Verfassungsblog
ON MATTERS CONSTITUTIONAL

Systemic infringement action: an effective solution or rather part of the problem?

Paul Blokker

05.12.2013 doi: 10.17176/20170930-151503

Kim Lane Scheppele suggests a comprehensive, holistic approach to deal with prominent challenges to the basic principles of the European Union. I very much sympathize with this idea, but believe a purely legal approach in itself is not sufficient (and might even be counter-productive). I should start with the premise that as a political sociologist rather than a lawyer or legal scholar, I might interpret some of the dimensions of the Hungarian problem as well as the relation between European integration and democracy in a different manner than some legal scholars would. On the one hand, I share most if not all the worries about 'democratic backsliding' in Hungary and equally have concerns about other countries in the region (e.g. Romania) (see my *New Democracies in Crisis?*). I tend to agree wholeheartedly with the view that democracy and the main principles on which it is based need to be vigorously endorsed and – even better – expanded within the context of the EU. On the other hand, I lack an unconditional faith in the role of legal-technocratic institutions, expertise, and EU law in single-handedly supporting or even saving democracy (a concern that some legal scholars – e.g. Wojciech Sadurski or Floris de Witte – admittedly share). Most of my observations below will therefore engage with the nature of the idea of a 'systemic infringement procedure and the extent to which it addresses underlying, more structural problems of democracy in the European context. Below, I will first relate the idea of a systemic infringement procedure to a legalistic approach, and then question whether a legalistic cure is sufficient to address profound democratic problems of member states. I then relate Hungarian constitutional populism to legal resentment and a structural problems of contemporary democracy and conclude that the Hungarian disease is part of a wider European disease.

The Hungarian 'disease' and its cure

Scheppele argues that the main problem is that there are 'Member States that do not longer reliably play by the most fundamental rules' and show signs of a 'disease', which needs to be 'eradicated'. There is no doubt that Hungary's 'counter-constitutional turn' and related law-making process poses a clear series of threats to Hungarian democracy as well as to core principles of the European integration project. But I am not entirely convinced that a 'systemic infringement action' might fully address – and therefore pose an 'effective treatment' – of the Hungarian 'Article 2 TEU disease'. In this regard, I share Sadurski's and others' misgivings regarding attempts to 'find a purely legal remedy to an essentially political problem'. The solution offered appears to correspond to a widely shared – I would call it legalistic – tendency in Europe (as well as elsewhere) that assumes that political problems can be resolved by taking them out of the political sphere and turning them into legal matters. In this case it means that the complex Hungarian democratic problem is translated into a set of specific, concrete violations of particular provisions of EU law, which together constitute 'a systemic breach of basic values'. This systemic breach would be signalled by the European Commission to the CJEU, which would then need to confirm a systemic pattern of violations. The subsequent infringement procedure would have to ultimately result in a 'systemic compliance' on the part of the deviating state, which, if not complying, could be sanctioned by for instance a fine in the guise of withholding EU funding. According to Scheppele, her systematic infringement procedure avoids the traps of a political procedure. Indeed, the matter at hand is 'preeminently a legal question', as 'the question is

whether a Member State has systematically violated its treaty obligations through its own laws or practices'.

Legalism

What stands out in this solution is its legal-technocratic nature, the type of non-accountable, technocratic – EC, CJEU – actors involved, as well as the diagnosis of the disease as largely about the violation of treaty obligations. My concern is that there is, in this, a general risk of reducing profound democratic problems to measurable 'constitutional problems areas', but thereby ignoring deeper-lying democratic questions (an issue raised for instance by Bogdan Iancu in his discussion of Romanian post-accession constitutionalism). I will leave aside here the question of whether the Commission is ncessarily the right 'whistleblower', not least since its views have in some cases been strongly contested by domestic civil society (as in the case of the Romanian crisis of 2012). Here, I rather want to raise concerns regarding a creeping 'scientization of politics', as Habermas has described it some decades ago, and a trend that shows some affinity, that of a 'juridification of politics'. As has been often observed, a general depoliticization is not least evident in the current EU crisis management strategies. The problem is that ultimately highly political, contestable and contested matters – such as the meaning of the rule of law or democracy (see for instance a recent study by the CEPS) – are turned into legally verifiable facts and subsequently treated as resolvable purely through the legal process. My concern is that this strategy is paradoxical and risks becoming counter-productive: the attempt to restore pluralistic democratic politics and the rule of law takes the form of a top-down imposition of supposedly objective standards and principles. If we understand a vital democracy as being ultimately grounded in the common authoring of their own laws by the members of a political community, then such an imposition might enhance rather than diminish political tensions and conflict. A systemic infringement action might then possibly lead to temporary compliance to EU standards and principles, but an underlying, deeper problem, that of a fragile democratic system only weakly rooted in wider society, might be left untouched.

