14

'Populism? It's Administrative Law, Stupid!'

How Administrative Law Subverts Legal Resilience

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14.1 INTRODUCTION

The editors of this volume put two research questions to the contributors. First, what is the connection between populism, restrictive migration laws and democratic decay? Second, what are the possibilities of legal resilience against restrictive migration laws? In this chapter, I argue that administrative law lies at the heart of both questions. Triggered by the first research question this chapter asks how populist anti-migration discourses have made it to actual laws and legal decisions. It asks what legal infrastructure makes restrictive migration laws possible in the first place. My answer is administrative law.[1] Rather than understanding populist restrictive migration policies as a failure of ECHR, EU and constitutional law to protect migrant rights, this chapter looks at how administrative law is distinctively well-suited to produce restrictive migration laws. By distinctive I mean better than criminal and civil law. The focus on administrative law also informs my answer to the second question: resilience against restrictive migration laws will remain marginal and incidental as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies, that is, administrative law.

Section 14.2 briefly explains why the first research question about the connection between populism, restrictive migration laws and democratic decay leads to the question about the legal infrastructure underpinning populist restrictive migration laws. The Section also identifies some basic

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[1] I rely on Bas Schotel, 'Administrative Law as a Dual State. Authoritarian Elements of Administrative Law' (2021) 13 *Hague Journal on the Rule of Law* 195. The article was based on a paper presented at the Lund workshop in 2020 that constitutes the basis for the present edited volume.

features of restrictive migration policies which the legal infrastructure must cater for. To this end, it relies on the descriptions and analyses of the restrictive migration policies from the country studies in this volume.

Section 14.3 identifies the distinct features of general administrative laws or law-making, namely forward-looking, dynamic, and the capacity to categorize people. These features make it easier, compared to other branches of law, to translate restrictive migration discourses and policy objectives into law.

Section 14.4 explains how individual administrative acts grant authorities the discretion and legal legitimacy needed to implement the restrictive migration policies in ways not possible under criminal law.

Section 14.5 concludes on a pessimistic note. It critically examines the current instances of legal resilience against restrictive migration policies. It finds that the three types of legal resilience, namely judicial interventions by the ECtHR, CJEU and constitutional courts, signal and legitimize the lack of legal resilience within administrative law.

14.2 POPULISM, RESTRICTIVE MIGRATION POLICIES AND DEMOCRATIC DECAY

The contributions in this volume examine the possible connections between populism, restrictive migration policies and democratic decay. The picture that emerges from the country studies is not straightforward.[2]

First, the country studies record restrictive migration policies and crumbling migrant rights.[3] Furthermore, a new wave of populist parties and movements has found access to the formal channels of state power. Either because the parties obtained an absolute or coalition majority in parliament,[4] or because conventional parties co-opt the popular discourse and policy stances.[5]

[2] See for a recent comparative and systematic analysis, Katharina Natter, Mathias Czaika and Hein de Haas, 'Political Party Ideology and Immigration Policy Reform: An Empirical Enquiry' (2020) 2 *Political Research Exchange*.

[3] Kriszta Kovács and Boldizsár Nagy, 'In the Hands of a Populist Authoritarian: The Agony of the Hungarian Asylum System and the Possible Ways of Recovery' (hereafter 'Hungary'); Barbara Mikolajczyk and Mariusz Jagielski, '"Good Change" and the Migration Policy in Poland: In a Trap of Democracy' (hereafter 'Poland'); Margit Ammer and Lando Kirchmair, 'The Restriction of Refugee Rights during the ÖVP-FPÖ Coalition 2017–2019 in Austria: Consequences, Legacy and Potential for Future Reselience Against Populism' (hereafter 'Austria'); Stefano Zirulia and Giuseppe Martinico, 'Criminalising Migrants and Securitising Borders: The Italian "No Way" Model in the Age of Populism' (hereafter 'Italy'); Ellen Desmet and Stijn Smet, 'Right-Wing Populism, Crumbling Migrants' Rights and Strategies of Resistance in Belgium' (hereafter 'Belgium').

[4] Hungary 1; Poland 1, 2; Austria 1, 2; Italy 1.

[5] Belgium 1, 2.

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Anti-migration discourse is a crucial part of the populist political agenda and one of their main electoral selling points. Arguably, there is thus a close connection between populism and restrictive migration policies. By the same token, the country studies also indicate that many restrictive migration policies predate the new populist parties and movements (e.g., Austria, Italy). It suggests that conventional parties were already populist *avant la lettre* or that the anti-migration discourse is simply not unique to populism. This raises a question about the general legal infrastructure that makes it possible to enact and implement restrictive migration laws, regardless of who is in power: populists or conventional parties.

Second, the country studies, in line with the burgeoning literature on rule of law and democratic decay in Europe, show a clear link between populism and an authoritarian rule of law.[6] Crucial in this respect is the breakdown of constitutional safeguards, especially judicial independence of the highest courts.[7] The populist strategy is clear. If the constitutional constraints are lifted, the populists can have it their way: retain power and marginalize political opponents and social opposition. Again, this raises questions about the nature of the basic legal infrastructure that can continue to operate its daily business without constitutional constraints. To put it differently, what kind of law is able to maintain its legal character while the constitution is breaking down? Why do we speak of a constitutional breakdown but not of the breakdown of administrative law? The answer might be that normal administrative law is already quite well-suited to make populist, anti-migrant or authoritarian agendas legally possible.

