Fight Fire with Fire - a Plea for EU Information Campaigns in Hungarian and Polish

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"Be great in act, as you have been in thought! [...]
Be stirring as the time, be fire with fire,
Threaten the threatener, and outface the brow."
William Shakespeare, King John

Even though this advice to King John comes from the Bastard, I propose that this play of Shakespeare's bears some wisdom for the rule of law and current crisis of democracy in the EU. While proposals to address this crisis made by lawyers often rely on the judiciary,[1] I find that in order to protect future majorities[2] we should also take into account to address the people today. We have witnessed various (electoral) campaigns directly discrediting individuals or groups in Hungary. The latest campaign has led to a serious dispute between the Hungarian FIDESZ party and the European People's Party (EPP). According to recent news reports, the EPP has established three conditions to be fulfilled so that FIDESZ can stay a member of the EPP. This post suggests that we should not put too much pressure on the judiciary to fix the rule of law and democracy. Neither should we put too much hope for positive developments on (European) party politics. Rather I suggest that the EU should start speaking directly to the electorate via EU information campaigns in Hungarian (and Polish). The 2019 European Parliament elections might provide an adequate framework for such campaigns.

The difficulty of measuring the rule of law and democracy

Knowing what is wrong is essential for analyzing, judging, and influencing the national organization of the rule of law and democracy if the EU is meant to correct deficiencies. Much of the discourse on the crisis of the rule of law already knows what is wrong and what things should be like at their best; only how to deal with it and what might work seems to be a matter of debate. Yet, it is dangerous to hold that "[we] know it when [we] see it", to paraphrase Justice Potter.[3] This is even more so the case when the core of the problem is not an unfortunate accident or mistake but has some deeper underlying causes. In order to understand and judge what is going wrong in an EU member state from an EU perspective, we need a scheme which fits the purpose. We need a scheme according to which we can judge the organization of core issues of the different legal orders of EU member states.[4] The immensely important but, at the same time, notoriously vague EU values enshrined in Art 2 TEU are an important starting point. Yet, as they stand, they do not constitute a sufficient basis to have an impact.

The need for a proper legitimacy conception

Addressing the people is important in order to prevent another EU legitimacy deficit when interfering with what constitutes the core of EU member states' legal orders, namely their organization of the rule of law

[1] See only recently on this blog von Bogdandy/Spieker, Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values, VerfBlog, 2019/3/06, C.f., the proposals in Closa/Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); Jakab/Kochenov (eds.), *The Enforcement of EU Law and Values* (OUP 2017).

[2] See Möllers/Schneider, *Demokratiesicherung in der Europäischen Union* (Mohr Siebeck 2018).

[3] Justice Potter Stewart concurring opinion, US Supreme Court Jacobellis v. Ohio, 378 U.S. 184 (1964), p. 197:. „I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

and democracy. It is true that all EU member states agreed to the values of Art 2 TEU when joining the EU. Yet, Art 2 TEU on its own does not provide an adequate basis for interfering with core issues in EU member states. It simply presumes that these values "are common to the Member States". The Art 7 TEU procedure has, so far, not provided an adequate legal basis to act either in order to safeguard the rule of law and democratic principles in EU member states in cases where these principles are endangered. What is important, thus, is a legitimacy conception which is strong enough to carry EU interventions in core issues involving EU member states on its back.[5]

Addressing the people in their mother tongue - EU information campaigns

EU information campaigns in Hungarian and Polish might intuitively look like massive interference in the sovereignty of EU member states. Yet, this intuition might be a deceptive first impression. First, such information campaigns must not attack populists, let alone member states directly. On the contrary, such direct attacks would fall into the trap of giving the floor to populist topics and thereby accepting their framing.[6] Hence, the envisaged EU information campaigns should rather outline and propagate the positive sides of the EU, thereby strengthening core EU values. Focusing on positive topics and simply ignoring the negative campaigns led by their opponents was a successful strategy employed by democrats in the US midterm elections when talking about the need to ensure affordable health care instead of the Trumpian wall.

Second, information campaigns are less intrusive than direct judicial interventions, which are not fully backed by EU treaties, or massive financial sanctions, which might easily hit those who should actually be convinced of the supremacy of EU values, or the suspension of voting rights. Yet, such campaigns are very likely to provoke resistance. For instance in Hungary, the opposition party Jobbik launched a campaign against the government in 2016. This was answered by the ruling party with a new statute prohibiting "political campaigns" except for immediately before parliamentary (domestic and EU) and local elections.[7] Such resistance, however, demands confrontation and should rather take Shakespeare's advice seriously.

A fitting framework might be EU actions relating to economic, social and territorial cohesion according to Art 174 (1) TFEU in connection with the objectives of the EU outlined in Art 3 (3) TEU. But, choosing the right budget and legal basis for action might be tricky. What is for sure is that despite the title of this post, such information campaigns should proceed with tact and sensitivity, rather than adopt a schoolmasterly and accusatory tone. The message to be conveyed is that we Europeans belong together and this "we" is constituted by fundamental EU values rather than "you did something wrong".

Finally, and most importantly, it is of utmost importance to address and convince those who are affected by the rule of law and democracy crisis; namely the people in the EU member state(s) concened. If the red line is set to ensure the possibility of changing future majorities, it is hard to imagine how this should be secured without including the people. In other words, we should aim at winning hearts and not only minds. On the long run the commitment to respect and live core EU values has to come from the people. An external mechanism alone, no matter how clever and wise it might be, will not do the job. Addressing the people in their mother tongue might be a very first step towards this goal.*R*

[4] In a forthcoming piece I propose to use a transnational variation of what Christoph Möllers coined „separated powers" („Gewaltengliederung"). See Lando Kirchmair, Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zur transnationalen Gewaltengliederung, *Zeitschrift für praktische Philosophie* 1 (2019).

[5] For another forthcoming piece where I argue in favour of an interdisciplinary conception of legitimacy, see Lando Kirchmair, Legitimität und Realität. Vorüberlegungen zu einer interdisziplinären Legitimitätskonzeption für das EU-Rechtsstaatlichkeitsverfahren gemäß Artikel 7 EUV, in: Zucca-Soest/Herbst (eds.), *Legitimität in einer multidimensionalen Welt* (forthcoming 2019 with Nomos in the series „Staatsverständnisse").

[6] See, for instance, Elisabeth Wehling, *Politisches Framing. Wie eine Nation sich ihr Denken einredet – und daraus Politik macht* (Herbert von Halem 2016).

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[7] The current Hungarian anti-EU campaign, however, is not qualified as a "political campaign" according to Hungarian law, which is provided by an exception in the law holding that the government can launch „information campaigns" any time.