Ways to Frame the European Rule of Law: *Rechtsgemeinschaft*, Trust, Revolution, and Kantian Peace

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Conceptualising the European rule of law-value – A critique of the concept of *European legal community* – A conceptualisation of trust for a fresh understanding of the rule of law-value – Trust research in the social sciences – The trustworthiness of the European rule of law in light of calls for breaking up the current order

From Sunday talks to debating chambers

The European community of law, once standard fare during self-congratulatory and rather sleepy Sunday talks, has become a truly critical topic. Its core, the European rule of law, is deeply controversial when it comes to hugely important, indeed transformative policies, be it the European Central Bank's Quantitative Easing programme, Germany's voluntary acceptance of asylum seekers or the Polish reconstruction of its judiciary. To meet such momentous challenges, more is needed than 'interpretation' of the words *rule of law* in Article 2 TEU. It takes conceptual work.

This contribution explores two different, but interconnected ways to conceptualise the European rule of law-value as enshrined in Article 2 TEU. It starts by showing the need for fresh thinking through a critique of the concept of European legal community, and in particular its German version, the

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Rechtsgemeinschaft. This concept, which initially was a stroke of genius, has dated in light of the transformations of Europe. Reflecting on these transformations is, however, also relevant for the English-speaking world. There, the continuity of the *rule of law* terminology obfuscates a hugely important decision. The framers of the Treaties, when laying down the Treaty on European Union in 1992, decided to commit not to *communauté*, but to *État* de droit (*Rechtsstaatlichkeit*, *stato di diritto*). Why?

Perhaps, to prepare for the mutual trust required by the union that was set in motion by the Maastricht Treaty. Anyway, *trust* has become crucial to both contemporary European public opinion as well the case law of the Court of Justice of the European Union. Both address the current crises of the rule of law as crises of trust. Accordingly, a conceptualisation of trust might contribute to a fresh understanding of the rule of law-value in Article 2 TEU. To this end, the article presents pertinent insights from scholarship on trust to sketch basic elements of the European rule of law. The trustworthiness of the European rule of law is then assessed in light of calls for breaking up the current order, calls for revolutionary steps towards a better future. Reviewing such proposals frames the European rule of law as a unique and unlikely achievement, as an instance of Kantian peace.

The dated *community of law*

Initially an ingenious concept

Conceptual work represents a core task of legal scholarship. It is not an academic pastime, but of deep social relevance: 'it is not the hangman, but the professor who forms the basis of the modern social order'.[1] Legal concepts make it possible to systematically arrange legal phenomena, which is crucial for a modern society to operate well. They create a context of meaning, generate insight, and provide orientation. They also inform jurists' relationships to the wider world. Some legal concepts even diffuse into broader discourses. They shape public opinions, identities, and, not least, crises: it is not incidents that shake the world, but words about incidents.[2] The European community of law is one of these, and particularly so its German version, *die Rechtsgemeinschaft*.[3]

[1] E. Gellner, *Nationalismus und Moderne* (Rotbuch Verlag 1995) p. 56 [English original: E. Gellner, *Nations and Nationalism* (Cornell University Press 1983)]; *cf* also A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945) Constructing the State. The Science of Administrative Law in Italy* (Giuffrè Editore 2009).

[2] Epictetus quoted after R. Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten, Begriffsgeschichte und Sozialgeschichte* (suhrkamp taschenbuch wissenschaft 2000) p. 107.

[3] On the emergence of the field of community law in France *see* J. Bailleux, *Penser l'Europe par le droit. L'invention du droit communautaire en France* (Dalloz 2014); in Germany A.K. Mangold,

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The *European community of law* is a concept as far-reaching as it is successful. It originates in the early 1960s. As Antoine Vauchez shows in his seminal study *L'Union par le droit*, the *communauté de droit* is a pathbreaking conceptual innovation of immense social and political consequence.[4] Its creation responded to an early crisis of integration which a group of spirited European jurists sought to overcome by introducing doctrinal innovations that turned the largely amorphous law of the three founding treaties[5] into an instrument of integration, which the treaty makers had hardly envisaged.

The European community of law combines inventions such as the unity of community law; its *sui generis* nature; its direct and overriding effect; the role of the Commission and the European Court of Justice as guardians of the treaties; the development of market freedoms, fundamental rights and EU secondary law into a uniquely powerful transnational legal regime which indeed transformed Europe.[6] Conventional wisdom tells: '*L'Europe n'est nulle part plus réelle que dans le domaine du droit*'.[7]

What's special about the Rechtsgemeinschaft*?*

If that celebratory understanding is shared throughout Europe, the German concept of a *Rechtsgemeinschaft* gained a particularly foundational role in the German speaking discourse that is hardly encountered elsewhere.[8] One reason for that might be the specific German proclivity for coining and trusting legal concepts. The Court of Justice, in its seminal *Les Verts* decision, speaks, in English, of a *community based on the rule of law*, seven words, in French of a *communauté de droit*, three words, and in German of a *Rechtsgemeinschaft*, one word.[9] Such composed words easily take on a life of their own. What also contributed to the

Gemeinschaftsrecht und deutsches Recht (Mohr Siebeck 2011); in Italy A. Sandulli, 'La scienza italiana del diritto pubblico e l'integrazione europea', 15 *Rivista italiana di diritto pubblico comunitario* (2005) p. 837.

[4] A. Vauchez, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe* (Presses de Sciences Po 2013) p. 47 ff; *cf* also the revised English version: A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Policy* (Cambridge University Press 2015).

[5] *See* the Treaty of Paris establishing the European Coal and Steel Community (ECSC) of 18 April 1951 and the two Treaties of Rome, creating the European Economic Community (EEC) and European Atomic Energy Community (EURATOM) of 25 March 1957.

[6] The classic texts on this subject were written in the United States: E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *AJIL* (1981) p. 1; J.H.H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) p. 2403.

[7] Comité de réflexion sur le préambule de la Constitution, *Redécouvrir le Préambule de la Constitution. Rapport du comité présidé par Simone VEIL* (2008) p. 41.

[8] *See* A. Jakab, *European Constitutional Language* (Cambridge University Press 2016).

[9] *Cf* ECJ 23 April 1986, Case C-294/83, *Les Verts* v *Parliament*, margin number 23.

word's success was that it was Walter Hallstein who coined the concept,[10] with assistance from the young Claus-Dieter Ehlermann. Hallstein, an influential German politician, was at the time the first president of the EEC Commission, with a clear sense of a historic mission.[11] Being also an accomplished German law professor, he knew about the social power of legal concepts.

Hallstein's famous term *Rechtsgemeinschaft* elaborates on the common ground of *communauté de droit.* He presents the European Economic Community as a creation of law, a source of law, and a materialisation of the idea of law; he later replaces the latter point with *legal order*.[12] This might appear bland today, but it was not so back then. Indeed, as one of the editors of the *European Constitutional Law Review* recalls, for most other Europeans, European integration was greatly about containing Germany. Therefore, Hallstein's concept fended off the accusation that Paris and Rome were, for Germany, another Versailles and therefore deeply illegitimate.[13]

Hallstein's concept proved very successful. Ever since, the *Rechtsgemeinschaft*, more than any other concept, articulates the common ground of German scholarship on European law. Lectures on European law often begin with the axiom that Europe is a *Rechtsgemeinschaft*, and then appraise Union law in this light. *Rechtsgemeinschaft* in that respect, continues to be ahead even of the similarly fundamental concept of *Verbund*.[14] It is not by chance that Michael Stolleis,

[10] The core text dates from 1962, W. Hallstein, 'Die EWG - eine Rechtsgemeinschaft', in T. Oppermann (ed.), *Walter Hallstein Reden* (Deutsche Verlags-Anstalt 1979) p. 341; on his role *cf*, for example, F. Mayer, 'Europa als Rechtsgemeinschaft', in G.F. Schuppert, I. Pernice and U. Haltern (eds.), *Europarechtswissenschaft* (Nomos 2005) p. 429, 430; F. Schorkopf, *Der Europäische Weg. Grundlagen der Europäischen Union* (Mohr Siebeck 2010) p. 116; C. Calliess, 'Die Europäische Union als Rechtsgemeinschaft', in C. Calliess, W. Kahl and K. Schmalenbach (eds.), *Rechtsstaatlichkeit, Freiheit und soziale Rechte in der Europäischen Union* (Duncker & Humblot 2014) p. 63.