Third, though anti-migration policies and laws may amount to instances of democratic decay and an authoritarian rule of law, the reverse is not always the case: democratic decay is not tantamount to anti-migrant policies. Empirical studies have shown that authoritarian regimes may in fact adopt policies that are relatively favourable to immigration.[8] Yet those policies do not grant legally enforceable rights to migrants. So probably if there is a connection between authoritarianism and anti-migrant policies, it is not so much that authoritarians necessarily oppose migrants, but they do oppose rights.

[6] For an overview of the literature see Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9.

[7] Poland 2; Hungary 2, 3.

[8] Katharina Natter, 'Autocratic immigration policymaking: The illiberal paradox hypothesis', (IMIn Working Papers; No. 147), (MADE project paper No. 4) (2018) International Migration Institute Network, available at www.migrationinstitute.org/publications/autocratic-immigration-policymaking-the-illiberal-paradox-hypothesis.

Hence, the connection between populism, restrictive migration laws and democratic decay is not clear-cut. But precisely because restrictive migration laws cannot be traced back to populism and democratic decay, a fundamental legal question emerges: what is the legal infrastructure then that makes anti-migration policies possible in the first place, irrespective of populism and democratic decay? Or what is the legal infrastructure that allows populists to turn anti-migrant discourses into law? My answer is administrative law.

Administrative law has particularly distinctive features that allow authorities to do things that would not be possible under normal criminal and civil law. Since migration policies are largely matters of administrative law, politicians and authorities can benefit from these distinct features when legislating and executing immigration policies. While migration policies have become a matter of administrative law for historical reasons, there are also practical reasons for why administrative law is distinctively well suited to enact and implement immigration policies.[9] When enacting immigration laws, policy makers generally find that administrative law gives them the freedom to incorporate highly politicized discourses. And when executing immigration policies, the administration is granted significant de facto and legally sanctioned freedom to act. By the same token, this freedom to make and execute immigration law is governed by law, thus granting authorities a legality bonus.

In the sections below, I will discuss the distinctive features of general administrative laws and of individual administrative acts. But first, I will briefly return to the country studies in this volume. For if we want to see how administrative law distinctively caters for – populist – restrictive immigration policies, we need to know what the basic ingredients of anti-migration policies are. In other words, what do populist policymakers need for their restrictive migration laws? Or if we want to ask the question from the perspective of administrative law: what do populists want from administrative law?

The first ingredient of anti-migration policies is an anti-migrant discourse. Populists need to have their anti-migrant language and logic incorporated in legal instruments. Thus statutes should be capable of integrating the language whereby people can be categorized in terms of 'us' and 'them'.[10] The law must be able to adopt language whereby certain migrants can be considered wanted

[9] For this historical development with references to the literature see Bas Schotel, 'From Individual to Migration Flow: The European Union's Management Approach and the Rule of Law' in Martin Geiger and Antoine Pécoud (eds), *Disciplining the Transnational Mobility of People* (Palgrave 2013), 63; Bas Schotel, 'Legal Protection as Competition for Jurisdiction: The Case of Refugee Protection through Law in the Past and at Present' (2018) 31 *Leiden Journal of International Law* 20.

[10] Italy 2; Poland 3.2; Hungary 2; Austria 2.1.

and others unwanted.[11] The challenge of populism, however, is that the categorization is not so much based on actual behaviour, but on expected behaviour and ascribed properties of the particular groups (ethnicity, country of origin, etc.). For example, the legal instruments used to enact and implement anti-migration policies must be able to depict unwanted migrants as dangerous or criminal, but without the normal legal provisions and mechanisms of criminal law.[12] Normal criminal law actually defies the populist logic of making quasi existential distinctions between groups of people ('us' versus 'them'; 'good citizens' vs 'dangerous people'). Normal criminal law requires a clear statutory definition of a particular *behaviour* that is prohibited, as opposed to merely ascriptive qualities (e.g., race, nationality, religion, gender, etc.). Next, criminal law investigations and criminal prosecution pertain to alleged criminal behaviour of *individuals*, as opposed to groups. Furthermore, the alleged criminal behaviour must be established in fact by an independent court, as opposed to mere speculations and allegations. Finally, when convicted the person does not become a 'criminal'. In fact the notion 'criminal' to designate a person who has committed a crime does not exist in criminal law. One is a suspect, defendant, perpetrator, or convicted person. So strictly speaking it is conceptually impossible to use criminal law to depict migrants as criminals.

Second, as populists are typically on a permanent election campaign,[13] there is a constant need to adapt policies to the new discourses and policy objectives. In other words, populists need a kind of law that they can change by a stroke of the pen.[14] Of course, formally speaking legislation is the primary source of law in all branches of law, except for international, human rights and constitutional law. And in theory this allows for rapid and instant changes in the law. But in civil and even criminal law the main substantive legal norms change slowly over time and are often the product of a long interpretative practice, inside and outside the courts.

Third, restrictive migration policies are largely about making life difficult for unwanted migrants. It means one needs a kind of law that can govern the life of unwanted migrants as much as possible. This may mean actively intervening through coercive actions.[15] But it may also include non-coercive measures or simple passivity, for example, denying social, economic,

[11] Italy 2; Hungary 4.2; Poland 3.1, 3.2.
[12] Austria 3.1.
[13] See for this point Nadia Urbinati, *Me the People. How Populism Transforms Democracy* (Harvard University Press 2019), Chapter 3.
[14] Austria 2; Belgium 2.2; Italy 2.
[15] Italy 3, 4; Austria 3; Belgium 3.2.2.

educational assistance and limiting the practical possibilities to apply for permits and benefits.[16] The measures may target migrants directly, or those that are helping them, for example, NGO's or captains of vessels at the High Seas.[17] Again, non-coercive measures can be extremely effective in this respect; for instance, by denying subsidies or checking the transparency of funding (Poland, Hungary). Another useful tool is the capacity to take measures that are unlawful but nevertheless have immediate effect and which, until annulled by a court, can make life really difficult for a migrant (e.g., unlawful denial of a visa, see below Section 14.4.2).

