

Forum: EU: W. Schmale: The Covid-19 crisis and European legal culture

by Wolfgang Schmale

To a large extent, European integration is achieved through common law and common standards which are applied everywhere in everyday life. In fact, implementation is never uniform in all Member States, but a European legal culture has nevertheless emerged since the 1950s. The legal culture includes the way in which law, legislation and standards are implemented in practice and in everyday life, not only by legislators, authorities and courts, but also by citizens.

Enforcement and practice is only one aspect; the legal needs of all parties involved are no less characteristic of the legal culture. What kind of law and, if applicable, standardisation is required „from below“ (or „from above“)? What is the reason for non-compliance with European law? The experience of having to reach agreement within the EU, ensuring the compatibility of national law and European law, etc., is also part of legal culture as practical experience.

The Corona crisis shows how far or how little progress has been made with this European legal culture. Conclusions for the further development of European law can be drawn from a corresponding analysis. The following explanations cannot claim to be exhaustive. The point of view taken is that of a cultural historian, not a lawyer.

1. There is no European electoral culture

In many countries, elections (from the municipal to the national level) should have taken place during the corona lockdown or have been held – or postponed. All the observations that have come to light on this can, of course, also be found out by eagerly studying the electoral law of the Member States, but who does that? Covid-19 delivered many different impressions quite comfortably free of charge. Some people in some countries argued about whether to introduce postal voting – it had not been planned until then. Others carried out voting entirely in the form of postal voting. There were arguments about

bringing elections forward or postponing them; in elections with two rounds of voting, the first round was held regularly and the second round was postponed without date.

But the basic problem to be overcome was the same everywhere. Does it really make sense to solve the same problem differently in every country, or would not harmonising electoral law be a timely project? The EU Treaty protects national legal traditions, but the Corona pandemic has highlighted problems here that cannot be glossed over by any tradition.

One of the problems highlighted is the slight susceptibility to abuse. This does not refer to electoral fraud, which may be added, but rather to the nonchalant handling of appointments and deadlines, as in Poland with regard to the presidential election. The similarity of the problems was not discussed in a European context, the handling of the apparent formalities, which are essential for the correct conduct of elections, was surprisingly sloppy.

2. The imperative of non-discrimination goes deeper than we have known

European law is clear on the prohibition of discrimination, and the EU Treaty also places the principle of non-discrimination where the *raison d'être* of the EU is expressed (Article 2 TEU).

The Corona pandemic demonstrated the following, among others: In some countries, such as the United Kingdom, People of Color were more affected by Covid-19 than White people. The reason for this was that these people worked as carers, bus drivers etc. and were more exposed to the risk of infection. They should have been better protected, but at first nobody cared because of the lack of protective equipment. To some extent, this was compounded by the slanting nature of the health care system, which additionally disadvantaged the same people.

Once attention had been focused on this, discrimination in everyday life became the focus of attention. The assassination of the African-American George Floyd in Minneapolis on May 25, 2020 by

a White policeman while being filmed happened in the USA, but triggered a worldwide movement against racism and discrimination based on skin color and ethnicity. Would it have been the same without Corona and the de facto inequality of People of Color, even in Europe? The debate did not stop at police violence, but extended to all kinds of discrimination. Unequal educational and professional opportunities due to hidden discrimination based on a „foreign“ sounding name, appearance, skin color, gender or, more generally, sexual orientation are commonplace in everyday life and have now been more clearly addressed.

In some cases, the corona lockdown increased the gender gap to the disadvantage of women; children, who were socially disadvantaged anyway, felt even more disadvantaged, and the same applies to people with disabilities or special needs. The state suddenly shifted tasks and responsibilities to the families during the entire lockdown, without giving families the strong position or support they needed. It was as if the political theory of the early modern era, according to which families are the foundation of a state, was suddenly revived without the family being upgraded accordingly. There was a dose of cynicism – there was no compass to guide the setting of priorities in the lockdown.

