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AVRIL
2011

PUNITIVE EUROPEAN POLICY: a view from the North

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In the wake of recent blips in the Euro- and Schengen zones, northern member states want to see new forms of conditionality and sanction introduced to EU law. It has unleashed a chorus of disapproval. Such policies would, say critics, not only reinforce the unfairness inherent in many EU rules. They would also have less to do with deterrence than with straightforward retribution: northerners quite simply want to punish other members for what they see as moral failings. But is this so bad? Punitive policies may be messy and unfair, but they are an overdue response to a political system that is oblique, technocratic and conflict-shy. Dabbling in mutual punishment is not a perversion of the European dream but a perfectly healthy phase in the EU's development.

The end of mutual trust

Northern EU governments suspect that they have been the victims of free-riding, moral hazard and deception at the hands of their partners. Their suspicions focus on the common European currency and the EU's passport-free travel zone. There, interdependencies between member states are high but governments retain considerable national regulatory discretion. Unsettled northerners wish to see an end to that gentleman's agreement known as "mutual trust" under which each government's sphere of autonomy is respected. They will now monitor more closely one another's implementation of EU rules as well as the prosecution of national policies with implications for EU cooperation.

The enlargement of the EU to 27 has stretched these governments' tolerance to breaking point. The disparities highlighted by enlargement have sunk the myths of "convergence" which formerly nourished hands-off intergovernmental relations. The prospect of Romania and Bulgaria acceding to the Schengen Zone has, for example, done more than merely highlight the crime and administration problems in those two countries. It has forced northerners finally to face up to border and immigration problems in Greece, long a Schengen member but until now physically separated from the bloc.¹ Meanwhile, the Euro-crisis has shown northerners that the process of integration as currently constructed will not overcome regulatory disparities.

This penchant for control is associated particularly with Germany, which has become the unsmiling face of punitive Europe. However, it is not alone. The Finnish government has presented itself as 'more German than the Germans' on the issue of financial bail-outs—something that is only likely to increase given the True Finns' position on the subject and their nearly 20% share of the vote in the recent parliamentary election. The Dutch government too proved a key ally to Berlin last year when the conditions for financial assistance were formulated. For its part, France has seemingly forgotten that its role in the Franco-German tandem is to represent

1. N.N., "France blocks Romania, Bulgaria's Schengen bids", Euractiv, 9th December 2010, www.euractiv.com

southern European states to an otherwise uncomprehending Germany, and has failed to offer a foil. Even bailout-recipient Ireland has shown signs of aligning itself with the EU's new punitive mood, glad to be viewed merely as inexperienced rather than downright bad.

The beginning of mutual control

One expression of this new mood is the resistance by northern governments to calls for "solidarity". Their partners, northerners suspect, cry "solidarity" to demand transfers of resources, without giving donors a say in how these are used. They view Malta's recent behaviour as exemplary of this: back in March, Valetta reportedly called for a rapid intervention by European border experts to help it deal with its immigration crisis. Like Italy before it, Malta presented the situation as acute. Not only, however, did Malta make such calls before the crisis had even materialised, it did so with the provision that it should not be not subject to the usual legal constraints applied to interventions. Days later, it attempted a similar manoeuvre, this time calling for other member states to offer temporary protection to irregular migrants landing in Malta. Whatever their merits, Malta's calls met with stony silence.²

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Indeed, northerners have replied with calls of their own, this time for new conditions to be tied to the transfer of resources. The northerners' desire for rules on macro-economic discipline to be attached to financial bailout packages has attracted most attention. But the introduction of conditionality mechanisms in the EU's other redistributive policies is also being explored. Austrian EU Commissioner Johannes Hahn is mired in a debate about making the EU's regional and cohesion policies conditional upon recipients' budgetary and economic discipline. It marks a distinct change of course for the EU. As the former Regional Policy Commissioner, Polish MEP Danuta Hübner, notes: such mechanisms would likely focus disproportionately on certain states, and would clash legally and politically with the original goals of this policy field.³

Undeterred, northerners are also placing greater emphasis on monitoring policy implementation, with transposition failures drawing sharper sanctions. The current "Schengen Evaluation Mechanism", for example, has been in place since 1999 and al-

lows Schengen members to check that each is faithfully carrying out the security measures necessary to offset the removal of border controls. As the Commission has noted, the 1999 mechanism is key to the "full mutual trust" between member states, but has weaknesses in terms of its "methodology and use of risk analysis".⁴ Translated, this means that member governments have traditionally been soft on one another, failing to highlight the obvious weaknesses in each other's border defences in common risk analyses. The latest proposals for the reform of the mechanism look set to change this: not only would the new controls be more intrusive than their predecessors, they may actually be adopted thanks to the fervour of northern states.