Fourth, in order to implement restrictive migration laws, the authorities need sufficient freedom to act. This is especially relevant for populists. Though they may incorporate their populist discourse into the recitals of legislation and general objectives, it is more difficult to introduce outright racial, religious and ethnic considerations into actual legally binding criteria, especially when it comes to asylum law. What is needed is a mechanism whereby the migration authorities have discretion to determine whether the legal and especially factual conditions for a migration decision are satisfied. In other words, there must be a point up to which the migration authorities need not further justify and substantiate their decisions. This space of discretion should be sufficiently large to cover up for the populist motives underlying the migration decisions. Of course, such a mechanism runs the risk of being perceived as mere prerogative and arbitrary power. Thus, the mechanism must also provide for legal legitimacy. A proven tactic for legal legitimacy is technical expertise. Accordingly, the migration authorities are not presented as political agents but are technical experts in the field of migration. They deserve to have discretion because they are politically neutral experts. Another source of legal legitimacy is to ensure – at least on paper – that migration decisions are susceptible to review by an independent court. Yet, the downside is that genuine judicial review may significantly limit the discretion of migration authorities. Hence populists have an interest in a legal infrastructure that has enough judicial review to grant legal legitimacy but that in practice is sufficiently limited to maintain wide discretion. Populists need a legal infrastructure that provides for full access to the courts on paper, but that also allows authorities to de facto limit access to the courts. A case in point is limiting or abolishing independent legal aid for migrants. Another way for the legal infrastructure to grant both legal legitimacy and discretion is to have

[16] Belgium 3.3.2; Austria 2.4, 2.5; Hungary 4.3.1, 4.3.2, 4.3.3.
[17] Italy 8; Hungary 4.3.4; Poland 3.4.1.

courts that have – or think they have – only a limited mandate to review individual migration decisions.

So in order to enact and implement their anti-migration policies populists need at least four things from the law. First, they need a kind of law that can easily incorporate 'hyper' political discourses and objectives which are often new or alien to traditional legal concepts. Second, they need a type of law that is accustomed to constant and immediate change. Populists must be able to constantly adapt the law to what is politically topical as they are on a permanent electoral campaign. Third, they need a form of law that is capable of categorizing groups of people on the basis of ascriptive qualities rather than individual behaviour. Finally, they need a legal infrastructure that gives the administration the freedom to implement populist policies but while maintaining a veneer of legal legitimacy.

In the next sections I will show how administrative law caters for these things. For analytical purposes it is helpful to distinguish between two levels of administrative law: general administrative laws and individual administrative acts. For the purposes of this chapter, I define general administrative laws as the general legal norms issued by Parliament, government and administrative agencies that are governed by the general rules of administrative law, as opposed to criminal and civil law. For example, an Alien Act enacted by a national legislator is a general administrative law; royal and ministerial decrees further implementing an Alien Act also constitute general administrative laws. General rules, regulations and guidelines issued by Immigration Authorities constitute general administrative laws in my definition. The individual administrative decisions are legally binding acts issued by the administration and directed at individuals, for example, granting or denying asylum, granting or refusing a building permit, withdrawing social aid. The distinction between general administrative laws and individual administrative decisions is helpful because they cater for different 'populist needs'. The characteristics of individual administrative acts are well suited to enable populists to enact populist policies. The characteristics of administrative law are well suited to enable populists to implement their policies.

14.3 General Administrative Laws: Forward-Looking, Dynamic and Capable of Categorizing People

General administrative laws have three qualities that are particularly well suited to cater for anti-migration policies. Administrative law-making is largely forward-looking, dynamic and has the capacity to categorize people. General administrative laws are forward-looking in the sense that they are about

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improving the existing social, economic, cultural, environmental, and public ordering of things and people, rather than simply maintaining and restoring the existing order.[18]

Certainly civil laws also reflect political preferences and choices. But the objectives are much more general and indeterminate (e.g., individual autonomy, efficient markets). They are not forward-looking in the sense of seeking to improve and change the existing order. Rather civil laws are supposed to be an expression of or a medium for the existing order. For the civil laws (e.g., the Civil Code) do not tell people how to behave in precise and concrete ways: the precise and concrete content of civil laws are largely determined by individual consent and custom, and not by particular political objectives.[19] It also means that courts, not politicians, play a crucial role in specifying what behaviour is required or permitted. Often when legislators enact civil laws they explicitly indicate that the content of particular legal standards needs to be further developed by the courts. It implies that the legislator welcomes legal conflicts as they may result in case law. This is typically not the case for general administrative laws. These seek to immediately impact and improve the existing order. The administrative lawmakers (Parliament, national government, local administration or agencies) often issue highly detailed standards that – at least on paper – should allow the implementing authorities and citizens to immediately adapt their behaviour. In this respect general administrative laws rather seek to avoid these problems being brought to the courts.

Similarly, normal criminal laws (as opposed to the criminal provisions in administrative laws) are not about improving or changing the existing order but about restoring the order. Most normal criminal laws only tell you what not to do but do not tell people how to behave in order to improve the economy, environment, cultural life, etc. Normal criminal laws do not give concrete and detailed norms of behaviour in order to achieve a particular political objective.

