Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission

Jan-Werner Müller

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Could there be a dictatorship *inside* the European Union? If such a spectre appeared, should Brussels somehow step in to shore up democracy? Or would this constitute an illegitimate form of meddling in the domestic affairs of countries which, after all, have delegated only specific powers to Europe – and *not* empowered Brussels to lecture Europeans from Lapland to Lampedusa on how popular rule is correctly understood, let alone to be a policeman for liberal democracy across the European continent? All these are no longer theoretical questions: recent developments in Romani and especially in Hungary have put such challenges squarely on the agenda of European politics.

I have argued in a short book and in a paper for the Transatlantic Academy that it is legitimate for Brussels to act as a guardian of liberal democracy. The problem is more of a practical nature: as of now, the EU has no convincing tool kit to deal with situations which probably not many Eurocrats – or, for that matter, European elites more broadly – ever foresaw. To be sure, the repertoire of legal and political instruments the EU has at its disposal at the moment to exert pressure on Member States might occasionally work — but it can also appear arbitrary and opportunistic. I propose extending this repertoire as well as the creation of a new kind of democracy watchdog – tentatively called the 'Copenhagen Commission' – which can raise a Europe-wide alarm about deteriorations in the rule of law and democracy.

What is wrong with the existing instruments and strategies which the EU has at its disposal? After all, there is Article 7 of the Treaty on European Union, which allows for the suspension of membership rights for states persistently violating basic European values. The idea for such an article had in fact been pushed by two paragons of Western European democracy, Italy and Austria, in the run-up to enlargement, out of fear what those uncouth Eastern Europeans might do (the irony being that sanctions – though not under Article 7 – were of course first applied against Austria in 2000).[1] But nowadays Article 7 is widely considered a 'nuclear option', even by the President of the European Commission. In other words: it is deemed unusable. Countries seem too scared that sanctions might also be applied against them one day. And the very idea of sanctions goes against a whole EU ethos of respectful compromise, mutual accommodation, and deference towards national understandings of political values.

As an alternative to going 'nuclear', legal scholars have proposed that national courts, drawing on the jurisprudence of the European Court of Justice, should protect the fundamental *European* rights of Member State nationals who, after all, also hold the status of EU citizens (something of which most Europeans are blissfully unaware, alas).[2] As long as Member State institutions can perform the function of guaranteeing what these scholars have called 'the essence' of fundamental rights of EU citizens, as set out in the Charter of Fundamental Rights of the European Union, which protects EU citizens against abuses by EU institutions and which legal theorists consider in turn indispensable for European citizenship, there is no role for either national courts or the European Court in protecting the specific status of men and women as *Union citizens*. But if such institutions are hijacked by an illiberal government, Union citizens can turn to national courts and, ultimately, the European Court of Justice, to safeguard what the Court itself has called the 'substance' of Union citizenship.

This is a clever thought: the aim is not merely to bring in the European Court, but to strengthen *national* liberal checks and balances in times of political crisis. Yet the thought is too clever by half in the eyes of observers who think that a truly illiberal government will not be much impressed by rulings from Luxembourg. Other critics hold that, even if this danger can be avoided, such a legalistic response to an essentially political challenge will not do.

But then what would a properly political response look like? It has often been said that the Eurocrisis has brought about the politicization of Europe — and that it is now time for the Europeanization of politics: people have woken up to the fact that what happens elsewhere in Europe has a direct impact on their lives; what we need is, for instance, a European party system, so that different options for Europe's future can be debated across the continent. Did we not already see signs of such a truly democratic future when, in January 2012, Hungarian Prime Minister Viktor Orbán appeared in the European Parliament and openly debated his government's record?

Alas, a less desirable effect of such a Europeanisation of politics has now become apparent: the conservative European People's Party firmly closed ranks around Orbán; on the other side of the political spectrum, Martin Schulz, President of the European Parliament and one of Orbán's most outspoken critics, has defended his fellow Social Democrat Victor Ponta in Bucharest, at least initially. So it appears to be all party politics instead of an impartial protection of European standards.

