

Constitutional Crisis in the European Constitutional Area

Theory, Law and Politics in Hungary and Romania

Edited by

Armin von Bogdandy and
Pál Sonnevend

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CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA

The concept of a European Constitutional Area has been used in legal scholarship to describe a common space of constitutionalism where national and international constitutional guarantees interact to maintain the common constitutional values of Europe. This concept has not yet been tested in a case where the constitutional order of a Member State of the European Union seems to develop systemic deficiencies. The present volume aims to assess recent constitutional developments in Hungary and Romania, as well as the interplay of national, international and European constitutionalism which react to the loopholes in national constitutions. Accordingly, a core part of the volume is an in-depth analysis of the situation in Hungary and Romania. Based on that, the volume offers an account of the different reaction mechanisms of the European Union and of the Council of Europe. Beyond a detailed stock-taking of these mechanisms, their legal and political frameworks are explored, as well as different ways to extend their reach. In this way, the volume contributes to a little studied aspect of European constitutionalism.

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Preface

The dominant understanding of the relationship between European Union Law and national constitutionalism has been to conceive European integration as a threat to national constitutional values, first to fundamental rights, and later to democracy.¹ Whatever steps the framers of the Treaties or the European institutions have taken, this understanding has remained alluring, particularly for high courts all over Europe. This is well demonstrated by the series of constitutional challenges to the European Arrest Warrant in several jurisdictions,² and some reactions to the Lisbon Treaty.³

Like every successful and long-living frame of understanding certain phenomena, this narrative has had solid grounds in reality. How to safeguard democracy in the framework of European integration is indeed a thorny issue. It also remains beyond doubt that the Court of Justice of the European Union has been reluctant to embrace the role of a supreme court with a full constitutional function. The traditional understanding of the European Union as a functional legal order still underlies much of its jurisprudence. The European Union certainly does not provide a sophisticated system of fundamental rights protection, similar to that of several national constitutions.

The present book, while not denying that there is truth in the understanding of the European integration being the threat to, and EU Member States the protectors of, fundamental values, will lay out a very different one. It focuses on national systemic deficiencies in respecting the founding values of Article 2 of the Treaty on European Union (TEU). The concrete examples of Hungary and in Romania demonstrate that this converse narrative is more than justified: Member States being the threat to, and European institutions the possible protectors of, fundamental rights, rule of law, and democracy.

¹ For an overview see the contributions in G Martinico and O Pollicino, *The National Judicial Treatment of the ECHR and EU Laws* (Groningen, Europa Law Publishing, 2010).

² See Scott Siegel, *Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts*, Jean Monnet Working Paper No 5 (2008), available at <http://www.jeanmonnetprogram.org/papers/08/080501.pdf>; C Grasso, The European Arrest Warrant Under the Scrutiny of the Italian Constitutional Court (2013) 4 *New Journal of European Criminal Law*, 120ff; A Torres Perez, 'Constitutional Dialogue on the European Arrest Warrant' (2012) 8 *EuConst* 105ff. See also Decision 32/2008. (III. 12.) AB határozat (Constitutional Court of Hungary) which found the international agreement extending the substantive rules of the European Arrest Warrant to Iceland and Norway to be in violation of the *nullum crimen* principle of the Hungarian Constitution and thus indirectly challenging the European Arrest Warrant, see http://www.mkab.hu/letoltesek/en_0032_2008.pdf.

³ Most outspoken is the Federal German Constitutional Court, decision of 30 June 2009, BverGE 123, 267.

Indeed, these two understandings are not mutually exclusive, but can be combined because Europe is not homogeneous. This heterogeneity requires to leave behind the traditional, far too simplistic frame of understanding of the relationship between national constitutionalism and European law. Constitutional crises in some EU Member States highlight the need to understand EU law also, and, given the depth of the crises, perhaps even mainly, as a chance of preserving the core values of every constitution in Europe: democracy, the rule of law and respect for fundamental rights.

Systemic deficiencies in the rule of law in Member States not only threaten the foundations of the EU legal order but also rattle the trust in the core values underlying all national constitutions in Europe. Accordingly, effective reactions by European institutions equally serve the preservation of the foundations of the European Union and the maintenance of the principle of the rule of law in times of crisis in Member States. This is no threat to national constitutionalism. The Union's structure of competences and institutional set-up ensures that the primary responsibility for maintaining constitutional values rests with the Member States. Equally important is, however, the understanding that constitutional crisis may warrant common action and the effective reactions by European institutions.

The examples of Hungary and Romania indicate that, at present, European institutions do not yet possess a sufficiently effective set of instruments to address constitutional crisis. In Hungary, the constitutional developments of the last few years have been marked by at least three crisis symptoms: a permanent constitution-making by the governing majority in Parliament, a gradual deterioration of the guarantees of fundamental rights, and a lack of effective checks and balances (see Chapter 2, Pál Sonnevend, András Jakab and Lóránt Csink, 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary' and Chapter 3, Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution'). The result is a constitutional system in which constitutional values become freely disposable, the constitution serves everyday political interest, and constitutional culture is in the decline (see Chapter 1, László Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary'). The problem is exacerbated by concerns relating to the freedom of the media (see Chapter 4, Gábor Polyák, 'Context, Rules and Praxis of the New Hungarian Media Laws: How Does the Media Law Affect the Structure and Functioning of Publicity?').