The direct consequence is that while in civil and criminal law the content of particular substantive legal norms is determined by legal practice inside and outside the courtroom, in administrative law the lawmakers take the lead. This

[18] For a historical and theoretical account of these features, see Luca Mannori and Bernardo Sordi, 'Science of Administration and Administrative Law', in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence. Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Springer 2009), Sections 6.3–6.6 and 6.10–6.11; Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010), Ch. 14 'Potentia', Ch. 15. 'The New Architecture of Public Law'.

[19] For analytical purposes I consider the standard for negligence as a customary rule.

also explains the highly dynamic nature of administrative law-making. The production of new general administrative laws is prolific, especially compared to normal civil and criminal laws. But also the number of changes made to laws in a single functional field is impressive. Rather than having legal practice fill out the content of substantive norms, lawmakers constantly adapt the content of administrative law to meet new practical, bureaucratic or purely political needs.

The forward-looking and dynamic nature of general administrative laws makes administrative law the field of law that is most responsive to political ambitions and political discourse. I believe this basic feature of administrative law-making explains why administrative law constitutes an ideal legal infrastructure for populist anti-migration discourse. Administrative law is the field of law where law-making easily follows the particular political agenda of the lawmakers and does not feel the need for any long-term embedding in actual legal practice inside or outside the courts. If existing migration policy discourse and objectives are felt too soft, they can be replaced easily by new general administrative laws with a stricter discourse and policy objectives. To be clear, this is not specific to or distinctive for populist anti-migrant discourse. General administrative laws might just as well incorporate discourses that are progressive, multicultural and oriented at social equality. The point here is to show that, of all branches of law, administrative law is most capable of immediately translating political platforms into law.

The forward-looking nature of general administrative laws also means that administrative law is largely permissive and instructive. Contrary to criminal laws that are largely prohibitive, administrative laws seek to promote particular activities because they allegedly will improve the social, economic, environmental and cultural order, or even create a new one. A quintessential mechanism in this respect is the system of permits and licenses. In effect, in migration law, permits to enter and stay in the territory constitute the central legal mechanism. A permit system offers legal certainty to migrants who have a permit because they know ex ante that their entry and stay are lawful provided they comply with the conditions of the permit. This is typically not possible under the system of prohibitive criminal law rules that does not offer citizens the possibility to seek clearance rulings with the public prosecutor. But it also means that general administrative laws have the potential to intervene actively in many aspects of social life and impose particular types of behaviour. Furthermore, the system of permits also implies that migrants must proactively seek contact with the administration and apply for a permit. The migration authorities can then make life difficult for the applicant by stalling the procedure or refusing the permit. This is not possible under criminal law.

If authorities want to make life difficult for migrants through criminal law they must actively start legal proceedings against them.[20]

Closely related to the forward-looking and dynamic nature of general administrative laws and the ambition to improve or even change the existing social and economic order is the welfare state. Certainly, administrative law does not necessarily entail a fully-fledged welfare state, but a welfare state does require a well-developed administrative law. A large part of the welfare services is only accessible through the system of social benefits. It means that individuals have to pro-actively contact the administration and apply for social benefits. Here again the administration can make life difficult for individuals by stalling the procedure or denying the benefit. In most European countries today, social and economic structures are such that it is difficult for a person without a regular paid job to live a decent life without the minimal social and educational benefits provided for by the welfare state. This is even more the case for migrants. If so, then the welfare state and administrative law are both a means to help migrants and an instrument to make their lives extremely difficult. Furthermore, since the benefits are largely governed by administrative law, they do not have the same legal status as normal enforceable civil subjective rights. In other words, the distribution of the benefits is more a matter of policy than rights.

Another crucial feature of general administrative laws is the capacity to categorize people on the basis of ascribed qualities rather than their actual behaviour and will. Not only for policing people but also for benign measures, especially providing public services in the context of a comprehensive welfare state, it is essential to divide people in categories that are perceived relevant for the administration (age, gender, ethnicity, income, type of profession, medical condition, postal code, religion, domicile, number of children, etc.).[21] Furthermore, it is necessary that the categories are sufficiently formal in order to be incorporated in the bureaucratic apparatus. Finally, the authorities must be able to adapt the categories swiftly for reasons of either administrative or political expediency. The ability to categorize people on the basis of ascribed qualities makes it possible to immediately target people and distinguish between people without the need to establish their actual behaviour. It is therefore a powerful instrument to include and exclude people. The inclusion

[20] Of course, if one considers the deterrent effect of criminal law, then criminological studies have shown that perceived detection and punishment rates are main factors of deterrence.

[21] To be sure, some of these properties are strictly speaking the result of particular behaviour of the individual, but depending on the country and era many of these properties are also largely socially determined and often beyond the effective individual control of people.

and exclusion can be used for benign social and emancipatory purposes (e.g., comprehensive welfare state). But it can also be used for purposes of enacting restrictive migration policies, making it possible to distinguish between wanted and unwanted migrants on the basis of ascriptive qualities. In the field of labour migration it is possible to distinguish between wanted and unwanted migrants on the basis of seemingly neutral economic selection criteria such as education, training, work experience and language skills, which can operate as a proxy for more suspect criteria such as gender, ethnicity and religion. In the area of humanitarian visas it is possible to openly select on the basis of such suspect criteria. For example, a populist government may pro-actively decide to grant humanitarian visas to a particular group of Christian migrants. Since the humanitarian visas are a matter of favour and not right, the categorization will not be considered discriminatory. This form of categorization is even possible when a populist government pro-actively grants asylum to migrants located in an UNHCR refugee camp. This will not be considered a form of discrimination provided that the government leaves open, at least on paper, the possibility for other migrants to seek asylum.