[11] On Hallstein *see* M. Zuleeg (ed.), *Der Beitrag Walter Hallsteins zur Zukunft Europas* (Nomos 2003); W. Loth, W. Wallace and W. Wessels (eds.), *Walter Hallstein. The Forgotten European?* (Palgrave Macmillan 1998). On Hallstein's monumental political miscalculation *see* L. van Middellaar, '*Vom Kontinent zur Union. Gegenwart und Geschichte des vereinten Europa*' (Suhrkamp 2016) p. 110 ff.

[12] W. Hallstein, *Die Europäische Gemeinschaft* (Econ 1973) p. 33; *cf* also in French: W. Hallstein, L'*Europe inachevee* (R. Laffont 1970); in English: W. Hallstein, *Europe in the Making* (Allen and Unwin 1972).

[13] Fighting the Versailles Treaty was a red thread for many political forces in the Weimar Republic, *see* Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar - Genf - Versailles 1923 – 1939*, 3rd edn. (Duncker und Humblot 1994) p. 32-42.

[14] See A. Voβkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 *EuConst* (2010) p. 175; P. Kirchhof, 'The European Union of States', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd edn. (Hart, C.H. Beck, Nomos 2009) p. 735; I. Pernice, 'La Rete Europea di

a leading legal intellectual, mounted his defence of Europe in the daily *Frankfurter Allgemeine Zeitung* under the title 'Our *Rechtsgemeinschaft*'.[15]

Given this centrality, any crisis of the *Rechtsgemeinschaft* easily appears more dangerous, even more existential to Germans than to other Europeans. At this point, an important insight lies in understanding that this specific German perception of crisis depends on how the German concept of the legal community is construed. In Europe today, the rule of law-crisis has therefore a specific ring and dimension in Germany.

The German concept facilitates transplants from the domestic, German plane to the European one. Indeed, the German Federal Constitutional Court uses the concept, and not only with reference to the European legal space, but also in a purely national context.[16] This adds to a tendency in Germany to understand, using the concept *Rechtsgemeinschaft*, the required normativity of Union law, i.e. its effectiveness and autonomy from the politics of the other branches of power, similar to that of the German Basic Law.[17] This understanding has led to major disappointments, especially in the financial and sovereign debt crisis, and has thus deepened the perception of crisis.[18] Nonchalant statements such as by the former French Minister of Finance, Christine Lagarde, on the illegality of EU rescue measures[19] have a particularly important echo.[20]

Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie', 70 *ZaöRV* (2010) p. 51. On the state of German scholarship, D. Thym, 'Zustand und Zukunft der Europarechtswissenschaft in Deutschland', 50 *Europarecht* (2015) p. 671; F. Weber, 'Formen Europas. Rechtsdeutung, Sinnfrage und Narrativ im Rechtsdiskurs um die Gestalt der Europäischen Union', 55 *Der Staat* (2016) p. 151.

[15] M. Stolleis, 'Unsere Rechtsgemeinschaft', *Frankfurter Allgemeine Zeitung*, 3 June 2016; A. Voßkuhle, 'European Integration Through Law', 58 *European Journal of Sociology* (2017) p. 145, 146.

[16] *Cf*, for example, Bundesverfassungsgericht 21 June 2016, Case 2 BvR 2728/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, margin number 117, 144.

[17] References in Bundesverfassungsgericht 9 November 1999, Case 2 BvL 5/95, ECLI:DE:BVerfG:1999:ls19991109.2bvl000595, margin number 38; Bundesverfassungsgericht 16 January 2008, Case 2 BvR 2391/07, ECLI:DE:BVerfG:2008:rk20080116.2bvr239107, margin number 6.

[18] P. Kirchhof, 'Verfassungsnot!', *Frankfurter Allgemeine Zeitung*, 12 July 2012; M. Seidel, 'Europarechtsverstöße und Verfassungsbruch im Doppelpack', 22 *Europäische Zeitschrift für Wirtschaftsrecht* (2011) p. 241. For a different opinion *see* Editorial Comments, 'Debt and Democracy: "United States then, Europe now?"', 49 *CMLRev* (2012) p. 1833.

[19] Reuters US, 'France's Lagarde: EU rescues "violated" rules: report' 18 December 2010, quoted after R.G. Asch, '"This realm of England is an empire": Die Krise der EU, das Brexit-Referendum und die europäische Rechtsgemeinschaft', 14 *Zeitschrift für Staats- und Europawissenschaften* (2016) p. 174, 179.

[20] L. van Middelaar, *Vom Kontinent zur Union - Gegenwart und Geschichte des vereinten Europa* (Suhrkamp 2016) p. 22.

Of course, the idea of constitutionalising primary law is not a purely German idea, but an interpretive scheme found across Europe,[21] and the limitation of national debt is unanimously adopted treaty law. Nonetheless, different understandings exist of how treaty law can be interpreted flexibly in times of crisis and of what role the courts play in this regard.[22] The concept of *Rechtsgemeinschaft* all too easily generalises expectations from the German to the European setting without due reflection of the fact that the European context is different from the German one.

By international comparisons, the normativity of the German Basic Law is fairly unique, thanks to the extraordinary authority of the German Federal Constitutional Court, which, however, can hardly be replicated in other contexts.[23] Constitutional courts that followed the German Federal Constitutional Court in this respect, for example in Hungary or Spain, have often encountered deep crises.[24] This suggests that an understanding guided by German constitutional practice generates expectations of Union law that are probably too high and too prone to cause disappointment, thus contributing to the crisis. Legal thought that breeds disappointments undermines the law itself. Moreover, such expectations are easily misunderstood by European partners as veiled egoism, which makes it more difficult to master crisis situations jointly. This understanding lures politics onto the path of increasing juridification, where the crisis tends to be further exacerbated.[25] More conflicts are unable to be solved through juridification than the German perspective might assume.[26]

[21] *Cf*, for example, Vauchez, *supra* n. 4, p. 198 ff.

[22] 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 *CMLRev* (2016) p. 597 ff, 604; setting the discourse today, *see*M.K. Brunnermeier, H. James and J.-P. Landau, *The Euro and the Battle of Ideas* (Princeton University Press 2016).

[23] For a seminal analysis see M. Jestaedt et al., *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (suhrkamp 2011); in comparative terms see A. Farahat, 'Das Bundesverfassungsgericht', in A. von Bogdandy, C. Grabenwarter and P. Huber (eds.), *Handbuch Ius Publicum Europaeum: Verfassungsgerichtsbarkeit in Europa: Institutionen, Band 6* (C.F. Müller 2016) § 96, margin numbers 1 and 116; D.P. Kommers, 'Can German Constitutionalism Serve as a Model for the United States?', 58 *Heidelberg Journal of International Law* (1998) p. 787 at p. 788.

[24] For more detail on this *see* J.L. Requejo Pagés, 'Das spanische Verfassungsgericht', and L. Sólyom, 'Das ungarische Verfassungsgericht', in von Bogdandy, Grabenwarter and Huber, *supra* n. 23, § 106, margin number 106 ff; and § 107, margin number 41 ff.

[25] F. Schorkopf, 'Gestaltung mit Recht – Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft', 136 *Archiv des öffentlichen Rechts* (2011) p. 323; Asch, *supra* n. 19, p. 174 at p. 179.

[26] C. Joerges, 'Integration through law and the crisis of law in Europe's emergency', in D. Chalmers, M. Jachtenfuchs and C. Joerges (eds.), *The End of the Eurocrats' Dream. Adjusting to European Diversity* (Cambridge University Press 2016) p. 299.

Also, the *Gemeinschaft*, the 'community', has a specific and deep meaning in German. Whereas the word *communauté/comunità* in Romance languages suggested itself because of its theoretical innocence, in Germany it is part of the theoretically strong dichotomy between *Gesellschaft – Gemeinschaft* (society – community), which is foundational for German sociological thought.[27] Indeed, bonds within a *Gemeinschaft* warrant more trust than those within a mere *Gesellschaft*. This arouses expectations that have little equivalent in other traditions.[28]

Now, it may be assumed that the term integration through law, coined at the European University Institute in the late 1970s, Europeanised the *Rechtsgemeinschaft* under a different name.[29] However, this is not the case. Indeed, the Florentine team developed the concept integration through law without referring to either Hallstein's creation or many of the earlier debates on the *communauté*. Moreover, the term integration through law mostly thematises the phenomenon of how the European Court of Justice can promote integration through 'activist' case law concerning individual rights.[30] Hallstein hardly mentioned such judicial activism. Integration through law is a different, narrower project. However, it is dated for many of the same reasons as the German *Rechtsgemeinschaft* or the *communauté de droit*, as I will now show.

