If the Message Doesn't Suit, Shoot the Messenger

The Attack on Dimitry Kochenov

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In Autumn 2019 a Dutch news programme claimed that Dimitry Kochenov was 'involved' in the 'passport trade'. He was associated with two organisations that lobbied for citizenship by investment (CBI) and he had advised the Maltese government on this. The programme caused enough fuss that there were questions asked in the Dutch parliament, and Kochenov's university felt the need to set up an investigation.

The programme was a personal attack. That is to say, it did not set out to examine whether CBI and the Maltese programme can be justified, perhaps putting Kochenov across the table from an expert with opposing views and asking them both critical questions. Rather, it implied that his actions were illegitimate and inappropriate to a professor at a university. A fair number of Dutch academics, to judge from Twitter, private conversations, and blog comments, were inclined to agree – although many more were not.

I see this as raising a question of academic freedom. When do an academic's views or actions put them beyond the pale? Traditionally we engage with the substance of views that we disagree with. We all have colleagues who advocate laws and policies which we would regard as harmful to society. Yet generally, we do not think that this undermines their professional position. We simply write our articles, saying why they are wrong about the EU, or competition law, or whatever it may be.

Purists might say that views should not be paid for: external payment undermines academic objectivity, delegitimating the researcher and their research. Aside from the problem that such posts are ubiquitous, this misunderstands the nature of legal research. Unlike empirical sciences, which rest on potentially falsifiable data, lawyers make arguments built on publicly available documents. Their motivation, their ethics, their character, are all irrelevant to the quality of those arguments. Like novelists or poets, the value of what they do depends on the way their words fit together, not why they write, nor what they do in the afternoons.

Motives might be, however, more important to the extra-curricular activities themselves. When academics intervene in society and politics perhaps, as publicly funded figures, they should do so in good faith: their views may be their own, but they must act for their understanding of the public good, not just their self-interest.

Judging motives would not be a fruitful path to go down. It underestimates the complexity of what is at stake in any action. People may act for those they dislike because they approve of free speech and representation, or they think that disruption and revolution are desirable, or perhaps because opponents are even worse, or bigger issues are at stake. Who is to say they are wrong? In practice a view that academics may advise the local sports club or charity, but not the government of Malta, would just collapse into 'my causes are good, yours are illegitimate'.

Nor am I convinced that payment helps us decide what is acceptable. The assumption that money is uniquely corrupting or influential seems without much basis. Particularly for professors who have comfortable and secure salaries, glory and status may be quite as seductive as a few thousand extra euros. Should we dismiss academics who accept positions for the love of acclaim or of an audience? Is the campaigner for social justice, active in NGOs and good causes, to be dismissed because vanity drives her as much as compassion? The view has a certain biblical beauty, but as that implies, asks too much wisdom of those

who must play judge – and perhaps too much saintliness of everyone.

Clearly, if we are to decide which extra roles are acceptable for an academic, we need a more objective test than the purity of their heart, and a more meaningful one than whether they are being paid.

Is it publishable?

There are, I think, just two ways of drawing a line. One is to ask whether there is a defensible argument in favour of their actions. The standard might be 'is it publishable?' If so, then it seems to me that these views, and the corresponding actions, are ones that an academic may have, and the response is to argue against them, not to attack the person. The other way is simply to exclude, as we do with free speech, the most extreme, offensive or socially threatening standpoints. This should, of course, be a last resort, and in practice it is related to the first approach: those standpoints we exclude are those for which no adequate arguments are thought to exist.

The attacks on Kochenov implied that his activities were of this last type – beyond rational defence. This, however, is utter nonsense, showing a simplistic lack of understanding of what is at stake, as well as of what he did.

Regarding CBI, it is far from evident that for a nation to accept a million euros in exchange for a passport is irrational, unethical, or hard to understand. It is a serious contribution to that society, and perhaps a much needed one. Certainly, there are issues of potential corruption, and of externalities for other states (As the Netherlands, with its tax policy, ought to understand). One may also worry about what it does to national community and identity. But on the other hand, the principled rejection of CBI is often associated with a sacralization of citizenship, which is in turn a cousin of ethno-nationalism. When we say that national belonging is special, and can never be sold, we entrench a form of belonging which has been the cause of much of Europe's historical misery. Frankly, without being any fan of the Maltese government, those who abhor the very idea of CBI frighten me, for I see echoes in them of a danger for the continent that is far greater than anything the sale of passports will create.