Romania might, in a certain sense, face less severe difficulties in that the constitution itself is not jeopardised. Yet, the separation of powers, rule of law, and constitutionality have acquired surprisingly pliable and unstable meanings in the current Romanian climate. Political crises easily turn into constitutional ones, and the Romanian Constitutional Court has thus far not proven able to develop a consistent case law to create a clear point of reference for the constitutional system (see Chapter 5, Bogdan Iancu, 'Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts'). It is also argued that the 2012 events were a crisis only in relation to the intensity and the scope of the measures

undertaken in a relatively short period of time and that the generalised practice of quasi-illegal political manoeuvres systemically validates further breaches of law (see Chapter 6, Cosmina Tanasoiu, 'Romania in the European Union: Political Developments and the Rule of Law after Accession').

By contrast, reactions by European institutions so far have remained rather isolated and mostly lacked teeth. European institutions have commonly felt trapped by a lack of appropriate competences and instruments, though this is changing.⁴ With a few exceptions, only narrow issues linked to the internal market have been targeted (see Chapter 7, Frank Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?'). Institutions of the Council of Europe have addressed a wide range of issues, yet here the enforcement mechanisms are far less effective. This is especially true for the Venice Commission which has thoroughly dealt with a variety of questions relating to Hungary, but many of its concerns and requests remain unanswered (see Chapter 11, Joakim Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania'). Although the European Court of Human Rights may develop and apply the European Convention on Human Rights as a constitutional document (see Chapter 9, Christoph Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights'), the length of its proceedings and its focus on individual cases prevent it from providing a sufficient answer to systemic deficiencies in the rule of law (see Chapter 10, Mahulena Hofmann, 'Central and Eastern European Member States of the EU and the European Convention on Human Rights').

This volume does not only diagnose the problems, but also makes proposals on how to deal with the crises. For example, Article 2 TEU may serve as a basis for judicial enforcement of the foundational values of the EU within the framework of a reverse-*Solange* doctrine (see Chapter 8, Armin von Bogdandy, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Kottmann and Maja Smrkolj, 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* doctrine'). The European Convention on Human Rights can be strengthened to provide a common constitutional minimum in Europe (see Chapter 13, Tilmann Altewicker, 'Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights'). Furthermore, legitimate national constitution-making needs to respect comparative, European and international standards (see Chapter 12, Matthias Hartwig, 'What Legitimises a National Constitution?'). The existence of such standards allow the concept of unconstitutional constitution

⁴ See European Commission presents a framework to safeguard the rule of law in the European Union European Commission—IP/14/237, 11 March 2014, http://europa.eu/rapid/press-release_IP-14-237_en.htm; in detail A von Bogdandy and I Ioannidis, 'Systemic deficiency in the rule of law' (2014) 51 *Common Market Law Review* 59.

on the basis of core European values (see Chapter 14, Catherine Dupré, ‘The Unconstitutional Constitution: A Timely Concept’).

Ultimately, the chapters in this volume will join in the discourse on systemic deficiencies in Europe by demonstrating the examples that warrant this discourse, and by indicating possible ways of addressing such deficiencies.

Heidelberg/Budapest, March 2014

Armin von Bogdandy and Pál Sonnevend

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List of Contributors

Tilman Altwicker is a lecturer at the University of Basel.

Carlino Antpöhler is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Armin von Bogdandy is Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg

Lóránt Csink is an associate professor of Law at Pázmány Péter Catholic University, Budapest, and a Head of Department at the Office of the Commissioner of Fundamental Rights, Hungary.

Johanna Dickschen is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Catherine Dupré is a senior lecturer at the University of Exeter.

Christoph Grabenwarter is a Professor of Public Law, Business Law and Public International Law, Vienna University of Economics and Business Administration and judge at the Austrian Constitutional Court.

Matthias Hartwig is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Simon Hentrei is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Frank Hoffmeister is the Deputy Head of Cabinet in Commissioner De Gucht's Cabinet.

Mahulena Hofmann is a professor at the Faculty of Law, Economics and Finance, University of Luxembourg and the SES Chair in Satellite Communications and Media Law.

Bogdan Iancu is an associate professor (Comparative Constitutional Law and Constitutional Theory), University of Bucharest, Faculty of Political Science

András Jakab is Schumpeter Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and the Director of the Institute for Legal Studies at the Centre for Social Sciences of the Hungarian Academy of Sciences in Budapest.

Matthias Kottmann is an attorney and was a research fellow at the Max Planck Institute for Comparative Public Law and International Law.

Joakim Nergelius is a professor at Örebro University School of Law, Psychology and Social Work.

Gábor Polyák is an associate professor at the University of Pécs.

Kim Lane Scheppele is the Rockefeller Professor of Sociology and International Affairs, as well as the Director of the Program in Law and Public Affairs, at Princeton University, and also a Faculty Fellow at the University of Pennsylvania Law School.

Maja Smrkolj is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

László Sólyom was President of Hungary from 2005 until 2010. Previously he was president of the Constitutional Court of Hungary from 1990 to 1998.

Pál Sonnevend is a Professor of European and International Law at ELTE University Faculty of Law.

Cosmina Tanasoiu is an Associate Professor of Comparative European Politics at American University in Bulgaria, Department of Politics and European Studies.