Why the concept became dated

Hallstein's inspired term, as well as the general concept of the *communauté de droit*, has become dated, as it does not provide appropriate orientation in our times. One shortcoming results from its focus on the EEC, i.e., a supranational organisation; the Member States, in this regard, are largely ignored.[31] This understanding prevails to this day, meaning that *Rechtsgemeinschaft* falls short as a concept that is able to capture important current problem areas, such as the rule of

[27] F. Tönnies, *Gemeinschaft und Gesellschaft* (Fues 1887) p. 19.

[28] U. Volkmann, 'Vom Ursprung und Ziel der Europäischen Union: die Perspektive der Rechtsgemeinschaft', in G. Kirchhof, H. Kube and R. Schmidt (eds.), *Von Ursprung und Ziel der Europäischen Union* (Mohr Siebeck 2016) p. 57, 58. For the French, *see* Vauchez, *supra* n. 4, p. 75, who quotes Paul Reuter, legal advisor to Robert Schuman and Jean Monnet, according to whom Community 'did not mean anything legally, except for wedding and churches'.

[29] M. Cappelletti, M. Seccombe and J. Weiler, 'Integration Through Law: Europe and the American Federal Experience – A General Introduction', in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience. Methods, Tools and Institutions, vol. 1* (De Gruyter 1986) p. 3.

[30] D. Augenstein (ed.), *'Integration through law' Revisited. The Making of the European Polity* (Routledge 2012); R. Dehousse, 'From integration through law to governance', in H. Koch et al. (eds.), *Europe. The New Legal Realism* (Djoef 2010) p. 153.

[31] *Cf*, for example, references in *supra* n. 10.

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law crises in Greece, Poland, and Hungary.[32] Of course, it is essential for the *legal community* that Member States' implementation of supranational law is overseen by supranational institutions, in particular through the infringement or preliminary ruling proceedings. However, this changes nothing regarding the supranational focus[33] and the problematic narrowness of the concept, which is evident today. Systemic problems, for example in the judiciaries of some Member States, require far greater attention for Europe to succeed.

This missing national dimension can be easily appended to the concept, but the coercive turn of the Union and its politicisation presents a more structural problem. A very distinct feature of the European edifice is its intuitively plausible *sui generis* nature, highlighting its position somewhere between statehood and an international organisation. Herein lies the genius of *legal community*: on the one hand, due to the authority of EEC law in Member States, the EEC is indeed a community of law, in contrast to most, if not all other transnational regimes,[34] where the normativity of the law is far lower. On the other, the EEC, now the EU, is unlike a state as it is *not* a community of *coercion*, but *only* a community of law.[35]

This is not a purely ivory-tower idea by any means, but is of the highest constitutional relevance as it lessens the need for legitimation. The concept is an ingenious one, as it mobilises the legitimation resources of the idea of law without, however, creating the need for legitimation arising from possible coercion. Who would want to oppose a community that shapes social coexistence in Europe through common, legally defined institutions and that does not resort to harsh, one-sided coercion, to brute force, but at most to declaratory judgments of a court?

The Union of today, however, can no longer be defined in this way. Since the early 1990s, there has been an expansion of instruments of sanction going beyond

[32] On Hungary, European Commission for Democracy through Law, Opinion on the New Constitution of Hungary, Opinion No. 618/2011 of 20 June 2011, CDL-AD (2011) 016; on Poland, European Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland of 11-12 March 2016, CDL-AD(2016) 001-e (2016); on Greece, J.M.D. Barroso, State of the Union Address, 11 September 2013, < www.europa.eu/rapid/press-release_SPEECH-13-684_en.htm > , visited 23 October 2018.

[33] *See* the focus of the ground-breaking essay by F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993) p. 19.

[34] A later attempt to comprehend phenomena of international law using Hallstein's conceptualization is found in H. Mosler, *The International Society as a Legal Community* (Recueils des cours de l'Académie de La Haye 1974) p. 1; for more on this *see* R. Kolb, *Les cours généraux de droit international public de l'Académie de La Haye* (Bruylant 2003) p. 16 at p. 541 ff.

[35] Hallstein, *supra* n. 12, p. 348; Mayer, *supra* n. 10, p. 479; I. Pernice, 'Begründung und Konsolidierung der Europäischen Gemeinschaft als Zwangsgemeinschaft', in Zuleeg, *supra* n. 11, p. 56.

declaratory rulings of the European Court of Justice.[36] Above all, the reactions in EU law to the financial and debt crisis have resulted in tough coercive instruments against Member States.[37]

Moreover, the EU can exercise massive political coercion today: just recall how the European Central Bank forced Greece to back down through a 'near death experience'. Perhaps the Union has already made the step towards a transfer union whose core is not legislative acts of a free legal community, but instead legally obscure instruments of international law (memoranda of understanding, compliance reports, macroeconomic imbalance procedures, etc.) whose coercive effect is due to a straitjacket woven from the economic logic of a monetary union.

These coercive instruments contributed, with their distributive effects, to a massive politicisation of the Union, also going beyond the scope of the received concept of the legal community. Franz Mayer explains Hallstein's *Rechtsgemeinschaft* in the tradition of David Mitrany, the creator of technocratic functionalism.[38] This functionalism had wide appeal across Europe.[39] Hans Peter Ipsen further elaborated on this aspect in the early 1970s with the concept of the *Zweckverband funktionaler Integration* (special purpose association for functional integration), an idea later presented and popularised by Giandomenico Majone.[40] It is true that Hallstein's *Rechtsgemeinschaft* is more political than Ipsen's *Zweckverband* and therefore obviously less outdated. Indeed, even the original thinking of the legal community is by no means anti-political in the sense of anti-parliamentarian: Hallstein argued in favour of strengthening the European Parliament. Indeed, the European Court of Justice has used his concept to this effect.[41] But Hallstein sees the political character above all in the authoritative

[36] S. Bitter, *Die Sanktion im Recht der Europäischen Union* (Springer 2011) p. 121 ff; K.-H. Ladeur, 'Diesseits der Rechtsgemeinschaft: Die 'instituierende Gewalt' der sozialen Regeln und die Grenzen der europäischen Integration', in S. Kadelbach. and K. Günther (eds.), *Europa: Krise, Umbruch und neue Ordnung* (Nomos 2014) p. 139.

[37] Extensively, M. Ioannidis, 'Europe's new transformations: How the EU economic constitution changed during the Eurozone crisis', 53 *CMLRev* (2016) p. 1237 at p. 1264 ff. The fact that this does not always result in the desired obedience to the law is another matter.

[38] Mayer, *supra* n. 10, p. 432. It seems that the term 'Community' (*Gemeinschaft*) is due to Carl Friedrich Ophüls. *See* C.F. Ophüls, 'Zwischen Völkerrecht und staatlichem Recht. Grundfragen des europäischen Rechts', 4 *Juristen-Jahrbuch* (1963/64) p. 137 at p. 154; W. Hallstein, 'Zu den Grundlagen und Verfassungsprinzipien der Europäischen Gemeinschaft', in W. Hallstein/H.-J. Schlochauer (eds.), *Zur Integration Europas. Festschrift für Carl Friedrich Ophüls* (Karlsruhe 1965) p. 1.

[39] L. van Middelaar, *The Passage to Europe. How a Continent became a Union* (Yale University Press 2013) p. 2 at p. 5.

[40] H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck 1972) p. 197 ff; G. Majone, *Regulating Europe* (Routledge 1996).

[41] ECJ 23 April 1986, Case C-294/83, *Les Verts* v *Parliament*, 23.

guidance of societal and especially economic processes.[42] Hallstein's EEC is political because it regulates by means of policies (today Article 26 ff TFEU), not, however, because it is a disputed object or forum of public debate. In other words: the community of law was set up for regulatory politics, not for politics that deal with crises that might tear apart the body politic.[43] But that is how the Union is mostly seen by its citizens today.

