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EU Policies in time of coronavirus crisis¹

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Abstract

This paper seeks to uncover the link between the current crisis in the field of migration and asylum policies and the rise of populist polarization in Europe. Provided that normative consistency serves effectiveness, the study reflects on the existing literature, selected legislative acts, and cases. Hence, criticism against the European Union's heterodetermination and inertia in the political debate is simmering. Populist phenomena all over the spectrum define the supranational policymaking, outweighing voices of inclusion and democracy, if not the very essence of the Union's value-based system. Contrariwise, liberal democracy shall not only be capable of defending itself and including the alien when the fears come true but also educating its citizens in the democratic realm before enforcement promptitude is practically imperative. All in all, primary and secondary legal norms entail adequate solutions to address the issue institutionally, subject to political determination, and courage.

Introduction

Petitio principii (εν αρχή αιτήσθαι, *circulus in probando*) describes a logical fallacy where the sentence to be proven is already included implicitly or explicitly in the hypothesis. Since the very basis of the argument needs confirmation itself, it is questionable how a contested hypothesis can extort a sound conclusion (multiple queries fallacy).

The *vicious circle* (fallacy of many queries) tends to avoid questing the hypotheses in a way that eventually “there is as much evidence pending as is necessary for the conclusion itself”. This variant is missing a sound statement and thus its circular reasoning is not understood.

Using Aristoteles' logical tools, the subsequent analysis explores the legal implications of populism and the immigration crisis within the European Union (EU). Since the study focuses on the constitutional viewpoint of these variants, it presumably coheres better to work on the legislative acquis and the relevant case law, notwithstanding programme documents, political declarations, if relevant. The aim is to uncover the inconsistency and retrogression of the Union between liberal democracy and populism. The main reasons therefore are not only the vast systematic divergence among the Member States but also the inertia of the institutions and the Court towards clear theses and straightforward commitments.

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The fallacy would roughly be as follows:

- The Union is “*founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*” (Treaty of the European Union, 2012: Article 2).
- The procedure of Article 7 TEU addressing contravention to the above values at the domestic level has been instigated only in two cases, against Poland (European Commission, 2017) and against Hungary (European Parliament, 2018). No other measure or statement unambiguously expresses disapproval of the domestic political parties' rhetoric or actions.
- The Union's populism yardstick, if any, is very limited to two Member States, and it does not profoundly affect the Area of Freedom, Security and Justice, since only in the Hungarian case scarce concerns about fundamental rights of migrants, asylum seekers and refugees were addressed (Morijn, 2019: 622).

There is an important agenda of democratic reform left aside, in order to deal with a substantially illusionary scare-gun (Howse, 2019). The brief's conception builds upon this reasoning pattern to prove the EU's myopia and explain that the ceaseless forbearance of the institutions does not enhance unity but instead endangers the entire integration process, liberal democracy and the position of individual. Consequently, the EU is not self-evidently a Union based on the rule of law, but needs to repeatedly prove this, especially when such challenges become so apparent, as in the current phase.

Part I includes all necessary background in terms of terminology, norms, as well as facts, whereas Part II underlines the fallacies by way of exemplary depictions in the legislation and the jurisprudence. The last Part concludes and offers a more optimistic view of the issue based on the historical evidence of the successful overcoming of wars and crises in the European region. Besides, there is a very adequate legal regime and constitutional legacy, subject to sincere and brave enforcement.

Approach and Results

Yet apart from the fact that several populist coalitions have appeared in the political arena, their practical significance regarding decision-making and the general orientation of EU Immigration and Asylum Law has not luckily been equivalent. This does not mean that there is no real populist threat nor that there have not occurred certain ambiguous backslides towards nativism. It is argued that the

EU has maintained a phobic stance risking its value-based system instead of bravely confronting Member States in compliance. Notwithstanding the CJEU's significant effort to balance interests and tame confrontations, the following analysis suggests that there is a case of auto-censorship stemming from the overall heterodetermination, meaning monopolizing the discourse.

Accordingly, the aim of this section is to introduce a twofold enigma. If the EU constitutes a legal order founded in values, such as the rule of law and human rights, it is also important to (re)read the political discourse accordingly. In the case of Asylum and Immigration law policies holding great controversies but also cruciality for the integration process, the legislature and the judiciary ought to safeguard primary law.