Of all areas of law, administrative law is the best suited to categorize legal subjects in function of ascribed qualities. Criminal law and civil law look mainly at the actual behaviour and will of legal subjects. A case in point is the ruling by Italian constitutional court of 2010 annulling a Decree that made irregular stay an aggravating circumstance for any offence committed by a foreigner.[22] Of course, in civil law the ascribed properties of the person (e.g., gender, age, descent) are crucial in family law, the law of persons and estate law. But the categories have remained quasi the same over centuries and in practice cannot be changed swiftly. In administrative law legislative and regulatory change at both parliamentary and executive level is extremely fast and prolific compared to criminal and civil law.

14.4 INDIVIDUAL ADMINISTRATIVE ACTS: DISCRETION AND LEGALITY BONUS

As we saw in the previous section, general administrative laws are well-suited to accommodate the highly political logic of populist anti-migration discourses and policy objectives. General administrative laws can easily and quickly translate political discourses and policy objectives because they are predominantly forward-looking and dynamic. General administrative laws can

[22] This case was presented by Stefano Zirulia during the workshop in Lund in 2020.

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accommodate anti-migration discourses and objectives because they have the capacity to continuously make new categorizations of people. General administrative laws are thus a crucial element of the legal infrastructure that makes anti-migration policies possible.

Arguably, general administrative laws are often a sufficient tool for politicians. In many cases it may suffice for politicians to show they adopted laws that directly reflect a particular popular political position. The actual implementation, let alone effectiveness, of the laws is irrelevant. This seems particularly the case when it comes to migration policy. Across the political spectrum lawmakers have shown no interest in either the real empirical causes and modes of migration or the empirical effects of migration policies.[23] It suggests that the real effectiveness of migration policies and laws is often irrelevant from a political and electoral perspective. Probably for the majority of voters (and thus politicians) what really matters is their perception of migration and migration policies, not the actual effects. Still, general administrative laws do get implemented. Even if the overall effectiveness of migration policies is doubtful, sometimes migration authorities must take immediate and concrete action either to address real incidents or to appear tough in the media. Migration policies may not be effective, but they do have consequences.

If general administrative laws are the instrument to enact populist migration policies, then the individual administrative act is the instrument to implement the policies. The individual administrative act is another crucial element of the legal infrastructure that makes populist anti-migration policies legally possible. Elsewhere, I identified and analyzed the authoritarian elements of administrative law in European jurisdictions. My analysis focused on the typical features of the individual administrative act: i) presumption of legality and the privilege of execution; ii) policy and factual discretion for the administration; iii) judicial deference to policy and factual discretion.[24]

Presumption of legality means that the administrative act is deemed to be lawful; it has immediate legal effect and must be complied with accordingly. Only when the administration withdraws the administrative act or a court annuls it, does it lose its legal effect and validity. Furthermore, the administrative act can be executed, even by force, without the need to seek prior

[23] H. De Haas, M. Czaika, M-L. Flahaux, E. Mahendra, K. Natter, S. Vezzoli and M. Villares-Varela, 'International Migration. Trends, Determinants and Policy Effects' (2018) *IMIN Working Paper Series* 142/DEMIG Paper, 33.

[24] See Schotel 2021, *supra* note 1, 207 at footnote 49 with references to textbooks on European domestic and comparative administrative law.

approval by an independent court that makes a judgment on the legal and factual merits of the administrative act. This is the so-called privilege of execution. Even if individual administrative decisions executing a migration policy can be challenged before a court, it is important to note that the decision has immediate effect, producing concrete consequences in the tangible or legal reality. In other words, the administration can simply establish facts on the ground, while awaiting a legal challenge before a court. Importantly, because of the presumption of legality and the privilege of execution, appeals against most types of administrative decisions do not have suspensive effect. Though migration policies may not be effective in terms of stated policy objectives, they are pretty successful in making life difficult for the individuals concerned. This is clearly the picture emerging from the contributions in this volume. The crux is that administrative acts put the ball fully in the court of the individual affected by the administrative decision. Furthermore, depending on the type of act, the harm may be already inflicted and later annulment by a court would simply come too late.

In fact, to the extent that anti-migrant policies aim to make life difficult for unwanted migrants and those helping them, the presumption of legality and privilege of execution are enough for the administration to get the job done. As long as the administration creates legal consequences or establishes facts on the ground without seeking prior approval by courts, it can make life difficult for unwanted migrants. In this respect, it should be noted that in many cases the administration does not even need to execute or enforce the decision since the presumption of legality suffices. For example, the refusal of a permit or social benefit to a migrant becomes immediately effective; the refusal does not require any further execution. The absence of the permit or a social benefit can already put a migrant in extremely precarious conditions. These may directly affect the mental, physical or financial resources to challenge the refusal before the courts. Even if the migrant were to obtain a favourable judgment from a court, much of the harm will already be done. And even if the migrant can effectively benefit from a favourable judgment, the administration was in any event successful in making life extremely difficult for the migrant while the court case was pending. Thus the presumption of legality and the privilege of execution are crucial features of the administrative act and give the administration an advantage over migrants, which it does not have under normal civil and criminal law.