Kochenov's scholarly work is driven by his concern with how citizenship may become a tool of exclusion. He does not advocate CBI as such, but takes the view that it is a legitimate choice that countries may make – and he robustly investigates the implicit presumptions in the arguments of those most fiercely against. He has been consistent and principled in his views since the beginning of his career, and while plenty disagree with him, he has a considerable academic following and has established an important debate.

For him to be involved with Henley and the IMC seems to me no different from the labour lawyer who works for a trade union, the liberal free-marketeer who works for a commercial law firm, or the justice campaigner on the board of a human rights NGO. They are all, it is worth remembering, lobby groups: organisations that exist to pursue a cause, whether it is their own profit or the wellbeing of the vulnerable. Each of these academics proclaims in the realm of practice and policy the views that they defend in scholarship. Kochenov has always been quite open about his involvement with Henley and the IMC, and it is quite compatible with his research.

For many though, it is working for Malta that crosses the line: the accusations of corruption, and the murder of the journalist Daphne Caruana Galizia make their CBI policy particularly controversial. Yet even here, there is room for difference. The government is democratically elected, and even if much of the money is lost in corruption the policy may still serve the Maltese people. How many children have been educated or treated with money from foreign millionaires? It is too glib and easy to think this does not count. A reasonable person could take different positions on whether Malta should (be allowed to) have their policy, or on whether it should be closed down, or just cleaned up.

In any case, Kochenov's involvement with the Maltese government was to give advice and representation on the question of competence: whether the EU had the power to intervene. That is an abstract and important question of law with implications far

beyond the Maltese question, and without doubt an entirely legitimate issue to consider. If the Commission had got its way, and established a competence to limit Member State nationality policies when, for example, they create externalities for others, it would have been the first step to wider interventions. It seems unlikely, given their own idiosyncracies of nationality law, that the Netherlands would want this. One hopes that they are grateful to Kochenov for successfully arguing their view.

Some seem to think, however, that it is wrong *per se* to advise a corrupt government, or about a bad policy. That is an interesting point of view, but hard to maintain. The rule of law requires that everyone have access to lawyers. Some may refuse to advise parties they dislike – although that violates professional ethics in some jurisdictions – but this self-indulgence is possible because others will step in. Otherwise, the legal system collapses. *A fortiori* in a case such as this one, where Kochenov was not asked to defend the policy as such, but to address the division of powers between Member States and the EU.

Attacking Kochenov for all this, seems to me, on the whole, a form of intellectual laziness. He takes views that are critical of the way society is organized, and contrary to the public and political orthodoxy. That causes unrest when it is noticed, and creates the risk that questions will be asked about whether academics should have such freedom or such status. In a sense, he threatens us all – by being a little dangerous.

However, for that same reason, we should treasure his sort. He challenges and disrupts conventions, confronts us with the consequences of unexamined assumptions, and pushes us outside our comfort zone. His arguments, whether or not we are fully persuaded, are always thought-provoking and take us a little further. This is what academia should be about. To suggest that he should not act according to his well-thought through principles, or to attack him for defending the unpopular, seems to me a betrayal of academic integrity.

Post-script on the investigation

The investigation found that Kochenov had broken internal faculty rules, but not that there was anything inherently wrong with his involvement with Henley, IMC or Malta. The summaries by the university, and by Professor Colombi Ciacchi, in the comments on this blog, are accurate. The representations by the Nieuwsuur journalists and Luuk Mulder (also in the comments) are not. The investigation does not support the insinuations made in the initial programme.

The investigator's report did contain two substantive criticisms. One was that Kochenov had created a conflict of interest. However, weighty though this sounds, the conflict they identify appears to be a purely financial and internal one, concerning whether he should have kept the fees he earned himself, or passed them on to the faculty – which appears to turn on details of faculty rules. The finding of a conflict does not, therefore, imply that his advice or speaking was inappropriate as such – indeed, in addressing the division of profits it appears to suggest the opposite.

The other criticism was that he had damaged the reputation of the university by engaging with a sensitive matter. That is a very troubling claim, unless the university wishes to be known as one that does not address sensitive topics. In that case it may be time for new management. More plausibly, its academic reputation has been damaged by its failure to defend Kochenov more actively. The university authorities did not seem to be aware of their responsibility to protect professors who research difficult subjects, take inconvenient views, and are attacked for doing so. On the other hand, their non-confrontational approach may well have kept the peace with local politicians, journalists and some academics, for whom an outspoken and successful foreign colleague is an unwelcome disturbance. Maybe the question is just 'which reputation – with whom?'

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