Northern members are also introducing leverage where formerly there was none. A case in point is the vexed question of Romanian and Bulgarian accession to the Schengen Area. February's meeting of home affairs ministers saw France and Germany reiterate their concerns over Romania and Bulgaria's failure to combat corruption and cross-border crime. The two hopefuls will be prevented from joining the Schengen Area until they have cleaned up, even though anti-corruption efforts have little place in the official Schengen-accession criteria. This blocking manoeuvre came in the teeth of opposition from Poland, the Czech Republic, Greece, Latvia and Slovenia, which all stressed the fact that Romania and Bulgaria had

faithfully followed the accession criteria and should not now be subject to new rules. But this counterattack only spurred Austria, Denmark, France, Germany, Sweden and Schengen-member Switzerland to renew their calls for greater scope to punish and suspend delinquents once they have joined.

Criticism

The motives for such moves seem clear. In more clement times, EU governments launched a small number of highly ambitious political projects such as the Euro and Schengen Area which touched upon core attributes of national sovereignty. Governments were not prepared for a wholesale transfer of power to supranational authorities, preferring instead to deal intergovernmentally with many issues.⁵ Today, with greater diversity in the EU's membership and a heavy financial crisis, hands-off intergovernmentalism is no longer an option for jittery northern governments.

Germany, Austria, France, Benelux and the Scandinavian states were previously amongst the fiercest opponents of common oversight and conditionality mechanisms. The recent EU enlargements have altered this calculation. Feeling

2. Valentina Pop, "EU ignores Malta on special status for refugees", EU Observer, 31st March 2011, <http://euobserver.com/18/32103>.

3. Danuta Hübner, "Conditionality linked to Cohesion Policy objectives", speech to the informal meeting of cohesion policy ministers, 23rd November 2010.

4. European Commission, "Commission adopts revised mechanism for verifying the application of Schengen rules in the Member States", Press release, IP/09/359, 5th March 2009.

5. Tony Bunyan, "The story of Tampere", Statewatch briefing, September 2003.

that their own implementation of the rules is comparatively sound, these northern states now believe that oversight mechanisms would not encroach upon their own autonomy so much as provide a means of increasing their control of faithless partners.

Apart from the predictable squeals from those member states which would likely fall foul of the new sanctions, the notion of introducing these mechanisms has been met with grim acceptance as a necessary corrective: the EU is just emerging from something approaching an existential crisis, and caution is the name of the game. Hands-off inter-governmentalism and “mutual trust” can scarcely be condoned by responsible democratic governments when the EU is subject to financial or cross-border terrorist risks.

Yet, two sets of criticism are made of these mechanisms which cannot easily be dismissed. The first points to their unfairness. It is all very well to impose punitive sanctions upon instances of faulty implementation or bad faith, but if certain member states are fundamentally unable to live up to their EU commitments, such moves will rather aggravate the situation than resolve it. Schengen provides a good example. The removal of border controls between Schengen states places a heavy burden upon members at the EU’s southern and eastern perimeter. These states now guard their borders on behalf of the whole Union, despite their limited experience of such tasks and their even more limited input into the EU’s border, asylum and crime acquis.

The second line of criticism is more fundamental and concerns the idea that these sanctioning measures will be exploited by northern member states for their own dastardly purposes. Usually such mechanisms would have the legitimate function of dissuading delinquent states from deviating from a set course (*deterrence*) or of compelling miscreants to correct their behaviour once they had been found out (*correction*). Northerners have indeed been careful to cite these goals of deterrence and correction. Yet, critics suggest the existence of a sub-text—retribution. Northern governments quite simply wish to punish other governments for past sins.

Vengeance can be fine

Such criticism suggests that the northerners are pursuing an agenda which is unconstructive and illegitimate—that this punitive turn marks a new low in EU cooperation. Yet, whilst all this may be novel to the EU, punitive policies are no new phenomenon in international relations. And scholars have long grappled with the question why states pursue sanctions which do not meet their ostensible purpose of correction and deterrence. Examples of seemingly futile sanctions litter world history. When threatened with pain of sanction, for example, the Soviet Union, Iran, South Africa and Iraq famously carried on regardless. In one case, Thatcher and Reagan denied the effectiveness of sanctions (South Africa) almost

as they were introducing them elsewhere (USSR).⁶ Why did they bother with this ostensibly unconstructive course?