Discretion is probably the most well-known and discussed feature of administrative law. It entails that the administration has the liberty to choose between reasonable policy preferences and options (policy discretion) or reasonable ways to evaluate and establish the facts (factual discretion). The

conventional view has it that from discretion necessarily follows judicial deference. Judicial deference means that when reviewing an administrative decision, administrative courts do not make their own judgments of the merits of the case but rely on the decision of the administration. Particularly relevant in daily practice is judicial deference to fact-finding by the administration.[25] This means that the court does not establish the facts of the case but 'only' checks whether the fact-finding by the administration was reasonable. In other words, the court only establishes the reasonableness of the facts but not their truth.[26] Again, this is another feature of administrative law that gives the administration an advantage over citizens, which it does not have under normal criminal law.

The crux of the features of administrative acts is that they confer on authorities sufficient freedom and leeway to take measures that would not be possible under civil and criminal law. Through individual administrative acts, authorities can infringe the rights of people and harm their social and economic interests in ways that would not be possible under normal civil and criminal law. But that does not mean that administrative acts are taken in a legal void; they must be based on (statutory) law and are susceptible to judicial review. These features of the individual administrative act ensure that the actions by the authorities retain a lawlike character granting the authorities what I have called a legality bonus. It is the combination of the freedom to act beyond civil and criminal law and the legality bonus that makes administrative law such a convenient legal infrastructure for anti-migrant measures. As was discussed in Section 14.2 populists may loathe and despise liberal democracy and the rule of law, they still need the benefits of legal legitimacy.

What makes administrative law so convenient is the fact that on paper legal protection is available to migrants but in practice it remains extremely limited. Indeed, the contributions in this volume contain many references to limited judicial protection for migrants. For reasons of space I will concentrate on

[25] German administrative law is an exception in Europe as the administrative courts have a constitutional duty to establish the facts. For references to the legal literature see Schotel 2021 *supra* note 1, 212.

[26] One may distinguish between four types of facts: 1) facts that can be ascertained precisely (e.g. height of a building); 2) facts that must be ascertained through estimation (e.g. market size); 3) facts that must be ascertained through projections (e.g. environmental impact assessment); 4) facts that involve an evaluative judgment (e.g. threat to public order). Administrative courts typically conduct a reasonableness test when it comes to facts of type 2), 3) and 4). To be certain in criminal law, courts do not use a standard of 100% factual certainty either. But in criminal law the standard of proof is higher than in administrative law, namely beyond reasonable doubt. See Schotel 2021 *supra* note 1, 213–214.

three topics that are discussed in some of the contributions: alien detention, humanitarian visas and denial of free legal aid for inadmissibility cases.

14.4.1 *Alien Detention*

A clear picture emerging from the country studies is the widespread use of alien detention.[27] Populist and right-wing parties in or outside government promote alien detention in order to fight abuse of the asylum system and illegal stay and to ensure effective return of failed asylum seekers. In addition, though not a lawful purpose, alien detention is used as a securitization measure. This contributes to more repressive and restrictive migration policies. But the country studies also show that alien detention predates the rise of populism and the securitization logic. This raises the question how largescale alien detention has been possible when liberal democratic parties had full control over parliament and the executive. Furthermore, how come the courts have not halted the widespread practice of alien detention? There are probably many factors that play a role here, but I believe that administrative law plays a key role.

To be clear, detention in and of itself is not a characteristic or typical product of administrative law; it is both a pre-trial measure and form of punishment under criminal law. However, detention without prior judicial authorization and not based on reasonable suspicion of a serious offence is highly problematic from a normal criminal law perspective. In the logic of administrative law, however, detention of aliens does not appear awkward and problematic for the following reasons.

Firstly, it is precisely the unique comparative advantage of administrative law that the administration can act without the prior authorization of a court, which explains the acceptability and normalization of detention as an administrative measure in the migration context. The presumption of legality and the privilege of execution warrant immediate factual action by the administration. From an administrative law perspective, the detention of aliens without prior judicial authorization is qua logic no different from any other immediate factual action taken by the administration. The fact that the administration can detain an alien without first seeking approval from a judge means that the procedural ball is put in the court of the alien. If for whatever reason the alien does not lodge an appeal against the detention before a judge, in some Member States it may mean that the alien can be detained for up to

[27] Austria 3; Hungary 4.3.2; Poland 3.4.2; Belgium 3.2.1; 3.3.3.

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four weeks without any judicial check on the legality of the detention (e.g., the Netherlands).

Secondly, from the perspective of administrative law it is much easier to find alien detention proportionate than if one were to adopt a criminal law perspective. In criminal law the proportionality of pre-trial measures and punishment is codified. Criminal law has thresholds that determine when a certain measure or punishment is proportionate. So the period and type of imprisonment are explicitly laid down in laws, and the prosecutor and the judge only have certain bandwidth to propose or determine the proportionality of the punishment in relation to the seriousness of the offence committed. Similarly, even if there is reasonable suspicion and the detention of a suspect would serve the legal objectives of pre-trial detention (e.g., risk of absconding), it would simply not be permitted if the offence was not punishable with an explicitly stated minimal period of imprisonment (e.g., minimal four years in the Netherlands). In other words, in criminal law matters, the legislature has explicitly balanced the various costs and benefits and determined the thresholds of proportionality. Let us further explore how alien detention is considered proportionate under administrative law, while it would be difficult to justify it in terms of criminal law.

In administrative law proportionality is also a fundamental principle laid down in statutory law and/or case law in probably all Member States. However, in the actual practice of the administrative courts in many Member States the proportionality test turns out to be rather superficial. Specifically, in the many areas where there is room for a proportionality test, the administration also has factual and/or policy discretion. It is thus the administration that makes the first assessment of whether a measure is necessary and whether the benefits outweigh the costs for the affected individual. The administrative court can then check whether this assessment of the administration was reasonable. But as we have seen in many jurisdictions and in most areas of administrative law, the administrative courts show deference to the administration when it comes to factual assessments and balancing of interests.

