



The struggle for common legislation

The European Union is not only an internal market, it is also a shared legal space. However, ideas about what constitutes a state under the rule of law are drifting further apart. For some time now, Poland and Hungary in particular have been defining their own rules. **Armin von Bogdandy**, Director at the **Max Planck Institute for Comparative Public Law and International Law** in Heidelberg, is conducting research into this “constitutional crisis” and the possible responses that can be made by the EU.

Under the banner of the law: judgments passed by the European Court of Justice play an important role for the rule of law in Europe. With the Latin term *curia*, which stood for the judgment of the king in the Middle Ages, the Court of Justice places itself firmly in the European tradition.

TEXT CHRISTIAN RATH

The EU is a community based on the rule of law. The internal market would barely be able to function if there were no common rules. National authorities apply European rules, while national courts monitor their application. The European Court of Justice (CJEU) is only involved in cases of doubt or conflict.

Over the last 20 years, close collaboration has developed between the courts and the investigative authorities. Judgments are being mutually recognized. Police forces are assisting each other. Extraditions within the EU have been made much simpler thanks to the European Arrest Warrant. For all this to work, there has to be mutual trust between the EU states, since equivalent rule of law standards apply and are upheld everywhere.

Article 2 of the Treaty on the European Union lists the basic European values: “the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” It is claimed that these characterize the EU and are shared by “all Member States”. But is that really the case?

Armin von Bogdandy, Director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, has his doubts. For about ten years now, he has been researching the “EU constitutional crisis and the rule of law.” How can Europe function as a community based on the rule of law when the Member States themselves have difficulties with the rule of law?

States with weak institutions, such as Greece, are problematic. “The inefficiency with which Greek tax law was

implemented was one reason for the dramatic financial situation in Greece,” von Bogdandy explains. The country’s administration is regarded as non-transparent, bloated and corrupt.

Romania and Bulgaria, which joined the EU in 2007, also have significant problems. At that time, the judicial system was not capable of acting effectively against organized crime and corruption. For this reason, both states had to commit themselves to a mandatory monitoring process. Every year, the EU Commission writes a report on judicial reform and the fight against corruption. In most cases, these reports are not encouraging.

TRUST IN THE JUDICIARIES OF THE OTHER STATES IS KEY

However, these problems have long been dwarfed by the disputes with Hungary and Poland. Since 2010, Viktor Orbán has been transforming Hungary into what he himself calls an “illiberal democracy.” The government is pursuing the goal of expanding its influence over the media, educational institutions and also the courts.

In Poland, the governing PiS party under Jarosław Kaczyński has been attempting to bring the judicial system under its control since 2015 by introducing numerous new laws. It has made sure that the majority of judges on the Polish constitutional court are pro-government. The Council for the Judiciary, which appoints the Polish judges, is now also controlled by the political majority. The Minister of Justice can also replace all presidents of the district, regional and voivodeship courts.

Recently, the government attempted to bring the Supreme Court of Poland into line and to dismiss Małgorzata Gersdorf, the President of the Supreme Court, who had refused to bow to the government’s will.

Armin von Bogdandy is a key figure in the discussion surrounding the safeguarding of EU rule of law. In particular, he develops arguments and legal concepts as a reminder of the basic values of the EU, especially for the states that are drifting away from them.

According to von Bogdandy’s central theory, “The EU must take action wherever there are systemic deficiencies.” By this, he does not mean problems that occur occasionally. “A systemic deficiency is said to exist when trust in the law and its enforceability is lost in important areas.” Here, von Bogdandy means not just the application of EU law, but also of purely national law. Trust in the law and its institutions is important for citizens and companies doing business and planning their lives. Trust is fundamental to the EU, which specifies rules for the Member States and in some cases also transfers considerable sums of money. Trust is also necessary when Member States cooperate with each other on police and judicial matters. In von Bogdandy’s view, it is difficult for the EU to function as a community based on the rule of law if there are systemic deficiencies in individual states.