Conclusion

Notwithstanding the rejection of formal constitutionalism within the EU, the small c (Shaw, 2017), manifests a factual hierarchy of norms. As repeatedly declared by the Court³ during the Heroic Period (Wiler, 1991), it is not only the constitutional charter⁴ but also the reality and the very essence of a provision that manifest the constitutional significance of a matter, such as the rule of law, the sincere cooperation, or even entire policy areas, such as the internal market or the area of freedom, security and justice. This is internally observed in Article 6 TEU, where international agreements and constitutional traditions are elevated to the level of constitutional supremacy. More interestingly and based on the above multi-faceted sources of inspiration, the rule of law in this excursus of comparative constitutionalism entails several components that realize liberty and the respect of human rights. Liberal constitutionalism symbolizes a political community owned by the people, within which fundamental norms such as human rights, play a principal role and within which there is always a question of fairness, justice, and effectiveness. In the European normative order, the endeavours of modern constitutional scholarship, challenge the power of supranational political institutions by demoting the formal structure and promote cohesion. The European legal order is a very clear example where this type of interaction between norms and norm-making occur and mutate. And significantly, the Area of Freedom Security and Justice creates a subfield of this mutation. The impact of the policies on the individual (Thym, 2016), be it the EU citizen or the persecuted individual, as well as the State as such, advance them to the core of the legal order.

Liberal constitutionalism either descriptively or normatively comprise of governmental institutions and powers, notwithstanding its inherent grievances balances popular sovereignty in an operational

³ See: Case 294/83, *Les Verts*, ECLI:EU:C:1986:166, para. 23; A. Rosas and L. Armati, p. 37.

⁴ See: *Les Verts*, ft. 2.

manner. It does so to preserve its own tools and ideals, namely individual liberty, non-discrimination, and the rule of law. The rule of law offers the comprehensive disciplinary proprium behind the inherent divergence of twenty seven legal orders, in view of legitimizing the exercise of supranational public authority. Hence it is the very *acquis* to defend (Kochenov, 2019a), the absence of which renders customs or monetary union pointless (Bogdany, 2009) and in the long term deemed to fail (Bartels, 2009).

Primary EU law defends the disadvantaged (Mestmacker, 1994) who mostly fear the implications of disengagement from the assurance of human rights and the rule of law. In that sense, EU law pulls matters out of the exclusive grip of politics and negotiation and subjects them to a system of integration through law. The fragmentary and sparsely written character of the Treaties appoints the Court to pave the way. The Court's interpretative methodology has upright functional consequences for fashioning political choices about the nature of the policies, i.e., the policies on border checks, asylum, and immigration. Replacing national regulation with a single EU model carries a profound re-regulatory potential. Policing has sharpened under the claim to have created a system of special protection through the means of supremacy and direct effect, supplemented by State and private liability and imbued by the principles of good administration and fundamental rights (Habermas, 2015).

On the contrary, populism encompasses a series of concepts and initiatives that put into retrospection the above values. It questions their existence, their creation, and/or their validity. It stores resentment against dissenting statements but ultimately contradicts itself by trusting the same accused institutions for its hijacking into political hierarchy. Ironically, democracy is indeed destiny (Howse, 2019), learns its lessons and reverses even the most painfully losing battles.

In normative terms, although an obscure and diverse term, populism is also a discourse and a strategy that can be classified in the following mutations:

- i. populism as democratic determinant, i.e., popular sovereignty, unreconcilable social antagonism;
- ii. populism as a means to achieve political aims, i.e., sovereignty;
- iii. populism as substantial ideology relying on certain beliefs, i.e., against elites (Kaltwasser et al. 2018).

By and large, it is of lesser value which mutation applies in every particular case, as they mostly tend to overlap. It is, nevertheless, essential to acknowledge how intrusive populism is in the liberal *status quo* (Mudde & Kaltwasser, 2018). It induces “ideational” hatred among social partners, targets the foreigner and poisons tolerance and inclusion. The division among “the pure people” versus “the

corrupt elite,” therefore, affects not only the institutional balance in the domestic and the supranational level, under the claim of “popular” (Mudde & Kaltwasser, 2018) sovereignty precedence, but most importantly deprives the individual from the refuge to an independent judicial body.

