

Rescue Package for Fundamental Rights: Comments by MATTIAS KUMM

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2012-03-01T00:15:59

Hungarian

Premier Victor Orban and his ruling party Fidesz, after having received 53% of the votes in the previous election but 68% of parliamentary seats, have transformed Hungarian institutions, effectively asserting and entrenching control over courts and the justice system, the media and the electoral system to align them with the interests of the ruling party ([Jan-Werner Müller](#) and [Kim Lane Scheppele](#) have provided compelling descriptions).

This slide to authoritarianism should be a concern to constitutionalists, wherever it occurs, but it should be of special concern to EU citizens. Because Hungary is a Member of the EU, Hungarian citizens are also EU citizens, Hungarian courts are also adjudicators and implementors of EU Law, Hungarian Members of the government are also European legislators.

So what remedies do European citizens have, as Hungarians, as non-Hungarians living in Hungary or as non-Hungarians partially governed by EU laws in which Hungarian officials have participated, to ensure that their rights are respected everywhere in Europe and they are part of a community that takes seriously its commitment to democracy and the rule of law, as Art. 2 TEU asserts? Assuming that national remedies have been exhausted and have turned out to be futile and that politically the channels of political change are effectively blocked on the national level by rules drawn up to entrench the power of the ruling party, what remedies do European citizens have?

According to the [Heidelberg proposal](#) European citizens should be able to rely on their human rights as interpreted by European institutions against infringing acts of states like Hungary. The significance of such an option should be clear in light of the weakness of alternative remedies: Without such a possibility citizens could not bring an EU human rights claim based on EU Human Rights, unless the actions of the Hungarian government fell under the scope of EU Law.

They might turn to the Strasbourg court and rely on the ECHR, but besides work-load issues leading to long delays it is not clear that absent direct effect, supremacy and powerful remedies available on the EU level judgments by the Strasbourg Court would be effectively enforceable nationally.

Of course even the Heidelberg proposal relies on the cooperation of national courts. What if a judge, fearing retribution, refuses to make a reference? What if, notwithstanding the clear and manifest obligations under EU Law the national courts, packed with judges by the ruling party, simply ignore EU legal obligations in cases

where that conflicts with core commitments of party policy as embodied in national legislation?

In that case there would still be the possibility of the Commission or another state to bring a case against Hungary before the ECJ. That might not resolve the issue of a slide towards authoritarianism. But seen as a whole this is clearly a step that would empower European citizens and strengthen the European Union as a community committed to human rights, democracy and the rule of law.

Sceptics (like [Thym](#) and [Lindseth](#)) argue that we should be modest about the prospects of addressing fundamentally political problems relating to a slide towards authoritarianism through legal means focused on individuals seeking remedies from courts. They are right only in one sense: It is not enough to focus exclusively on legal remedies. It is also important to focus on imaginative ways to address these problems politically. Of course it is regrettable, even scandalous, that Art. 7 of the TEU requires unanimity (rather than, say, a supermajority) to determine that a serious threat to human rights exists in a Member State, a precondition for imposing any remedies. This reflects the ongoing unwillingness not of "the people", not of "states", but more specifically of executive branch of governments to relinquish control. Such unwillingness can be criticized, in normative terms, as just one more aspect of the capture of the European political process by the executive branch of national governments. It

should not be normatively dignified and misunderstood as part of a sovereigns attempt to secure democracy – there is no plausible conception of democracy that is protected in this way, once we take for granted the level of integration already reached in the EU.

Given this state of affairs the European Parliament, the Commission and other Member States can not effectively address the problem of authoritarian slide directly by focusing on the core issues, but are forced to articulate their criticisms in a way that focuses on concerns that "fall under the scope of EU Law", even if they are the more peripheral ones (as [Daniel Thym](#) rightly ridicules).

Even if the Heidelberg proposal should not be understood as a comprehensive European solution to the problem of authoritarian slide in the European Union, this should not detract from the fact that legal remedies have a productive and independent role to play as a way of empowering and mobilizing citizens and creating incentives for political actors to realign themselves with Europe's foundational commitments.

Even if the basic argument is legally plausible, there are details of the proposal, that would need further examination: Is it really correct to limit the competence to protect fundamental rights in case of structural deficiencies to EU citizens and exclude third party nationals? How exactly should the abstract criteria be made workable in the form of operational legal tests? How exactly should the cooperation with the ECHR be structured?

I have my own views on these issues, but these are the types of issues that lawyers can work out over time. They do not undermine the thrust of the proposal,

which deserves to be embraced as legally sound, politically aware and practically attractive.

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