What commentators have traditionally ignored is the idea that sanctions might indeed play a legitimate third role in international affairs besides correction and deterrence. In the late 1980s, the academic Kim Richard Nossal began to reassess the utility of sanctions, asking why they were so often pursued to no obvious end. He concluded that states were acting according to a higher logic: states wanted simply to punish those who transgressed their notion of good behaviour. In other words, retribution was a quite usual function of sanctions.⁷ Moreover, it was also a legitimate one. Taking umbrage with the idea that the pursuit of retribution was a case of vindictiveness or banal sadism, Nossal showed that in the international public sphere, retributive sanctions are a useful expression of moral indignation.

In the absence of nuanced international law and a robust super-ordinate body to sanction poor behaviour, this is no bad thing. Without a powerful moral authority and moral consensus in international affairs, retributive sanctions can provide something of an antidote. It is an observation that applies just as well to the EU system. Certainly, the EU’s legal order has attained a degree of complexity that sets it apart from other bodies of international law, but that does not

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make it equal to the nuances of sensitive political issues such as home affairs. The EU’s legal tools may be more nuanced than other international legal orders, but many of the issues it deals with are also far slipperier.

If retribution is their neglected contribution abroad, sanctions can also serve a purpose at home far removed from encouraging international deterrence and correction. As noted by scholars such as Johan Galtung and David A. Baldwin as far back as the 1950s, sanctions can be a simple political vent.⁸ For governments, imposing sanctions may just be a means of letting off steam, appealing to domestic voters more interested in straightforward retribution than the more complex processes of correction and deterrence. This venting can in turn shift the terms of the domestic debate, whether this is their intention or not. And again, this can have a positive effect on EU relations.

Currently, for example, most northern governments would

6. M.S. Daoudi and M.S. Dajani, *Economic Sanctions: Ideals and Experience* (London: Routledge & Kegan Paul, 1983); Kim Richard Nossal, “International sanctions as international punishment” in: *International Organization*, 43,2 (1989), pp. 301-322.

7. Nossal, “International sanctions”, (1989).

8. Johan Galtung, “Pacifism from a sociological point of view” in: *Journal of Conflict Resolution* 3 (1959), pp. 69-71; David Baldwin, *Economic Statecraft* (Princeton: Princeton University Press, 1985).

meet with incomprehension from their electorates should they renegotiate EU border, asylum and immigration laws in favour of border-states like Greece. These border-states have, after all, transgressed—why should they now be rewarded? And yet, if the EU is to overcome the problems of implementation, some kind of renegotiation and reassessment is necessary.⁹ Otherwise the burdens placed upon border-states will go unchecked, and border-countries will find themselves punished again and again for non-compliance and bad faith. By first venting their frustrations and expressing indignation, northern governments create a more clement domestic climate, and can revisit EU rules.

Moving beyond punitive policy

Of course there is no guarantee that such positives would even accrue. Larger and more powerful member states might be able to exploit punitive policies to their own ends. Their resort to punitive measures such as sanctions and condition-

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ality would be less about redrawing the terms of the European debate in favour of a fairer settlement than about reinforcing old inequalities. They would be able to bully other states into accepting unequal settlements. Moreover, they might do so for altogether unjust reasons. If France's current refusal to permit Romanian entry to the Schengen Area is indeed retribution over the Roma affair as some commentators believe, this is hardly to be commended. Retributive measures are prone to exploitation and manipulation.

The remedy therefore seems clear: a reinforcement of the rules governing accession to the EU and the Union's core areas of cooperation, so as to avoid the accession of states which cannot meet their commitments but also to avoid these processes being hi-jacked by individual members; a strengthening of the mechanisms that support the implementation of EU rules; the creation of a mechanism for "compulsory solidarity" under which stricken states could call upon help and be sure of receiving it; the more widespread introduction of sunset clauses in EU policies, to permit the revision of the more egregiously unfair European settlements. Yet such

legalistic and mechanistic reforms, although neater than today's messy punitive politics, could actually be damaging to the Union.