In this respect, there was a fairly „unified“ Europe, and also in the respect that politics lacked a reliable inner compass. So the lesson to be learned is that severe pandemics are also possible in real terms in Europe in the 21st century and are therefore also to be expected in the future, and that this compass must therefore be developed. Which priorities are unavoidable, which are only illusory priorities whose negative consequences will only become apparent later, but all the more severely? This is particularly true in the health sector, where the fatal consequences of deferred treatments, on the one hand, and increased calorie intake from frustration in the lockdown, on the other etc. were soon calculated.

The crisis must be used to adapt European and national legislation with practical experience in mind. European harmonisation would

make sense here.

3. Fundamental rights

Fundamental rights and freedoms were restricted without discussion at the beginning of the lockdown. It was not until the end of March, beginning of April 2020, that the number of voices drawing attention to the fact as such began to grow and debates began. This sequence was also quite uniform throughout Europe, but the way it was handled was not. It was somewhat shocking to see how government agencies got into a skid, especially on this crucial question of how far restrictions of fundamental rights can go and on what grounds. Demonstrations with few participants who wore masks and kept their distance were forbidden, people were driven apart, possibly reported. This had nothing to do with the likewise basic right of every human being to be protected from a possibly deadly infection. The authorities and the police reacted excessively. This reveals a surprising helplessness and ignorance of the fundamental rights and freedoms and their high value in a democratic constitutional state.

There is an obvious need for discussion in this area, and this exists in all European countries. Where is the European debate? What is needed is not so much a new law as a return to how important the debate on law, fundamental rights, the constitution and standards is for legal culture.

4. EU citizens

How much was the status as an EU citizen worth in the lockdown and during the travel restrictions? As an EU citizen living abroad, when the repatriation of citizens began, I asked myself whether the EU citizens living in other EU countries were included in the repatriation? In the beginning they were not even mentioned. The border closures have hit families whose members work in different EU countries particularly hard. Couples or communities that for some reason did not share a common household may have been separated if they were in different places/apartments at the beginning of the lockdown. Much

of what EU law actually makes possible as a way of life was suddenly problematic. It became clear how vulnerable the status as an EU citizen is in reality. The feeling of being taken for a ride is obvious. Where is the European debate?

5. Digitisation, unequal opportunities

The Covid-19 crisis raises many questions related to the digitisation of the living environment and digital property rights. The digitisation of the economy and things was on everyone's lips before Corona; what it would have needed was a digitisation of the educational infrastructure. Now we are smarter – and we should use that. We have practically experienced how vital the realm of the digital can be in a pandemic. Now we have to ask what does this mean in legal terms – what must people have a legal claim to in future? The answer can actually only be a European, not a national one. There has been repeated talk of a „digital divide“: some people had the necessary hardware and software or could afford it, others did not have it, did not get it, could not buy it. A part of the pupils in all EU member states therefore had virtually no access to education during the lockdown.

6. Conclusion

The member states of the EU are aware of their diversity and cultivate it. The EU has made this diversity a protected trademark. But where and when does diversity become counterproductive? It becomes so when everyone has the same basic problem, but thinks that diversity is nevertheless the top priority. The issues outlined above have shown, however, that the Covid-19 crisis has above all revealed the vulnerability and fragility of many elements of European legal culture. Most of these touch on fundamental rights, far beyond freedom of movement.

There is a need for European action here, because at least two crises are still active and are not very much concerned about the Covid-19 crisis: the climate crisis, and conflicts around the Mediterranean and in the northern half of Africa. At least the climate crisis has scenarios in store that could again necessitate far-reaching regulatory interventions

in everyday life. The Corona experiences can help to discuss these scenarios at least once in public and to involve the citizens. It is more difficult to predict which scenarios the armed conflicts around the Mediterranean will present for the EU and the everyday life of its citizens.

Overall, the time has come to debate law and legal culture again, because in the long run, the rule of law that is common in Europe will not work if, in more severe crises, it cannot help but massively restrict rights while at the same time admitting massive failures in precautionary measures, understood both materially and legally. It would be helpful if the constitutional state common in Europe became a European constitutional state.