Legal resentment

What is more, and if I am not mistaken, a technocratic-legalistic constitutional approach is exactly one of the political tendencies Hungarian constitutional populism has been reacting against. I have called this 'legal resentment' in my book *New Democracies in Crisis?* Legal resentment inter alia involves an emphasis on the primacy of (majoritarian) politics, a rehabilitation of a historical rather than liberal-universalist constitution, and skepticism towards the latter. What is significant, I believe, is that a strong emphasis on a liberal or legal constitution grounded in a European and universalist understanding exactly characterizes the Hungarian democratic pathway until 2010. Scheppele herself referred once to the pre-2010 Hungarian Constitution as 'a human-rights-oriented universalist liberal constitution'. What appears puzzling is that Viktor Orbán's constitutional populism could emerge in a system characterized by a strong legal-constitutional architecture and with one of the strongest guardians of constitutional democracy in the world, the Hungarian Constitutional Court. Please do not misinterpret me here, I am not trying the rehabilitate the populist counter-reaction. Rather, I am trying to diagnose what might be some of the deeper origins of the disease. The emergence of Fidesz's constitutional populism reflects deeper problems of the post-1989 Hungarian democratic regime that have to do with a structural gap between politics and society, a mutual distrust of political elites and citizens, and an absence of opportunities for real identification with and participation in politics. In short, populism emerges because politics is seen as something external and constraining, rather than as an emancipating force for citizens. But the populist answer evidently only offers pseudo-solutions and a myth of a People-As-One, while in reality distancing people even further from politics. Indeed, the Fundamental Law was hastily adopted without significant public debate and led to various restrictions of possibilities for civic political involve-

ment (as in the abolition of the 'actio popularis' or the absence of a referendum on the Fundamental Law).

A European disease

I agree with those that have argued that this disease is not merely Hungarian, but European (see Jiri Priban, Marco Dani). As Floris de Witte put it 'The problem of democracy in Europe is a lack of voice'. And I further agree with him that 'our solution must serve to enhance both voice and political conflict within the political process'. If deeper reasons for the Hungarian disease indeed have to do with structural problems of a democracy that does not respond (anymore) to emancipatory claims, then it seems to me that the 'systemic infringement action' is only a partial answer. It might do the trick withprotecting rights, but it appears less effective in stimulating identification with constitutional democracy, reigniting pluralistic politics, and spurring robust citizen engagement. A holistic answer will have to include empowerment of the citizens, the promotion of political pluralism (empowering weak oppositions and minorities, not only judges), and the stimulation of (innovation in) democratic engagement by citizens. This also means that Scheppele's emphasis on the importance of a 'multi-institutional process' – which I fully share – might need to expand to include domestic oppositional groups and civil society organizations that attempt to oppose illiberal tendencies from the ground. In a related way, a holistic answer might involve institutions à la a European 'actio popularis', which would allow local 'whistleblowers' to take European action against domestic illiberal tendencies. An answer to the Hungarian disease could then also be an answer to the European disease.

In sum, I share the concern that the Hungarian crisis needs a comprehensive response. But I also worry that a legalistic approach would not be sufficiently comprehensive and self-reflexive, and might actually become part of the problem. That is, it might actually strengthen a European disease, that is, an obsession with a continuous and unreflexive Enlightenment quest for rational mastery, which however tends to provoke evermore disenchantment and delegitimisation, and might result in its own undoing.

ABOUT THE AUTHOR

Paul Blokker

Paul Blokker is Full Professor of Political Sociology in the Department of Sociology and Business Law at the University of Bologna.

SUGGESTED CITATION

Blokker, Paul: Systemic infringement action: an effective solution or rather part of the problem?, Verfassungsblog, 05.12.2013, doi: 10.17176/20170930-151503.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170930-151503.