Today's conflict-laden politicisation of European law clearly lies beyond the original rather technocratic idea of the European community of law.[44] Questions of how to shape EU law are often at the centre of public discourse. They can even decide elections in Member States, and thus affect key interests of the political elites. By now they are producing a genuine cleavage in the European party system that, so far, has not strengthened the European political system.[45] To the contrary, many see it weakened.[46]

Today, one crucial question is whether EU law will succeed in managing this conflict-laden politicisation, even turning it into something constructive. The idea of the *legal community* suggests countering politicisation with ever more juridification. Since the expediency of precisely this legalistic approach lies at the heart of the debate, however,[47] the received concept of a *legal community* appears hardly suitable for generating a *common* horizon of understanding with respect to successful politicisation. It might provide a *partisan* concept for a legalistic, expertocratic handling of the crisis, which would profoundly change its existing function of providing common ground.

To conclude this section, the community of law distinguishes itself through the normative pull of its law, which unifies Europe and its citizens.[48] But today there is no doubt that EU law is also driving people apart. It is sufficient to recall the provisions for budgetary policy, the question of migration and refugees, or the exit of the United Kingdom, repudiating the European Court of Justice's case law. This tectonic shift must be reflected upon conceptually. The received concept of

[42] Hallstein, *supra* n. 12, p. 105 ff; *cf* also M. Zuleeg, 'Der unvollendete Bundesstaat: Vision oder Realität?', in Zuleeg, *supra* n. 11, p. 97 at p. 99.

[43] van Middelaar, *supra* n. 20, p. 16, 18, 22 ff (preface to the German edition).

[44] Early writing on this problem, R. Dehousse, 'Constitutional Reform in the European Community. Are there Alternatives to the Majority Avenue?', in J. Hayward (ed.), *The Crisis of Representation in Europe* (Taylor & Francis 1995) p. 118 at p. 124; U. Haltern, *Europa und das Politische* (Mohr Siebeck 2005) p. 44 at p. 104 ff.

[45] M. Dawson and F. de Witte, 'From Balance to Conflict: A New Constitution for the EU', 22 *ELJ* (2016) p. 204 at p. 207.

[46] *Cf*, for example, U. Guérot, 'Einmal heißer Krieg – kalter Frieden und zurück', *Kursbuch* 188 (2016) <kursbuch.online/ulrike-guerot-einmal-heisser-krieg-kalter-frieden-und-zurueck/>, visited 23 October 2018.

[47] Setting the discourse today, Brunnermeier, James and Landau, *supra* n. 22.

[48] Hallstein, *supra* n. 12, p. 33.

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the EU as a community of law suggests that, in principle, every legislative act of the Union, every judgment of the Court should be celebrated as a civilising and progressive step. This no longer convinces anyone today.

What remains and where to go

If the received concept of a European community of law no longer conveys an adequate understanding of the entire European edifice, it continues to be useful in one crucial aspect. Since 1986, the European Court of Justice has been using the concept of the Community based on the rule of law (today the union based on the rule of law) to expand its powers to review all instances in which the Union exercises its authority.[49] This comprehensive judicial review is indeed an important feature of the EU, rightly considered as deeply civilising.[50]

For this reason, I propose not doing away with, but recalibrating the concept along the lines of the principle of comprehensive judicial review, as does the CJEU, and to articulate this as a 'Union based on the rule of law': as an expression of what is at the heart of Article 19 TEU, Article 47 CFR, and Articles 6 and 13 ECHR. However, as a concept that stands for the entirety of the Union, and Union law, it should be historicised. This does not belittle the community of law, but rather assigns it new relevance for understanding the path of Europe.

What then? For Hallstein, as for many of his cohort, there was no doubt: the European community of law was to lead to a European federal state. As we know today, there was little appetite among the framers of the Treaties to cross that bridge. At the same time, they travelled a long way in that direction. First, the framers have given the Union competences of almost state-like breadth. Second, they decided to pin it to the fundamental principle of the *État de droit* (*Rechtsstaatlichkeit*, *stato di diritto*), leaving aside the *sui generis communauté de droit*. Third, they committed the exercise of *any* public authority in the European legal space to this principle. Fourth, they conceived of the principle as a value, turning the Union from one of (only) law to a more demanding one, one also of values.[51] These tectonic shifts in the positive law suggest a qualitative change that

[49] *Cf* ECJ 23 April 1986, Case C-294/83, *Les Verts* v *Parliament*, margin number 23; ECJ (Grand Chamber) 3 September 2008, Cases C-402/15 and C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, margin number 281; most recently, for example, ECJ (Grand Chamber) 6 October 2015, Case C-362/14, *Schrems* v *Data Protection Commissioner*, margin number 60: 'according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights'.

[50] This is not disputed even by ECJ-sceptical voices, *cf* especially H. Rasmussen, *On Law and Policy in the European Court of Justice* (Springer 1986), as well as the Festschrift dedicated to him, Koch et al., *supra* n. 30.

[51] A. Voßkuhle, *The EU as a Community of European Law and Value* (2018) p. 95 ff.

requires fresh understanding. And public opinion shows a way in which to build it.

Trust and the European rule of law

Trust as a reference point

Public opinion often addresses the current crises of Europe as a crisis of trust.[52] Legal scholarship has taken this up: in 2013 Iris Canor published her seminal essay 'An ever closer distrust among the peoples of Europe'.[53] Shortly thereafter the European Court of Jusitce postulated, at a fundamental point in a plenary and landmark decision, a principle of mutual trust of a scope never seen before: all Member States must trust that all Member States will observe Union law, and in particular its fundamental rights.[54] The principle also appears in other important decisions: it seems to be becoming a key concept of the Court of Justice under the presidency of Koen Lenaerts.[55] It is an expression of judicial wisdom all the same to add a caveat of great importance: 'except in exceptional circumstances'.

[52] *Cf*, for example, *The Guardian*, 'Crisis for Europe as trust hits record low', 24 April 2013, as well as the president of the Federal Republic of Germany, J. Gauck, *Speech on the occasion of the conferral of an honorary doctorate of Maastricht University on 7 February 2017*. *See also* J. Peet, 'Creaking at 60: The Future of the European Union', *The Economist*, 25 March 2017, p. 3 ff; G. Nonnenmacher, 'Europas letzte Chance?', *Frankfurter Allgemeine Woche*, 24 March 2017, p. 17.

[53] I. Canor, 'My brother's keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe"', 50 *CMLRev* (2013) p. 383. On the issue, *see also* C. Kohler, 'Vertrauen und Kontrolle im europäischen Justizraum für Zivilsachen', 19 *Zeitschrift für europarechtliche Studien* (2016) p. 135; M. Schwarz, *Grundlinien der Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts* (Mohr Siebeck 2016).

[54] ECJ (Full Court) 18 December 2014, Opinion 2/13, margin number 191; the Court emphasised the importance of that principle already in ECJ (Grand Chamber) 21 December 2011, Cases C-411/10 and C-493/10, *N.S.*, margin number 83: 'At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights'; *see* further earlier judgments relying on a practically unrestricted principle of mutual trust, ECJ 26 June 2007, Case C-305/05, *Advocaten vor de Wereld*; ECJ 29 January 2013, Case C-396/11, *Radu*; ECJ 26 February 2013, Case C-399/11, *Melloni*.

[55] ECJ (Grand Chamber) 5 April 2016, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, margin number 78; ECJ (Grand Chamber) 6 September 2016, Case C-182/15, *Petruhhin*; ECJ 1 June 2016, Case C-241/15, *Bob-Dogi*; ECJ 24 May 2016, Case C-108/16 PPU, *Dworzecki*. *Cf* also K. Lenaerts, 'La vie après l´avis: Exploring the principle of mutual (yet not blind) trust', 54 *CMLRev* (2017) p. 805 at p. 811; K. Lenaerts, 'Keynote Speech – The Court of Justice in an Uncertain World', in G. Bándi, P. Darák and K. Debisso (eds.), *Speeches and Presentations from XXVII FIDE Congress* (Wolters Kluwer 2016) p. 58 ff; for a critique *see*

Apparently, the want of trust in Europe leads the European Court of Justice to treat it like a fundamental principle. It seems indeed bold to postulate trust as a principle of Union law in times like these, even with such a caveat. Trust in Europe has been subjected to a severe test. 'Exceptional circumstances' are to be observed in important policy fields, and the impression is widespread that they amount to a crisis of the European rule of law. Yet they are very different phenomena: the European Central Bank's Outright Monetary Transactions and Public Sector Purchase Programmes,[56] systematic non-application of European refugee law,[57] national caveats on the basis of *ordre public* in cases of cooperation required under Union law,[58] widespread corruption in some Member States,[59] the actions taken by the Polish government against that country's constitutional court[60] and the non-implementation of judgments of the European Court of Justice,[61] but also, according to an editorial in the *Common Market Law Review*, recent rulings of the German Federal Constitutional Court on European issues.[62] Some perceptions are almost contradictory: a crisis of the rule of law might be seen in the fact that the European Central Bank supports *ultra vires* economically weaker Member States, but also in the violation of the European promise of full employment, social progress, social justice, and social protection (Article 3, paragraph 3 TEU). It is a promise and a challenge that the perspective of trust reduces these disparate phenomena to a common denominator which is examined in the following.