The case against a legalistic approach relies upon a long-established line of thinking in European, and particularly British politics about how a community ought to work. It stresses the preferability of messy custom, convention and common practice over abstract and legalistic rights such as "fairness" and "solidarity". Abstract rights and ideological thinking are to be rejected thanks to their simplistic impulse to tidy things up—the desire to square a complex society into uniformity. The proponents of this line of thinking enjoy pointing out that, even in a situation of apparent inequality, a sense of harmony and community can exist.¹⁰ Of course, with its faith in the capacity of institutions to develop responsibly and with its acceptance of manifest social and economic inequalities, this political tradition is today seen as rather smug and complacent. But in its ease with messy situations, it does at least help identify those structural traits of the EU set-up against which the northerners are reacting.

Embracing messiness

First in the firing-line is the EU's failure to distinguish between rules and their effect. After all, say northerners, what counts are not rules but the spirit in which a thing is done. It is all very well to boost the EU's formal accession criteria in a bid to ensure that only those states equal to the responsibilities

of membership can join the EU's various clubs. But it is unlikely to be effective as an approach. A truly successful accession process would be one in which an accession-hopeful actually resists joining until it feels able to meet the demands and responsibilities of membership. Such responsible self-regulation cannot be achieved in a mechanistic way. In this regard, the messy, punitive approach has something to offer. The desire to create a "spirit of Schengen" has been named by northern member states as one motive for their handling of Romania and Bulgaria. The northerners are seeking to communicate that, even when formal accession hurdles have been cleared, broader responsibilities remain.

Second, northerners are reacting against the imposition of abstract rights such as "solidarity" which are very much at the forefront of the European Commission's current reform agenda. Solidarity is, they argue, a relative value, and the governance of relativism requires constant tug-of-war. The introduction of absolute rules will only mask disagreements and permit free-riding. Rather than ceding to the proposed introduction of "compulsory solidarity" in the question of

9. Roderick Parkes, "Costing free movement: fear and non-transposition in the Schengen Area", SWP Comment C27, 2010.

10. Frank O'Gorman, *Edmund Burke: His Political Philosophy* (Routledge: London, 2004), p.46.

border control, punitive northerners prefer to withhold support for southerners until they are given a greater say over the demanders' border practices. Only so can they ensure that these countries build up their own border defences—the northern understanding of solidarity. For their part, border-states faced by genuine crisis can quite legitimately threaten either to cease applying EU law or to act in bad faith, perhaps through the regularisation of illegal immigrants, until other states relieve the burden on them. This regime of mutual punishment will result in a more nuanced and active understanding of “solidarity”.

Third, northerners are militating against the blindspots in EU law- and institution-making caused by simplistic ideological thinking: legalists have not managed to offer a sympathetic framework to messy EU cooperation. Despite formally achieving “integration” in home and financial affairs, the EU's neat institutions have in fact nourished considerable disparities. Northerners complain that, for ideological reasons, “supranationalization” has been confused with “integration”. It is a dire mistake. Supranationalization is not, they argue, a sign of member states converging. With its creation of higher political instances and shifts to qualified-majority voting, it is more often a means of bypassing differences and disparities. The northerners' new brand of messy and intrusive “punitive intergovernmentalism” signals a willingness to face up to political differences. It is thus more faithful to the principles of EU integration than is lazy supranationalization.

Finally, signs of messiness usually reflect a connection with society and public opinion. This is the case here too. The punitive expressions of moral censure by northern governments over the Schengen and Euro Areas mark the first real connection between these grand European projects and the individuals supposed to benefit from them. It will be tempting for the EU now to defuse this explosive situation by the introduction of mechanisms requiring no active engagement from publics. This, after all, has been the story in the past. The Schengen Area has long been sustained by a mix of oblique surveillance technologies and punitive sanctions on individuals and firms. No active support was required. Yet, if voters have now reacted with frustrated bewilderment to the Euro and Schengen crises, it is because they feel helpless. Better to engage individuals actively in sustaining these projects, even if it is a messy process, than hope to run such projects on their behalf.

That the EU has entered a messy stage in its development suggests it is finally growing up. This bad-tempered adolescence may be ugly, but if handled circumspectly it will turn out for the best. Despite all the concern about bullying and unfairness, the punitive turn has actually raised the prospect of an emerging European ethos. Indeed, the greatest surprise is that it has taken so long. After a half-century of intense

European cooperation, a more informal understanding of political constitution between members seems long overdue. A sense of shared destiny amongst governments should have come along years ago, with European cooperation proceeding more according to soft conventions, and treaty reform reduced to a pro-forma exercise. If the EU now chooses to adopt a narrow mechanistic stance, it will only ensure that governments cling tightly to a legalistic understanding of community, and the states' potential for true mutual trust will be scotched.

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