The moralized form of anti-pluralism and antagonism is not always clear from the outset. It recognizes, nevertheless, in almost all cases, the citizens as the only source of legitimacy, by delegitimising established authorities and mechanisms staffed by and serving the elites.

Implications and Recommendations

As promised in the introduction, the approach in this section will be more confident and future oriented. Not aligning with the very common habit of utterly identifying “elephants in the room,” the main argument hither is that there is enough and adequate legislation to address populism.

First, Article 7 TEU mediates between societal and legal discourses concerning backsliding in the rule of law within the domestic legal order. For much of the academic literature (and unsurprisingly for the politicians) the procedure is “dead”, as not only has it been inactive in several instances where it appeared applicable, but also it has led to another *quid pro quo* rather political features or bilateral (Kochenov, 2019b: 5) nexuses in the already complex multilevel institutional relations. Further, the procedure as such is rather complicated but still a realistic option in the cases presented above.

It contains the following procedural steps, chronologically interdependent:

- i. Reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission
- ii. Hearing of the Member State’s authorities
- iii. Recommendations on the alleged issues, if possible
- iv. Council’s determination of a “clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU” after consent of the European Parliament thereon.
- v. Observations by the Member States on the “persistent breach” of the values enshrined in Article 2 TEU
- vi. Council’s determination of the existence of a “serious and persistent breach” by unanimity rule, after a proposal by one third of the Member States or by the Commission
- vii. Decision on suspension of voting and other rights in the Council by a qualified majority, while Union law remains fully applicable and binding

- viii. Revocation of the punitive measures following pertinent assessment of the situation and the eagerness and success of the national authorities in addressing the determined breaches.

While inflexible in terms of the necessary majorities, the concept signifies a fine border line beyond which derogations from the very core of the EU cannot be tolerated. It also holds a self-precautionary effect of what the Union aspires to be by portrays of a stigmatizing effect to the “foreign body” within the same “Union” (Kochenov, 2019b: 6), more intensively than the infringement proceedings can do. In the two current cases of the Polish and Hungarian regimes, the packaging of discontent in policy areas implicitly conferred to the Union, formed an uncontrollable nativist, anti-liberal stance, flirting with substantial coup by irrationally evoking the popular element as the sole legitimizing factor of clearly unconstitutional, fundamental rights-restrictive initiatives. Either way, it appears to be the sole recourse, as contrarily to the enforcement mechanism of Articles 258 - 260 TFEU, within the framework of general principles of EU law there is no other effective mechanism (Kochenov, 2017).

From another perspective, the main actors of the political realm, the political parties are themselves bound by Article 2 TEU. Regulation 1141/2014 on the statute and funding of European political parties and European political foundations (EU-Euratom, 2014) requires full adherence to the values enshrined in Article 2 TEU for the funding of European political parties and European political foundations *en bloc*. Although contested (Morijn, 2019), the opting for a legal act of general application, binding in its entirety and directly applicable in all Member States⁵ sends a clear message on the significance of the issue for the EU democratic project. During the values verification mechanism the adherence to the value package is tested⁶. “Manifest and serious breach” in the course of “programme and activities”⁷ as a standard of review seems to correspond to the aforementioned case of Article 7 TEU. It is unlikely to explicitly contravene Article 2 TEU. It is therefore necessary to ensure policy implementation in that value direction.

Whether the adherence to the rule of law is destiny (Howse, 2019) remains unsure and of unpredictable durability. Safeguard mechanisms in the judicial proceedings for individuals and assurance of their enforcement by the institutions and the Member States themselves expands the horizons of policing towards a democratic ethos of self-control, introspection and openness. The EU overlooking of the undesirable effects of communautaire commitment does not affect only the backsliding countries, but also endangers the soundness of future measures, as well as disintegrates

⁵ See: Article 288 para. 2.

⁶ See: Recital 12, Articles 3(1)(c) and 3(2)(c).

⁷ See: Article 3(1)(c).

the citizens from the Union. The self-vindication of the EU's assertion to the rule of law, as per the first variable looming over the present study necessitates evidential materialization.

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