M. Nettesheim, 'Überdehnt der EuGH den Grundsatz des gegenseitigen Vertrauens?', 20 *EUZ* (2018) p. 4.

[56] European Central Bank, *Technical Features of Outright Monetary Transactions*, 6 September 2012, < www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html >, visited 23 October 2018; Decision (EU) 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10).

[57] Editorial Comments, *supra* n. 22, p. 597 at p. 598.

[58] M. Weller, 'Mutual trust: in search of the future of European Union private international law', 11 *Journal of Private International Law* (2015) p. 64.

[59] A. von Bogdandy and M. Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done', 51 *CMLRev* (2014) p. 59.

[60] European Commission for Democracy through Law, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001158, Opinion no 833/2015* (2016); COM(2017)835 final, European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: 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*.

[61] *See* ECJ (Grand Chamber) 17 April 2017, Case C-441/17, *Commission* v *Poland (Białowieża Forest)*.

[62] Editorial Comments, *supra* n. 22, p. 598, p. 604.

Trust: potential and risks of an interpretive scheme

Academic work mostly addresses the above-mentioned challenges with the concept of *legitimacy*.[63] What follows in this paper does not question the usefulness of this approach. Rather, it aims to supplement it with a new angle. Indeed, trust and legitimacy originate, as theoretical closely connected concepts, in Max Weber's groundwork of modern sociology that addresses the malaise of the German empire of his time.[64] Together they might reinforce each other to address the malaise of contemporary Europe.

Does trust bear up as a policy perspective, an analytical framework, and also as a legal principle, and, if so, what are the implications? Trust is first a non-legal phenomenon, which suggests an interdisciplinary approach involving reviewing pertinent research in the social sciences and the humanities.

One practical insight to start with: trust research teaches us that self-perception and the perception of others differ structurally: people usually consider themselves more trustworthy than they appear to others.[65] So, when the above-mentioned editorial in the *Common Market Law Review* mentions the German Federal Constitutional Court's rulings on the rescue of the euro, in a widespread German view the stopgap of last resort safeguarding the rule of law, in the same breath as the dismantling of the Polish Constitutional Court by the Polish government,[66] it is possible to respond indignantly, or instead to see it as an occasion for reflecting on one's own standpoint. Research on trust suggests that such assessments by others should be taken seriously.

Trust research offers European law many more insights. First of all, it confirms that the perspective of trust is meaningful. Since Weber, many reputed scholars have considered trust essential for successful societies.[67] The quality of social interaction is closely connected to the level of trust between partners; some relationships are hardly possible without trust. This is true of all relationships. Whereas trust was long considered a phenomenon limited to face-to-face relationships between individuals, today it is also related to institutions, such as the

[63] *See* in particular J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration', 37 *Journal of European Integration* (2012) p. 825; J.H.H. Weiler and Van Gend en Loos, 'The individual as subject and object and the dilemma of European legitimacy', 12 *International Journal of Constitutional Law* (2014) p. 94; L. Papadopoulou, I. Pernice and J.H.H. Weiler (eds.), *Legitimacy Issues of the European Union in the Face of Crisis – Dimitris Tsatsos in memoriam* (Nomos 2017).

[64] Max Weber, *Wirtschaft und Gesellschaft* (Mohr 1922) p. 122 ff, 153 ff.

[65] P.A.M. Van Lange, 'Generalized Trust: Four Lessons from Genetics and Culture', 24 *Current Directions in Psychological Science* (2015) p. 71 at p. 73.

[66] Editorial Comments, *supra* n. 22, p. 597, 598, 604.

[67] *Cf*, for example, K.S. Cook, 'Trust in Society', in K. S. Cook (ed.), *Trust in Society* (Russell Sage Foundation 2001) p. xi ff, also on the many open research questions.

European Court of Justice and the German Federal Constitutional Court, and even to systems, for example the EU, the Greek government system, and French air traffic control. Today, trust is considered a meaningful category for analysing the relationship between institutions and systems, not only between humans face-to-face.[68] Accordingly, the perspective of trust appears broad enough for developing an understanding of the diverse dimensions of European rule of law.

At the same time, it is necessary to understand that addressing a relationship with the perspective of trust entails a choice, a choice with immense implications. 'After all', writes Ute Frevert, 'the concept has the effect of a drug: it clouds the senses and creates addiction. (...) Indeed, the "thing in itself" can only be vaguely grasped, is difficult to measure, hardly possible to ascertain. It is as volatile as the air, which we (...) also perceive only when it is scarce or polluted. For this reason, speaking about trust always also means invoking its scarcity'[69] There is no robust method for determining from which point a lack of trust starts threatening the viability of a political system.[70]

One thing is certain, however: when a relationship or an institution is described using the term *trust*, then this has serious consequences: as a rule, it intensifies the perception of a crisis. Again: it is not incidents that shake the world, but words about those incidents.[71] Talking about trust, even if it is intended to be only analytical, has far-reaching cognitive, normative, and performative implications. Crises of trust can easily cause people to go off the rails.

This becomes even more clear when the alternatives are considered. The above-mentioned phenomena of (purported as well as actual) illegality could just as well be thematised using the traditional perspective of EU law: the effectiveness of Union law.[72] Yet, pitted against the dramatising effect of the 'crisis in trust' perspective, the traditional, technical approach of effectiveness has lost out. Any attempt to return to this approach is likely to be confronted with the accusation of placation, even as a refusal to acknowledge reality.

Once the perspective of trust is chosen, it should be handled consistently. This has concrete implications for statements about the crisis of the European rule of law. It is inconsistent to diagnose a crisis in trust, but to expect the relevant legal instruments to overcome it, as do some legal analyses of the Commission's 'rule of

[68] Ground-breaking, N. Luhmann, *Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität* (Ferdinand Enke Verlag 1968) p. 26, 59 ff; A. Giddens, *The Consequences of Modernity* (Stanford University Press 1990).

[69] U. Frevert, 'Vertrauen – eine historische Spurensuche', in U. Frevert (ed.), *Vertrauen. Historische Annäherungen* (Vandenhoeck & Ruprecht 2003) p. 7, 9.

[70] S. Schüttemeyer, 'Political trust', in D. Nohlen and R.-O. Schultze (eds.), *Lexikon der Politikwissenschaft. Theorien, Methoden, Begriffe, Band 2* (2002) p. 656.

[71] Koselleck, *supra* n. 2, p. 107.

[72] *Cf*, for example, Snyder, *supra* n. 33, p. 19.

law framework'.[73] Once trust has been eroded, it can be regained only slowly, and carefully. As pointed out by Paul Lazarsfeld and Elihu Katz: in politics, the process of building trust must remain inconspicuous if it is to avoid serious setbacks; it must rely on potent opinion leaders who have acquired an image of truthfulness, fairness and trustworthiness.[74] A crisis in trust cannot be 'resolved' by legal instruments, it can only be hedged and gradually allowed to subside over time. Instead of demanding a 'solution' to a crisis of trust, legal instruments should be evaluated according to whether they help avoid an escalation of distrust and enable continued cooperation which implicitly nurtures trust.

The crisis of the European rule of law mostly concerns institutions and systems. Crises of trust in institutions and systems appear significantly more dangerous than crises of trust in interpersonal relationships. People have their own 'radar' when it comes to trusting other persons. By contrast, in the case of institutions and systems they have to rely strongly on the assessments of others, in particular the mass media and opinion leaders.[75] So, once public trust in institutions or systems has eroded to a crucial point, a downward spiral can hardly be stopped. Trust in institutions and systems often appears to be stable, and is taken for granted, but is especially vulnerable if called into question collectively. 'Once the basis of trust comes under question, there is little to stop doubt from spreading catastrophically'.[76] Thus, it is unlikely that the population of a country will trust European institutions or those of other Member States if the domestic media and opinion leaders present them as untrustworthy over an extended period of time. Deep distrust is to be expected, which can easily bring about a sudden institutional implosion. The British debate on exiting the EU is a vivid example.

