceive a substantial problem, the stronger the evidence for a systemic deficiency. 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. Evaluations of international bodies as well as civic organizations are also relevant. Thus, a situation or measure is more likely to qualify as *systemically deficient* the more institutions of the various legal orders share this assessment. Again, it is fundamental for the common defence of European values that Europe speaks with one voice.

The fundamental message

To many people, the European institutions appear distant and foreign. If these institutions urge or even try to force democratically elected governments to revise important political projects, by invoking European values, they run the risk of being rejected as self-important, arbitrary and illegitimate actors. In order to credibly defend European values, any institution must make use of fair procedures to convincingly show a broad European public what the values require, why they have been violated, what needs to be done, and why it is not squashing European diversity.

The union of values is as risky and difficult as the union of money. So there is hope; after all, Europe was able to manage the severe crisis concerning the latter. The European idea is more resilient than many people might assume. Indeed, European resilience can unfold a particularly strong potential in this respect: the rejection of illiberalism after manifold terrible experiences.

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