If we were to consider alien detention from a criminal law perspective it would be difficult to find it lawful. Firstly, the administration has an incredibly wide bandwidth for the period of detention (e.g., up to eighteen months in the Netherlands). Administrative law thus grants enormous discretion to the administration. Secondly, in criminal law the maximum term of pre-trial detention is much lower than and in proportion to the minimal time of imprisonment for the offence of which the detainee is suspected (e.g., in the Netherlands: 110 days pre-trial versus minimal 4 years imprisonment).

A similar logic is impossible in alien detention because there is simply no offence to be penalized by imprisonment. Paradoxically, precisely because alien detention is not considered a punishment, it eludes a meaningful proportionality test.[28]

If the situation of the detainee is not exceptionally dire in the eyes of the judge, and the detention has a legal basis, the judge reviewing the detention decision only needs to check whether the detention serves the legal objective, for example, effective return. But this is largely a factual assessment of future events: namely risk of absconding and likelihood of expulsion. Under administrative law, these are matters in which the administration has large factual discretion (because of its alleged expertise). Consequently, in most jurisdictions the administrative court is likely to defer to the assessment of the administration. The court will limit itself to checking the reasonableness of the assessment by the administration. By way of hypothetical comparison, in the context of pre-trial detention a criminal court makes its own assessment of the risk of absconding and the risk for public order; it will not merely check the reasonableness of the State's decision to detain the suspect.

Against this background, the wide use of detention and the fact that administrative courts have not generally opposed this practice should come as no surprise. My point here is that alien detention is not merely a matter of the failure of human rights when it comes to migrants. I submit it is largely due to the fact that alien detention is a matter of administrative law and that limited judicial protection is a key characteristic of this body of law. It may help explain what many contributors to this volume have observed: the repressive and restrictive migration policies promoted by populist and right-wing parties are simply a continuation of techniques already used by liberal democrats.

14.4.2 *Humanitarian Visas*

In the previous paragraphs, I explained how the administrative law practice of judicial deference paved the way for wide-scale alien detention. In theory,

[28] To be clear, I do believe that administrative courts can and should conduct a genuine fact-based proportionality test in light of the official objective and nature of alien detention. Alien detention is a form of administrative coercion, not punishment. Administrative coercion is an instrument to entice an individual to comply with or execute a legal obligation. In the case of alien detention, the migrant is coerced into obeying the order to leave the country. In other words, the alien detention must be proportionate to achieving this objective. I think it would be difficult to convince a reasonable person how alien detention can contribute to this objective if it does not result in immediate expulsion. Any alien detention beyond this point seems proof of its own ineffectiveness.

judicial deference should not take place when it comes to asylum cases. Pursuant to Article 46 (3) of the EU Asylum Procedure Directive asylum decisions should be subject to 'a full and *ex nunc* examination of both facts and points of law'. The provision was introduced in order to implement case law of the ECtHR and CJEU to this effect. Many experts of migration law, of course, welcomed this improvement. But it did not raise any questions about administrative law procedures in general. Paradoxically, the Directive confirms the special status of *asylum* procedures and thereby normalizes the fact that for migration cases, *other than asylum and international protection*, it is perfectly fine not to have a full examination of the facts. The Directive is an illustration of how the legal community accepts or acquiesces to the fact that under administrative law the default is not to have full examination of facts and points of law by an independent court. Again the default in administrative law is judicial deference. The idea of a default is important because it helps to analyze two developments described in some country reports: politics of humanitarian visas and the abolition of free legal aid for appeals against negative asylum decisions for reasons of inadmissibility.

Desmet and Smet describe the so-called humanitarian visa incident whereby the Federal Government in Belgium refused to execute orders by the courts to issue a short-term humanitarian visa to a Syrian family.[29] The Belgian courts held that the migration office failed to state reasons why the family should not get a short-term humanitarian visa immediately. Zirulia reported how under the populists in Italy a special Decree repealed the humanitarian visa and replaced it with an exhaustive list of grounds for humanitarian visas.[30] Humanitarian visas are clearly a tool for all sorts of political games. But what makes them so fit for that purpose is the fact that neither the EU Visa Code nor the Asylum Procedure Directive and the ECHR apply to humanitarian visas. As a result, these visa decisions are not subject to a full judicial examination of the facts. In other words, the default regime of judicial deference applies. This is aggravated by the fact that under domestic law, granting humanitarian visas is a matter of administrative discretion par excellence. Also under the Italian mechanism of an exhaustive list of grounds for granting a visa there is wide discretion, because the grounds only permit the administration to grant a visa. It does not *require* the administration to do so if conditions are satisfied. In this respect, it should be noted that in the Belgian visa case, if the administration had made the effort of stating some plausible reasons for refusing a humanitarian visa, the administrative court

[29] Belgium 3.4.
[30] Zirulia *supra* note 22.

would have probably shown deference to the administration's judgment. In other words, since humanitarian visas are governed by default by administrative law, judicial deference applies and they can remain a tool for hyper political games.