For a long time, the nation state was considered the decisive framework of societal trust.[77] Only recently have relationships of trust between states[78] and

[73] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication from the Commission to the European Parliament and the Council) COM (2014) 158 final, 11 March 2014. *Cf*, for example, H. Hofmeister, 'Polen als erster Anwendungsfall des neuen "EU Rahmens zur Stärkung des Rechtsstaatsprinzipis", *Deutsches Verwaltungsblatt* (2016) p. 869 ff.

[74] *Cf* Frevert, *supra* n. 69, p. 30.

[75] F. Kroeger, 'The development, escalation and collapse of system trust: from the financial crisis to society at large', 33 *European Management Journal* (2015) p. 431 at p. 434 ff.

[76] Kroeger, *supra* n. 75.

[77] Especially in the Hegelian tradition of the 'ethical life' of the state. On this, *see* A. Honneth, *Das Recht der Freiheit: Grundriß einer demokratischen Sittlichkeit* (Suhrkamp 2011); L. Siep, *Der Staat als irdischer Gott: Genese und Relevanz einer Hegelschen Idee* (Mohr Siebeck 2015).

[78] J. Ruzicka and V.C. Keating, 'Going global: Trust research and international relations', 5 *Journal of Trust Research* (2015) p. 8.

between citizens of different nations[79] become a broader topic. In this respect, it is important to stress that not every form of cooperative behaviour is an expression of trust. Research differentiates between confidence and trust.[80] Following this differentiation, trust isonly necessary if something of significant value is at stake: life, well-being, self-understanding, or substantial material resources. This explains the vehemence often characteristic of discourses about violated trust.[81] In this sense, trust is to be distinguished from legitimate expectations and loyal collaboration, which have been concepts of European law for a long time.

This distinction identifies the threshold that the European Union has crossed in recent years due to the choices made with the Maastricht Treaty. Before Maastricht, the European edifice could operate with a *permissive consensus*, which is certainly something far less than a trusting relationship. Today, however, measures taken in the field of criminal law or for rescuing the Monetary Union affect financial interests, societal self-understandings, and core concerns of constitutional law in a qualitatively new way when a permissive consensus is not sufficient.[82] So, research on trust better explains why the semantics of trust have become so strong in Europe: mutual vulnerability has increased, and people doubt whether the prerequisites for accepting this vulnerability are being fulfilled.[83] The debate about the effectiveness of Community law revolved around its proper transposition into domestic law;[84] today, the problems of the crisis have a completely different magnitude.

This reveals the gamble taken in the relevant decisions of the European Court of Justice. Requiring Member States to trust each other requires accepting mutual vulnerability in a situation of *distrust*.[85] According to trust research, this makes sense: accepting mutual vulnerability can potentially instil trust. But at the same time, the destructive potential is just as powerful. The Court of Justice is taking a

[79] G.M. Genna, 'Images of Europeans: transnational trust and support for European integration', 20 *Journal of International Relations and Development* (2017) p. 358.

[80] *See* Canor, *supra* n. 53, p. 400 referring to N. Luhmann, 'Familiarity, confidence, trust: problems and alternatives' in D. Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* (Blackwell 1988) pp. 99–100.

[81] T. Michel, 'Time to get emotional: phronetic reflections on the concept of trust in international relations', 19 *EJIR* (2013) p. 869, 870; Frevert, *supra* n. 69, p. 8.

[82] F. Schorkopf, 'Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?', 51 *Europarecht* (2016) p. 147 at p. 156.

[83] This does not rule out working on less critical policy fields from the perspective of trust as well, *cf*, for example M. Hartmann, *Europäisierung und Verbundvertrauen. Die Verwaltungspraxis des Emissionshandelssystems der Europäischen Union* (Mohr Siebeck 2015) p. 14 ff.

[84] *Cf*, for example, Snyder, *supra* n. 33.

[85] On this point A. Baier, 'Trust and Antitrust', 96 *Ethics* (1986) p. 231 at p. 234; taken from M. Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice', 24 *European Law Journal* (2018) p. 124 at p. 133.

dangerous path. It would not surprising if domestic courts were to develop safeguards precisely to protect their essential interests.[86]

Summing up: the change from concern about the *effectiveness of Union law* to *mutual trust among institutions* highlights the latest European transformation. Once the perspective of trust is established in a social system, it evolves considerably and its principles must be aligned. This holds particularly true for the rule of law, given the perception of its deep crisis.

The perspective of trust and the rule of law

Trust research helps understand the concept of European rule of law as laid down in Article 2 TEU.[87] The starting point is the anthropological insight that the members of a society must organise their relationships and plan their behaviour. This also holds true for the European society referred to in Article 2 TEU. Both trust and law are to be understood against this background: trust normatively adjusts a person's behaviour to the future behaviour of others. Much like the law, it stabilises normative expectations.[88] A century ago, Georg Simmel described trust as 'the prediction of future behaviour which is strong enough to allow for practical action'.[89]

The insight that trust and law serve the same function leads to the question of what their relationship is. Research has advanced in this respect: older approaches tended to regard trust and law as *alternative* mechanisms for stabilising expectations. This is consistent with an older understanding of law strictly linked to the possibility of coercion.[90] It corresponds to an understanding of law that demands subjects' obedience, but which does not solicit citizens' trust. By contrast, today, especially in democratic and complex societies, law and trust are considered *complementary*: trust and law are interrelated and they support each other.[91] This is especially true in the European legal space, where institutions are

[86] *Cf*, for example, Bundesverfassungsgericht 15 December 2015, Case 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. Tellingly, its test is called identity control (*Identitätskontrolle*), which conveys an idea of how essential the interests that this test is meant to protect are.

[87] This section is based on von Bogdandy and Ioannidis, *supra* n. 59.

[88] Seminal S. Romano, 'Diritto (funzione del)' *Law (fragments of)*, in S. Romano (ed.), *Frammenti di un dizionario giuridico Fragments of a Legal Dictionary* (Giuffré 1953) p. 76 at p. 81; N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) p. 150–153.

[89] G. Simmel, *Untersuchungen über die Formen der Vergesellschaftung* (Suhrkamp 1992 (1st edn., Duncker & Humblot 1908)) p. 389, 393 ff.

[90] H.L.A. Hart, *The Concept of Law*, 2nd edn. (Oxford University Press 1994) p. 20 ff; H. Kelsen, *Reine Rechtslehre*, 2nd edn. (Verlag Franz Deuticke 1960) p. 34.

[91] U. Volkmann, 'Was ist Recht?', 64 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2016) p. 281; Frevert, *supra* n. 69, p. 28 ff.

not integrated within the strictly hierarchical system of a federal state. Along these lines, it is theoretically robust to construe the European rule of law with theories of trust, and to address the crisis of the European rule of law as one of distrust against and between public institutions.[92]

Of course, there are and have always been instances in which the Union and Member States have accepted illegal behaviour.[93] It is also true that this leniency has contributed to integration because it avoids dangerous confrontations. Yet, this does not undermine the approach developed here. Broadly, the enforcement of any norm is subject to general rules of prudence, and its application should not damage the system.[94] Concretely, the current debate in Europe shows, impressively, that Union law has indeed succeeded in creating such expectations and trust.

Accordingly, trust within Europe and the European rule of law are closely related. It makes sense to invent new legal mechanisms to support trust in the European rule of law.[95] This is particularly true when such policies strongly impact fundamental rights or imply major financial transfers. But the principle of trust is also of decisive importance to the European legal space beyond such policies. The principle supports and justifies legal presumptions that make all legal operations much easier. It legitimises decision-making in the EU, given the central role of domestic governments. It confirms Europe's self-understanding as a union of liberal democracies.

Moreover, this trust-based understanding of the European rule of law links up nicely with all rule of law traditions. This is a most relevant feature because the *État de droit, κράτος δικαίου*, *Rechtsstaatlichkeit, rule of law, stato di diritto*, etc., by no means represent a concept that is identical throughout the European legal space.[96] One need only consider the rich diversity in the European legal

[92] *Cf*, for example, M. Ruffert, 'All we need is Trust: Conditions are not a Means of Punishment', Verfassungsblog, 10 March 2017, <www.verfassungsblog.de/all-we-need-is-trust-conditions-are-not-a-means-of-punishment/>, visited 23 October 2018; the coercive character of Union law is indisputable today (see above), but it is not of the quality of state law.

