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'The European Union has weathered all these storms'

Poland and Hungary have been challenging the foundations of the EU. Armin von Bogdandy explains how and what should be done next

A debate is currently raging in the EU about the independence of the judiciary in Poland. But why is how Poland organises its judiciary important for the EU?

There are several reasons. First, the European Union sees itself as a liberal democracy. This applies to the way the EU institutions themselves are designed, but also to the way its member states are organised. Being a liberal democracy is, after all, an accession criterion. If this is now shaky in a Member State, then the EU's self-image is at risk. This is so critical that the Union cannot ignore it in silence.

Secondly, the Union guarantees its citizens liberal democracy in the Treaties. The EU promises that certain fundamental standards will apply everywhere in the Union. And it is precisely this guarantee that is being invoked in Poland and Hungary by those who are taking to the streets in support of free democracy. European flags often fly at the demonstrations.

Thirdly, we have a high level of integration in the Union in terms of cooperation between state authorities, especially in the courts. For example, a German and a French court assume that a Polish court operates according to law and order, including in the execution of arrest warrants or in the recognition of divorce or child custody cases. If it is no longer ensured that the judiciary in these countries operates independently, then this cooperation no longer works and thus European cooperation as a whole is shaky.

Where do we go from here?

First of all, it is important that the EU does actually do something. Nevertheless, one has to realise that one must not rely on short-term successes. The democratic transformation of authoritarian societies

that began in Central and Eastern Europe in 1990 has not yet been completed everywhere. Only when this process has made substantial progress in Poland and Hungary, for example, will phenomena like Kaczynski and Orban no longer pose such a threat. It is against this time horizon that one must judge.

Can this transformation be achieved or at least accelerated through external coercion and pressure?

As we are seeing right now in Afghanistan, external pressure is not enough; what is needed is a society with a significant majority of the population that really wants this transformation. In Central and Eastern Europe, however, we can assume that this is the case.

Does coercion help on this path? I think so. It is also vehemently demanded by those who are fighting for further democratic transformation - for example, that the funds to the government be cut. In the current case with Poland, in the escalated dispute over the disciplinary chamber at the Supreme Court, even the extremely resistant Polish government has given in to the threat of sanctions. This shows that such instruments of coercion can be effective. If possible, it should be a policy mix with the additional resources of considerable amounts flowing there.

In view of the charged debates on LGBTQ rights, abortion, migration, one may well ask whether there is a European community of values.

As a lawyer, I first look at the acquis of jurisprudence on human rights, democracy and the rule of law, which enjoys broad support. This can be described as a European consensus of values. Beyond that, you have to look at things in detail. On LGBTQ rights, there is a consensus that sexual orientation should no longer be punishable or subject to any social sanctions. The right to marriage or adoption has to be treated more openly - you can't drag other countries into this basic foundation yet.

I think it would be wrong to use European values to impose positions on other societies such as standard in countries like Germany, which today are seen as elementary prerequisites of a liberal democracy, but which ten or twenty years ago were only political demands as well. One should be humble and realise how long it took Germany to achieve this, and under very fortunate conditions, namely a strong economy, an accepted system of redistribution, a stable government and the reliable protection of the Americans. Other societies have a harder time. Accordingly, one should not put one's own country in absolute terms. For each demand, one has to weigh up in detail whether it should be part of the basic requirements or whether it has

to take the path via the normal political process at the national or European level.

When we speak of basic requirements: What is the lowest common denominator of liberal democracy in the EU?

This includes, first of all, that the political system remains set up in such a way that the political opposition has a fair chance to come to power in the next elections - the possibility of an actual change of power. A second aspect is a functioning system based on the rule of law, in which public institutions work according to law and not according to political command. Thirdly, there must be elementary relations of recognition. The legal system must insist that people meet as equals and as free.

What are the worst-case consequences for states that violate these basic principles, as is currently the case with Poland and Hungary?

In the end, you don't know. A lot can happen. It is possible that Poland and Hungary will ultimately prevail. Hungary has already succeeded to some extent on one point. If we look at today's European refugee policy, it is not so far removed from what Orban propagated in 2015. Hungary and Poland have very skilled politicians. And in other member states there are politicians who are along the same lines. Marine Le Pen or Matteo Salvini think what Orban is doing is great. It is not completely absurd that these positions could one day become capable of gaining a majority in the EU. We have to face that, even if I don't think it's very likely.

But it is also possible that the EU will pull the emergency brake and throw Hungary and Poland out of the Union. It is said that this is not legally possible. But I am quite sure that if there is a broad consensus in the Union, then we lawyers will find a way to make it work legally.

That would be a very hard step.

We will have to look at the concrete situation. I am firmly convinced that the Union with its 27 Member States - and hopefully soon with a few more Member States - is a great achievement of civilisation. One should leave no stone unturned to keep things together before taking such dramatic measures. But one should not rule out this harsh step.

Currently, Poland and Hungary are in focus. Which other EU member states should we keep an eye on in terms of democracy and the rule of law?

We should not be really sure about any state. In France, Marine Le

Pen could become the next French president. What that means, we do not know. Just as we cannot rule out that the next government in Italy will be formed by Meloni and Salvini. Problematic developments are also emerging in Slovenia, Bulgaria, Romania. In the difficult situation in Austria, it has been shown that a constitutional court can really make the difference. The Austrian Constitutional Court has issued clever rulings here so that the situation has stabilised. All this demonstrates that this is not a phenomenon limited to Hungary and Poland.

Despite all the challenges, do you remain optimistic about European integration?

You have to look at what we have achieved. True, we have not created a European nation, nor have we founded a European federal state. But there is a European society. Article 2 speaks of a European society characterised by democracy, the rule of law, human rights and equality between men and women. It is not just on paper, but has become a concrete reality in the lives of many people. This was a tremendous - peaceful - transformation from purely nationally fixed peoples to a European society.

Another important point is that the European Union has mastered the great challenges of the last twenty years - despite all the prophecies of doom. Many of the well-known observers, especially from the Anglo-American world, have said at every step: this was wrong, now the EU will fail. The parliamentarisation. The euro. The euro bailout. The Brexit. The pandemic. But the Union has weathered all these storms and has even managed to achieve results in difficult negotiations that have enabled the integration project to move forward.

Surveys regularly show that younger generations take life in the Union, European society and identity much more for granted than older generations do. The EU is a reality in most people's lives, and many trust it more than national institutions. It thus has a stability that many of those who disdain it do not perceive.

This interview was conducted by Anja Wehler-Schöck.



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