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Is there a Rule of Law Crisis in Europe?

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Introduction

- The traditional understanding that Europe is a monolithic entity is a myth that needs to be debunked. Europe is composed of 47 countries, with baffling diversity and has always been deeply divided.
- Historically “Europe” has attempted to create unifying notions such as the European Union and the EEA. Amongst which, “rule of law” is one of the most crucial principles and is even considered as one of the founding myths of “Europe”.
- The key question is, is there a rule of law crisis in Europe?

Rule of Law

- Three minimum requirements: (1) Legality, (2) Respect for Human Rights and (3) Reviewability of state and super-state actions.
- **Legality** refers to the idea that all actions are underpinned by legal authority and are non-discretionary, that such powers are exercised within the ambit of legal competence and is not ultra vires, and that such actions comply with the principles of legality such as certainty and foreseeability.
- **Respect for human rights** is identified as a fundamental legal and constitutional principle by Statute of the Council of Europe and the European Court of Human Rights. Further, compliance with human rights also require compliance with a set of techniques including the proportionality analysis, acknowledging that an action can comply with human rights law and still be unjust.
- **Reviewability** refers to the idea that state actions must be subject to review by a domestic or supranational court.
- **It is argued that all three requirements are under attack in Europe.**

Crisis

- Non-compliance with the requirements of the rule of law does not per se mean crisis. One must draw on socio-political literature to develop a broad understanding. For example Victor Turner described a crisis as a breakdown of meaning and the collapse of institutionalized relationships.
- Three types of crisis: (1) Rationality crisis (2) Legitimacy crisis and (3) Loyalty crisis.
- **Rationality crisis** happens where there is a sense by the decision makers that the reality is no longer effectively addressed by the status quo.
- **Legitimacy crisis** happens when new mechanical and normative way of doing things arise as a result of the rationality crisis.
- **Loyalty crisis** happens where the above two crisis converge such that loyalty is withdrawn from the existing system, such as the rules and institutions as it stands. Shared norms and values are challenged.

Examples of a Rule of Law Crisis in Europe **Counter-terrorism**

- Existing systems to counter terrorism are considered inadequate in the wake of ISIS and other radicalizations in the region.
- For example, UK instituted policies to indefinitely detain foreign terrorists without trial; EU formed a transnational action plan that enacted 300+ laws in a short time frame which is reflective of a period of hyperactive legislation.
- **Implications on legality:** question as to whether the EU has the competence to make counter-terrorism laws. Since traditionally this is a sovereign matter for states.
- **Implications on the infringement of fundamental rights** of all people in the EU: e.g. EU's Data Retention Directive. While mass surveillance without cause is disproportionate and a blatant interference with fundamental human rights, there has been a popular belief that it is a proportionate response with regards to the current risks faced by member states. A distortion of standards.
- **Rationality Crisis:** entrenched idea that terrorism cannot be effectively countered without this law.
- **Legitimacy crisis:** that this approach of data collection is acceptable.
- Effectiveness of judicial review also undermined by popular reaction.

Turkey and France

- Multiple human rights violation in Turkey, such as persecution of the Kurds.
- **Counter-argument** that Turkey is too particular an example does not stand - for example France also demonstrated rampant disrespect for the rule of law in its response to security risks e.g. antagonizing Muslim women, banning the burkini etc.
- There is a wealth of examples of derogation from the European Convention to put in place policies that reflect a panic of terrorism.
- Reflect a **rationality and legitimacy crisis**.

Russia

- Crimea annexation damages territorial integrity and disrespects Ukrainian rights under the conventions.
- Russia is not an exceptional case – consider the asylum problem surrounding Mediterranean states and the refusal of European states to shoulder responsibility.
- Granting asylum is now treated as an irrational policy. By reframing the ethnic culture and profile of Europe, and reincarnating the “Christian-Jewish” world view, Muslims are labelled as terrorists and threats.
- These deemed law as **irrational and illegitimate**, rather than using it as a tool to solve problems.

Judicial Review Crisis

- Although courts should be the bulwark that provide answers, they are also vulnerable institutions that rely on funding, enforcement and respect from states.
- **Rationality crisis:** courts are highly unwelcome by states so as to shield themselves from multiculturalism, migrants, and asylum, amongst other problems.
- **Legitimacy crisis:** courts are said to be taking away states' democratic mandates and are making nations less safe.
- Examples: British increasingly likely to repeal the Human Rights Act; Russia is introducing amendments into its constitution to subjugate international law to domestic law.
- Therefore courts are operating on implicit and explicit threats from states.

Conclusion – there is a rule of law crisis in Europe.

Two possible legal response

- First. Go firm and let states walk away from the European political order, or expel them. However this is likely to be futile and would instead bring back the “old Europe” conception, marking the failure of the European project.
- Second. Adjust existing rules to heed the legitimacy claims. This is already in progress but does not seem to be effective.
- Therefore rule of law crisis is not only a crisis, but also a trap. States must be awoken to conceive of the problems creating the disintegration of Europe in order for the crisis to be contained.

Q&A

1. “The court is powerless towards those who do not want the rule of law”. Why isn’t there a will now?
 - The popular demand for the rule of law has not changed. Instead it is a failure of empathy to see the connections across the entire European region as people segregate things done to “others” and “us”.
 - Also unpredictability of terrorism creates the attitude of “do what it takes”.
2. What is the role of rhetoric in the rule of law crisis?
 - Serious and subtle shifts to fundamental concepts like “rights”. For example the conceptualization of a right to security arose in the past decade. Also, sustainable development literature focuses on a functioning legal system, such as strong institutions and rule by law.
 - These shifts emerged from good places and signifies a political willingness to accomplish goals. However they differ from the international rule of law literature traditionally.
3. Comment: on the problem of empathy.
 - Empathy rests on the perception of the interconnectedness of Europe, and a sense of an “imagined community”. As of now, this imagined European community is clearly smaller than the geopolitical bounds of the EU.
 - It is questionable whether legality helps build empathy at all – empathy is ultimately a political inculcation.
 - Further, there could be an over-emphasis on rights over human beings. By structuring an understanding of society based on rights creates a barrier to cultivating empathy.
 - Similarly, an aspiration to equality is distorted by the legal claim of non-discrimination. The legalization of ideas has stripped down broad social meanings to bare legal tests that dehumanizes issues.