[93] Making this point against the trust approach, *see* Schorkopf, *supra* n. 82, p. 162.

[94] In Latin: *Fiat iustitia et pereat mundus*; on this *see* D. Liebs, 'Das Rechtssprichwort Fiat iustitia et pereat mundus', 70 *Juristenzeitung* (2015) p. 138.

[95] For an overview, *see* A. von Bogdandy et al., 'A potential constitutional moment for the European rule of law. The importance of red lines', 55 *CMLR* (2018) p. 963 at p. 965; Ioannidis, *supra* n. 37.

[96] *Cf*, for example, C. Grewe and H. Ruiz Fabri, *Droits constitutionnels européens* (Presses Univ. de France 1995) p. 22 ff; L. Heuschling, *Etat de droit – Rechtsstaat – Rule of Law* (Dalloz 2002); E. Díaz García, *Estado de derecho y sociedad democrática* (Editorial Cuadernos para el Diálogo 1966); T. Bingham, *The Rule of Law* (Allen Lane 2010) p. 8.

space when it comes to the judicial review of legislation.[97] Article 4, paragraph 2, TEU, which obliges the EU to respect the national identities of the Member States, strongly discourages a rigid and detailed EU concept of the rule of law for all legal orders.

This explains why it is so important that the perspective of trust identifies a common feature of all understandings: the requirement that the law actually rules.[98] The English terminology is particularly vivid: the *rule of law* requires that *law rules*. The rule of law, whatever else it may mean, requires that the law be obeyed, that it is applied and enforced by public institutions, that disputes are decided by independent and impartial courts. Officials must exercise public authority according to the constitution and laws, and the executive branch and the courts must make it their aim to ensure that private individuals also obey the law. Formulated from the perspective of individuals: the European rule of law corresponds to the right of all individuals throughout the European legal space to actually live under EU law.[99]

Not every violation of Union law disturbs its function in stabilising expectations, thus imperilling trust in the legal order. Rather, the legal handling of breaches normally supports trust in the legal order because it confirms normative expectations. A crisis of the rule of law requires phenomena of illegality that call this cycle into question. Trust in the legal order is undermined only when violations become the normal state of affairs or have a high degree of symbolic value, when they are generalised or systemic.

A crisis of the rule of law looms, for example, if a significant number of actors in important social fields stop relying on public institutions to confirm their normative expectations of legality. Once this threshold has been breached, a legal system no longer exercises its core function properly and breeds distrust. Whereas in the case of an isolated breach of the law, the normative expectation, although dented, continues to exist and remains relevant for future behaviour, trust in the law itself is lost if this threshold is crossed.[100] Individuals and institutions

[97] For a more detailed discussion, *see* A. von Bogdandy, C. Grabenwarter and P.M. Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum', in von Bogdandy, Grabenwarter and Huber, *supra* n. 23, margin number 30 ff.

[98] This will be identified as a *narrow* or *thin* concept of the rule of law. Many European institutions are pushing for a more substantive or thicker one, the value of which is not to be discussed here. For an example, *see* the Commission's EU framework to strengthen the rule of law (*supra* n. 73) p. 4, and Annex I.

[99] For an extensive discussion, *see* A.M. Russo, 'La cittadinanza "sostanziale" dell'UE alla luce della proposta del gruppo di Heidelberg: verso una "reverse Solange"?', *Federalismi*, 8 January 2014, p. 7 ff, <www.federalismi.it/ApplOpenFilePDF.cfm?artid=23938&dpath=document&dfile=07012014133121.pdf>, visited 23 October 2018.

[100] *See*, further, von Bogdandy and Ioannidis, *supra* n. 59.

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confronted with such a deficit of the rule of law *modify* rather than *maintain* their expectations.[101] Although they are certainly disappointed and probably outraged, they stop regarding obeying the law as normal: this constitutes the archetype of a crisis of the rule of law.

Some observers see such developments in the European legal space to such an extent that they suggest a hard break. This is fair enough. Trust in public institutions should be conceived of as both demanding and conditional.[102] This differentiates it from faith, which is unconditional, and confidence, which is cognitive. If trust is demanding and conditional, this implies critique and oversight as well as a search for alternatives. Indeed, these alternatives help frame the European rule of law.

Trust versus a European revolution

Analysing the current Union in terms of trust is unsettling, as it fortifies the impression of a deep crisis with no evident solution. Such an analysis might therefore appear to lend support to those who think that European integration has gone too far, that its current setting is no longer trustworthy. Accordingly, the established path of European rule of law[103] is confronted today with powerful calls for discontinuance, even for a hard break-up.[104] Brexit is the most important realisation of that call, and is indeed addressed as such, as a revolution or a counterrevolution. But there are other important calls for breaking up the current order and calls for revolutionary steps to a better future.[105] Against such proposals, the European rule of law can be framed and substantiated as a unique and unlikely historical achievement, as an instance of Kantian peace.

The alternative of a rupture presents itself in three very different variants. In terms of ideal types, it is possible to distinguish nationalist retreat, nation state-centred multilateralism, and the revolutionary establishment of a European republic. These variants will now be examined for their trustworthiness with a view to the rule of law in a situation of intense regional interdependency.

The first variant is found in the new nationalism, which opposes membership in the European Union, as well as other multilateral institutions of deep

[101] N. Luhmann, *Ausdifferenzierung des Rechts* (Suhrkamp 1981) p. 115 ff.

[102] Frevert, *supra* n. 69, p. 24 at p. 44; *see also* Lenaerts, *supra* n. 55.

[103] For five alternatives along and within this path see the relevant European Commission white paper: COM(2017) 2025 final, White paper on the future of Europe. Reflections and scenarios for the EU27 by 2025 (2017).

[104] A succinct compilation of relevant reasons in D. Chalmers, M. Jachtenfuchs and C. Joerges, 'The retransformation of Europe', in Chalmers, Jachtenfuchs and Joerges, *supra* n. 26, p. 1 ff.

[105] On this debate S. Kadelbach, 'Krise, Umbruch und neue Ordnung', in Kadelbach and Günther, *supra* n. 36, p. 9 ff.

transnational cooperation. The most important example is the new US bilateralism.[106] It is a crass manifestation of the age-old paradigm of particularism articulated paradigmatically by Carl Schmitt in his *The Concept of the Political*.[107] This variant is not based on mutual trust, but on distrust. Law beyond the nation has an instrumental function at best. It is certainly not able to generate a true order, i.e. a rule of law, or law-based trust in a transnational space. A stabilisation of expectations might occur through hegemonic structures,[108] but certainly not via transnational courts. What to think of this for Europe today? The history of French, German and Soviet attempts at hegemony do not really hint at this variant as being particularly trustworthy.

The second variant sees multilateralism, open statehood, and transnational cooperation in a positive light, but doubts that key premises of public order such as democracy, solidarity and, specifically, trust can be reproduced at the transnational level.[109] Therefore, neither a European rule of law nor trusting relationships are likely to emerge. Accordingly, it would be the order of the day to bring the Union back to a condition prior to mutual vulnerability. The strategy of the globalist British seems to be to replace it with other global governance institutions. Australia and Canada emerge as exemplary cases.

Also, in this respect it should be remembered that international law, due to its usually weak institutionalisation, is severely limited when it comes to generating trust through law. Whatever it potentially yields is at best an embryonic form of the rule of law, far from what can be found today in the current European legal space, all its problems notwithstanding. An international rule of law to which important interests can be entrusted remains to a large extent a figure of the imagination of scholars of international law.[110] For this reason, returning from

[106] J.S. Nye Jr., 'Will the Liberal Order Survive? The History of an Idea', 96 *Foreign Affairs* (2017) p. 10; P. Rudolf, 'US-Außenpolitik unter Präsident Trump', *SWP-Aktuell* (March 2017); T. Wright, *The 2016 presidential campaign and the crisis of US foreign policy* (Lowy Institute Analyses 2016).

[107] In more detail, A. von Bogdandy, 'Pondering Schmitt's Concept of the Political for International Public Authority: Also a Reflection on Methods, Standards and Disciplinary Settings for Public Law Theory', *MPIL Research Paper Series* (2016), < papers.ssrn.com/sol3/papers.cfm?abstract_id = 2864287 > , visited 23 October 2018.