Some time ago, he presented an argument on handling systemic deficiencies in the application of the rule of law. In exceptional cases, EU citizens should be able to assert claims to the European protection of fundamental rights either in the national courts (if they are still

independent) or directly at the European Court of Justice. Armin von Bogdandy talks of a reversed “Solange” doctrine, referring to a decision made by the German Federal Constitutional Court in 1986. At that time, the court in Karlsruhe decided that it would not monitor EU legal files for compliance with fundamental rights “solange”, or “so long”, as the CJEU guaranteed a largely equivalent protection of fundamental rights. Conversely, this means that the institutions of each Member State are themselves responsible for the national protection of fundamental rights outside EU law contexts – so long as they protect the essence of these fundamental rights. If not, indi-

vidual EU citizens have a right to a “European safety parachute of fundamental rights,” according to von Bogdandy. Since the CJEU has not yet adopted this concept, it has to date remained nothing more than a much-discussed academic recommendation.

In 2016, von Bogdandy also founded the “Heidelberg Discussion Group on the Multilevel Cooperation of Constitutional Courts” (“Heidelberger Gesprächskreis Verfassungsgerichtsverbund”) together with high-ranking individuals such as Andreas Vosskuhle, President of the German Federal Constitutional Court. In this group, scientists debate with constitutional judges and European judges. CJEU President Koen Lenaerts

and the German judge at the European Court of Justice for Human Rights in Strasbourg, Angelika Nussberger, are also members. In 2018, the subject of discussion was “Mutual trust in the European legal space.” This is an opportunity for von Bogdandy to discuss his research results directly with key stakeholders and to present these results to them.

However, what concrete measures can the EU take if there are problems in individual states? Currently, there are four measures in particular that can be considered.

The lowest-level measure is to initiate a dialogue process. This is based on an “EU framework to strengthen the Rule of Law” that was approved by the

» On principle, EU citizenship encompasses an entitlement to a European safety parachute for fundamental rights.



Photos: picture alliance/dpa (left), picture alliance/NurPhoto

A test of strength in Poland: the government of Jarosław Kaczyński (far left) has been attempting to bring the judiciary under its control since 2015. Małgorzata Gersdorf (large image), the President of the Supreme Court, was due to be forcibly retired in July 2018 but refused to give up her seat.



EU Commission in 2014. Such a dialogue encompasses three phases. First, the EU Commission performs an analysis of the situation, in which it defines the problems. It discusses these with the state in confidence. If the problem cannot be solved quietly, the Commission issues public recommendations and sets deadlines by which they must be implemented. During the third phase, the Commission checks whether the recommendations have been followed and draws corresponding conclusions. Apparently, von Bogdandy's ideas were an important inspiration for this dialogue process. However, the procedure does not provide for sanctions.

The EU Treaty (Article 7) for the EU Council of Ministers, the body of the Member States, has more powerful tools at its disposal. With the agreement of 80 percent of its members, the Council can determine a "clear risk of a serious infringement" of EU basic values. This is intended as a type of final warning. In the next step, the Council can determine that there is "a serious and lasting infringement" of EU basic values. This resolution must be unanimous (excluding the state in question). If this hurdle is cleared, certain sanctions such as the loss of voting rights can be initiated provided there is a qualified majority. While harsh sanctions are possible, this procedure is also strongly politicized. As soon as two states agree to close ranks, there is almost no possibility of introducing sanctions.

The third option consists of infringement proceedings, which can in turn be initiated by the EU Commission. The Commission can file a suit against individual Member States at the CJEU. Here, the matter in hand is not the general situation, but individual laws. These procedures are often effective, since states that fail to comply with CJEU ordinances and judgments are threatened with substantial financial penalties. On the other hand, such procedures frequently remain technical and non-political, since they do not openly address the development of authoritarian ruling structures.

As a fourth option, there are procedures at the European Court of Justice that are initiated by national courts. At issue here is whether a court in one state can still collaborate judicially with a problematic Member State. Here, trust in the other state's application of the rule of law plays a key role. Can a citizen be extradited to this state if they are charged with a criminal offense there? This is a tricky question for the CJEU. If it prohibits extradition because treatment according to the rule of law is not guaranteed in the destination state, this might help the person affected but will damage European cooperation in the fight against crime. If it approves the extradition, it is in effect closing its eyes to the problems relating to the rule of law in the country in question.

POLAND AND HUNGARY SUPPORT EACH OTHER

For Armin von Bogdandy, the question of whether or not these measures are effective in the short term is by no means decisive. For him, the main point is that the EU does something and responds to systemic deficiencies. "Here, the vast majority of the EU states can draw a red line and define themselves in the club." In this way, he says, a situation can be prevented whereby the understanding of the rule of law in questionable states comes to be regarded as different but of equal value.