So how could the EU deal with challenges to liberal democracy more effectively? First of all, Article 7 ought to be extended. There might be situations where democracy is not just slowly undermined or partially dismantled – but where the entire edifice of democratic institutions is blown up, so to speak (think of a military coup). In such an extreme case, the Union ought actually to have the option of expelling a Member State completely. Under the current law, states may decide to leave voluntarily – but there is no legal mechanism for actually removing a country from the Union. In that sense, one might identify a basic contradiction in the European polity as it has evolved up until now: every political community either has instruments for internal intervention or something like a right to expel one of its parts. At the moment, the EU has neither.[3]

A difficulty with the existing harsher sanctions envisaged in Article 7 is, of course, that it requires agreement among all Member States. So short of dramatic deteriorations in the rule of law and democracy, the EU ought to have tools available that exert pressure on Member States, but whose employment does not require a lengthy process of finding agreement among all governments. One suggestion is that the Commission begins to monitor the state of the rule of law in all Member States. It is important that such monitoring is done uniformly in all countries; while there are of course precedents in singling out individual countries for surveillance (Romania, Bulgaria), it simply sends the wrong signal – namely, one of prejudice — to target only some from the very get-go.

One might question whether the Commission can really be a credible agent of legal-political judgment. Many proposals to increase the legitimacy of the Commission contain the suggestion purposefully to *politicize* the Commission: ideas to elect the President directly or to make the Commissioners into a kind of politically uniform cabinet government all would render the body more partisan. And such partisanship makes the Commission much less credible as an agent of political judgment.[4]

An alternative to the Commission undertaking such a task itself would be to delegate it to another institution, such as the Fundamental Rights Agency, or perhaps yet another institution which could credibly act as a guardian of what one might call Europe's *acquis normatif*. Taking up a suggestion by the MEP Rui Tavares and others, I advocate creating a 'Copenhagen Commission', as a reminder of the 'Copenhagen criteria' to judge whether a country was democratic enough to begin the process of accession to the EU, and analogous to the Council of Europe's Venice Commission.

The real question is of course: *and then what?* An agency ought to be empowered to investigate the situ-

ation and then trigger a mechanism that sends a clear signal (not just words), but far short of the measures envisaged in Article 7. Following the advice of the Copenhagen Commission, the European Commission should be required to cut subsidies for infrastructure projects, for instance, or impose significant fines. Especially the former might prove to be effective, if the EU budget as such were to be significantly increased in future years (a measure included in many proposals to tackle the Eurocrisis). To be sure, this brings up a perennial problem with sanctions: they hurt populations and not the people in government. This danger is acute if one thinks of cutting EU cohesion funds – such cuts would clearly affect mostly those who are already poor. Clearly, we need to think more about what 'smart sanctions' should be in an EU context.

At the same time, all the existing tools remain in place: Member States could vote on Article 7; the Commission could take a Member State to the European Court for infringement of the treaties; the Court could protect the substance of EU citizenship; and politicians could have a serious word with one of their peers in another Member State, if they felt that the State in question is leaving the broad European road of liberal democracy.

None of this means that some of the pluralist principles and practices in the EU, which proponents of 'diversity', 'pluralism' and 'tolerance' as major European values tend to laud, have become irrelevant (or were a fiction all along): all the main actors of democracy-defense can retain something like a margin of appreciation to account for national idiosyncrasies; they can in the first instance suggest to an offending government to take seriously the idea of informal peer review and respectfully try to negotiate disputes away, etc. However, it cannot be pluralism all the way down. As one political community, the EU has outer and *inner* boundaries: where liberal democracy and the rule of law cease to function, there Europe ends.

This article also appears on the blog of the Transatlantic Academy.

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[1] Wojciech Sadurski, 'Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider', in: *Columbia Journal of European Law*, vol. 16 (2009), 385-426.

[2] Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', in: *Common Market Law Review*, vol. 49 (2012), 489-520.

[3] I thank Dan Kelemen for discussions on this point.

[4] There is also the less obvious point that every harsh criticism of a newer Member State can be seen to fall back on the Commission itself – did they fail to look more carefully before giving the green light for admission? See in this context Tom Gallagher, *Romania and the European Union: How the Weak vanquished the Strong* (Manchester: Manchester UP, 2009).

ABOUT THE AUTHOR

Jan-Werner Müller
Jan-Werner Müller is Class of 1943 University Professor of Politics at Princeton.

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