[108] Hegemony is making a surprising comeback, even beyond nationalist positions; *see* the seminal piece by C. Schönberger, 'Hegemon wider Willen: Zur Stellung Deutschlands in der Europäischen Union', 66 *Merkur* (2012) p. 1; A. Bolaffi, *Cuore tedesco. Il modello Germania, l'Italia e la crisi europea The German Heart. Germany as a Model, Italy and the European Crisis* (Donzelli 2013).

[109] Influential W. Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Suhrkamp 2015) p. 292 ff.

[110] G. Palombella, 'The rule of law beyond the state: failures, promises, and theory', 7 *International Journal of Constitutional Law* (2009) p. 442. For a comparison, *see* A. von Bogdandy, 'Common

supranational to international law hardly advances rule-of-law postulates, as the European answers to the financial and sovereign debt crises vividly illustrate. The normativity of law in other international institutions confirms this structural weakness of international law, as the institutional practice in the United Nations compared with that of the European Union shows.[111] Moreover, if the Union regresses to the state before mutual vulnerability, it is highly questionable whether such a process will respect and advance the rule of law. Dismantling joint policies, in particular monetary policy, is more likely to unleash dynamics like those of an empire bursting apart. In short, it appears highly probable that this variant also implies a major loss of the rule of law in Europe.

The third variant is a federal European state or republic in which EU institutions have instruments of power and legitimation similar to those of states.[112] Among all the problems that this variant entails, only one will be mentioned. Art. 48 TEU requires treaty changes to be unanimous. It is, however, highly unlikely that such a leap would be ratified by all countries.[113] Accordingly, such a step is most likely to involve a substantial breach of the law as well as massive conflicts. The existing European rule of law would probably collapse, a new polity would have to tread anew the arduous path of creating trust.

Trustworthiness for Kantian peace

Each variant of rupture would come with dire implications for the European rule of law. Is the crisis in the European legal space so serious that a rupture could nevertheless be recommended? Much speaks against this.

All available indicators show that the European legal space is the global region with the most vigorous rule of law.[114] It is the only transnational space close to

principles for a plurality of orders: a study on public authority in the European legal area', 12 *International Journal of Constitutional Law* (2014) p. 980 at p. 999.

[111] K. Schmalenbach, 'International Organizations or Institutions, Legal Remedies against Acts of Organs', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) margin number 25; M. Ruffert and C. Walter, *Institutionalisiertes Völkerrecht* (C.H. Beck 2009) p. 75.

[112] *Cf* especially U. Guérot, *Warum Europa eine Republik werden muss! Eine politische Utopie* (Piper 2016) p. 81 ff; G. Verhofstadt, *Europe's Last Chance* (Basic Books 2017) p. 229 ff; in the same vein, now the president of the German Social Democrats Martin Schulz, *cf* 'Schulz will Vereinigte Staaten von Europa bis 2025', *Welt*, 7 December 2017, <www.welt.de/politik/deutschland/article171358179/Schulz-will-Vereinigte-Staaten-von-Europa-bis-2025.html>, visited 23 October 2018.

[113] On this risk in detail, *see* S. Goulard and M. Monti, *La democrazia in Europa: guardare lontano Democracy in Europe: To See Further* (Rizzoli 2012) p. 189 ff.

[114] *Cf*, for example, *World Bank data*, <info.worldbank.org/governance/wgi/pdf/rl.pdf>, visited 23 October 2018, and the data compiled and presented by the *World Justice Programme*, <data.worldjusticeproject.org>, visited 23 October 2018.

Kantian peace[115] and effective legal protection. There continues to be considerable trust in and between public institutions.[116] The problems mentioned do not contradict this basic assessment. The European legal space, founded on the rule of law and an idea of unity, appears distinctly more promising for generating trust than the alternative of disruption, in whatever variant. Trust theory confirms the importance of law, of comprehensive judicial review (*union based on the rule of law*), and urges patience in dealing with challenges of systemic or generalised deficiencies. But what does it suggest with respect to politicisation?

For Max Weber, the path was clear: fully fledged parliamentary democracy;[117] indeed, the project of Article 10 TEU. This was intended to bring trust as well as legitimacy to the German state. However, the Weimar Republic, notwithstanding its fine constitution, was seen as neither trustworthy nor legitimate by many of its citizens. Hermann Heller then added, at the height of the Weimar crisis, an additional criterion. To survive, political institutions, to be legitimate to the broad majority of citizens, must be trustworthy in providing a path to improve one's lot.[118] This seems not too far from where conventional wisdom stands in Europe today.[119] The failed Constitutional Treaty got it right then when it spoke, somewhat melodramatically, of 'a special area of human hope'.

Does the Union merit this trust? In an enlightened world, trust should be a question of judgment and comparison, particularly when public institutions are concerned. So far, the European institutions have kept serious breaches of the law within limits.[120] 'Red lines' have started to

[115] In the seminal words of Robert Schuman, where war is 'not merely unthinkable, but materially impossible', Schuman Declaration, 9 May 1950; the original text is Immanuel Kant, *Zum ewigen Frieden* (Königsberg, 1796); on this text, *see* B. Vischer, 'Systematicity to excess. Kant's Conception of the International Legal Order', in S. Kadelbach, T. Kleinlein and D. Roth-Isigkeit (eds.), *System, Order, and International Law* (Oxford University Press 2017) p. 303 ff.

[116] *Cf* Eurobarometer, *Public Opinion in the European Union, Standard Eurobarometer 84*, Autumn 2015, < ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/70150 > , visited 23 October 2018; Bertelsmann Stiftung, *Mehrheit der jungen Mittel- und Osteuropäer steht fest hinter der EU*, 21 March 2017, < www.bertelsmann-stiftung.de/en/topics/aktuelle-meldungen/2017/maerz/majority-of-young-people-in-central-and-eastern-europe-strongly-backs-the-eu/ > , visited 23 October 2018.

[117] Max Weber, *Parlament und Regierung im neugeordneten Deutschland: Zur politischen Kritik des Beamtentums und Parteiwesens* (Duncker & Humblot 1918) p. 99 ff.

[118] H. Heller, 'Politische Demokratie und soziale Homogenität', in F. Borinski et al. (eds.), *Hermann Heller: Gesammelte Schriften, Band 2* (Mohr Siebeck 1971) p. 421 ff.

[119] van Middelaar, *supra* n. 20, p. 26.

[120] P. Sonnevend, 'Preserving the Acquis of Transformative Constitutionalism in Times of Constitutional Crisis: Lessons from the Hungarian Case', in A. von Bogdandy et al. (eds.), *Transformative Constitutionalism in Latin America* (Oxford University Press 2017) p. 123 at p. 144 ff: 'The example of Hungary shows that outsourcing parts of the constitutional functions to international or supranational organizations in peaceful years may help survive the years of crisis. (…) European

emerge.[121] Europe, as it stands, even provides a shining example of inclusive policy making at the transnational level. The alternative, in whichever variant, seems far less trustworthy.

This overall assessment, countering an armada of critics, was formulated succinctly by Lithuanian dramatist Marius Ivaškevičius. His completely unbureaucratic defence of the purportedly bureaucratic dream identifies the largest of Europe's many problems as 'the unending prattle of the critics about Europe's problems and its unavoidable death'. He counters with: 'you have heaped up a whole mountain of these problems, which is crushing Europe and blocking all the good that you have obtained from it. But I must disappoint you: this mountain exists only in your surly minds. Try to look through my lens. The view through it is distorted too. It is too positive and reveals unfounded enthusiasm. But if you look at Europe through it, then your eyes will relax at least a bit, for there is incomparably more light there, more colour, and more will to live'.[122]

institutions contributed to creating a situation where self-healing through domestic processes is still possible'.

[121] *See*, recently, ECJ (Grand Chamber) 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*; ECJ (Grand Chamber) 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality*; *Commission* v *Poland (Białowieża Forest)*, *supra* n. 61; *see further*, A. von Bogdandy et al., 'A potential constitutional moment for the European rule of law. The importance of red lines', 55 *CMLR* (2018) p. 963.

[122] M. Ivaškevičius, 'Europa mit den Augen eines Verliebten', *Frankfurter Allgemeine Zeitung*, 6 February 2017, p. 6.