Over the past three years, the struggle for the independence of the Polish courts has intensified. It is now regarded as a litmus test for the ability of the EU to uphold rule of law structures in the Member States. This case can also be seen as an example of what the tools the EU has at its disposal can achieve in practice.

Poland was in fact the first state with which the EU Commission conducted a dialogue over the rule of law. From January 2016 to December 2017, the EU Commission issued four recommendations to Poland, each referring to different laws. However, from the viewpoint of the EU Commission, the recommendations went unheeded. >



Left A speaker in demand: Armin von Bogdandy is also active in eastern European countries with regard to the discussion surrounding the rule of law in the EU. Here, he is seen at a conference in Budapest.

Below Waiting it out together: according to the EU Treaty, the Council of Ministers has the option of determining a “clear risk of a serious infringement” of the EU basic values by Poland. To date, the members have not reached such a conclusion.



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The EU Commission therefore applied to initiate the Article 7 procedure in the fall of 2017. However, the EU Council of Ministers has yet to pass a resolution on this matter. A removal of Poland's voting right appears almost impossible, since Poland and Hungary have assured each other that they would each prevent a unanimous resolution against the other state.

At the same time, the EU Commission has initiated two infringement proceedings due to the reform of the judiciary in Poland. The second legal action filed in September 2018 has attracted particular attention; it pertains to the reduction of the pensionable age for judges on the Polish Supreme Court. This reduction means that 27 of the 72 acting judges could be forced to retire, including President Gersdorf.

At the end of October, the CJEU, on behalf of the Commission, issued an interim injunction against this proposal. As a result, the judges affected were able to return to work. One month later, the Polish parliament, the Sejm, summarily passed a law that largely revoked the reform. The EU thus proved that it has the stronger arm, at least in individual cases.

During 2018, the CJEU also considered the extradition of criminals to Poland. In one case presented by the Irish High Court, the CJEU recommended a two-stage approach. First, national courts should examine whether there is a risk to the independence of the judicial system in Poland as a whole. The Article 7 procedure that has been initiated could provide important information in this context. In the second step, it must be checked whether this risk might have an impact on the specific case. Here, the CJEU takes account of the fact that the risk of an unfair trial is higher in politically controversial cases

than in cases of everyday crime. In this way, the Court of Justice cleverly avoids having to make its own assessment of conformity to the rule of law in Poland by transferring responsibility for the analysis to the national courts.

STRENGTHENING SELF-HEALING POWERS WITHIN THE COUNTRY

Armin von Bogdandy says that he is unable to predict whether or not the efforts made by the EU in Poland will be successful in the long term, and which tools could be the most effective. He says that he is neither a political scientist, nor is he sufficiently familiar with Polish domestic politics.

For the Director of the Max Planck Institute in Heidelberg, it is important not only to research the situation in Hungary and Poland from afar, but also to work with academics and judges from these countries in order to formulate questions and develop assessments. In 2017, for example, he held a conference in Warsaw.


At the same time, however, he warns against regarding the problematic EU states merely as objects of EU measures. "These countries have their own point of view, which we should listen to and assess carefully."

In the case of Poland, for example, the PiS government claims that it is in

fact creating the rule of law by removing judges from the communist era together with corrupt party members from the previous civic government. Poland and Hungary also claim that they are accused of having structures that have never been contentious in other states such as Germany, such as the election of judges by political committees.

Armin von Bogdandy is glad that in such debates there are also independent bodies such as the Venice Commission of the Council of Europe working alongside the EU institutions. This commission is a committee of experts that advises states on constitutional issues and also assesses them. It has explicitly criticized the restructuring of the judicial system in both Hungary and Poland.

However, for von Bogdandy, the purpose is not so much to enforce government compliance from the outside. First and foremost, he wants to strengthen the self-healing powers in the country in question. "If the EU insists on a judicial system that is independent and based on the rule of law, this is certainly acknowledged in the state affected." For him, it is a good sign that at the CJEU, nine judicial referrals are already pending from Poland with issues relating to the Polish judicial reform. ◀

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SUMMARY

- Through political interventions, Poland and Hungary are threatening to undermine the independence of the judiciary and thus the EU rule of law.
- The EU has several ways of responding to this. The most effective ones appear to be infringement proceedings arising from specific laws that constitute an infringement of EU law.
- In the long term, the EU will only be successful if it strengthens the self-healing powers in the Member States affected.