14.4.3 *Inadmissible Asylum Applications and Denial of Free Legal Aid*

The country studies also show how free legal aid is denied for appeal cases that are expected to be unsuccessful.[31] The denial of legal aid applies to appeals against decisions whereby the migration office found the asylum application inadmissible because the applicant is a national of a safe third country. Articles 33–38 of the EU Asylum Procedure Directive provide for a mechanism whereby the Member State may designate third countries that are considered safe. Applications from nationals from these countries can be treated as inadmissible after the migration office has examined the application and conducted an interview. The rationale is efficiency. The EU Asylum Procedure Directive also requires Member States to ensure free legal aid for applicants in the stage of appeal against the asylum decision before a court (Art. 20(1)). However, Member States may provide that free legal aid is not granted when the appeal is deemed to have no tangible prospect of success (Art. 20(3)). Appeals against inadmissibility are typically considered to have little chance of success. The practices described in the country studies are thus in compliance with the EU Asylum Procedure Directive.

Indeed, appeals against inadmissibility cases have little chance of success because the burden of proof is put virtually entirely on the applicant. He must show that either his country of nationality is not a safe country, or that there are serious grounds for considering the country not safe in his particular circumstances (Art. 36(1) EU Asylum Procedure Directive). In theory according to the Directive, courts must always conduct a full examination of the facts in asylum cases, including appeals against inadmissibility; and in theory courts are not formally bound by the designation of the safe third country but it is clear that in practice courts tend to defer to the expertise of the administration. However, precisely in situations where a court tends to be extremely deferential, applicants need professional legal aid to build the strongest case possible.

Denying legal aid in cases when it is most needed is a clear limitation of effective judicial protection. It would not be out of place in an authoritarian

[31] Austria 2.4.

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regime. However, it is fully sanctioned by the Asylum Procedure Directive and predates populist and right-wing law-making. I believe it can be understood as a product of the logic of administrative law. It is a clear example of the dominance of the central purpose of administrative law, namely effective administration and public policy. Furthermore, contrary to what is the case in most civil and criminal law procedures, representation by a lawyer is not required in the administrative courts in most jurisdictions. Ironically, the reason was to promote access to justice. Administrative law in general and administrative court procedures in particular were supposed to be less technical and formal. It meant that the average citizen could seek justice without the help from an expensive legal counsel. This benign rationale turns out to be very useful in ensuring limited access to justice in migration cases.

14.5 RESILIENCE

The first research question posed by the editors of this volume pertained to the connection between populism, restrictive migration laws and democratic decay. I turned this question around and asked what legal infrastructure makes it legally possible to enact and implement the populist restrictive migration laws that break down the rule of law. My answer is administrative law. This answer largely informs my response to the second research question: what are the possibilities of legal resilience against populist restrictive migration laws? Little, is the short answer. If we do not address some structural features of administrative law *from within*, there is little legal resilience against restrictive migration policies.

The country studies report seemingly promising instances where restrictive migration laws and individual decisions have been stalled, halted or annulled in the name of the law. Three types of law have been successful in this respect: ECHR, EU and constitutional law. Of course, in some countries constitutional law cannot do the job because the constitutional courts are packed by the populists. Also, the impact of ECtHR and CJEU decisions on unwilling populists ruling in states that are in democratic decay is far from straightforward. Still, the courts and lawyers did what they were supposed to be doing: challenging unlawful state practices.

The question is how to understand these instances of resilience. Is it the beginning of a practice whereby the unlawful features of migration policies will be structurally scrutinized by the ECtHR, CJEU and constitutional courts? Or does it actually reinforce and legitimize the current legal infrastructure by only addressing the migration laws and decisions that actually

make it to court and that have the most sloppy legal and factual justifications? I am inclined to adopt the pessimistic position.

When jurists predominantly rely on the three types of law (ECHR, EU and constitutional law) to challenge restrictive migration policies they already concede too much. The reason is that they overlook the structural features of the basic legal infrastructure, the administrative law, that underpin migration law. Let me explain my point with a counter example from criminal law. The country study on Italy contains a great example of legal resilience: the case where the Court of Cassation declares illegal the criminal arrest of a Commander who resisted a public official executing a ban to enter an Italian port.[32] The alleged criminal offence committed by the Commander was resisting a public official. Under administrative law, the order by an official is presumed to be lawful, must be obeyed immediately and can be executed by force. However, instead of the administrative law route, the authorities pursued the route of criminal law since they wanted to establish that the Commander committed a criminal offence. However, criminal liability for resisting a public official vanishes, if the administrative order issued by the official conflicts with another legal obligation. The duty to rescue at sea is such a legal obligation. It then follows that the criminal law logic puts aside the administrative law logic of presumption of legality and privilege of execution, at least for the purposes of the criminal law case.[33] The Court of Cassation simply made use of the legal resilience within criminal law. It is a basic feature of criminal law that a conflicting legal obligation may remove criminal liability for violating another criminal provision. This is not a typical human rights law principle but a basic notion of criminal law practice itself. In fact, probably any criminal lawyer regardless of his or her political preferences could tell you why upholding the criminal liability of the Commander is problematic from a criminal law perspective.

Of course, the resilience potential of criminal law is extremely limited when it comes to migration policy. This is not a defect of criminal law, but simply because most migration policies are not matters of criminal law.

[32] Italy 5.

[33] The logic of criminal liability is simply asymmetric to the administrative law logic of the duty to obey officials. The asymmetry may also work in the opposite direction, i.e., against the duty to rescue at sea. Imagine the Commander complied with the administrative order and had to violate his duty to rescue at sea. Depending on the situation, the administrative order may excuse the Commander from fulfilling his duty to rescue at sea. Also, it should be noted that border guards who were enforcing the administrative order are probably also covered by the presumption of legality and privilege of execution attached to the administrative order.

In fact, authorities – especially those implementing and executing migration policies – have a clear incentive to circumvent criminal law.[34]

The point of the criminal law example is to show the centrality of legal resilience from within the legal infrastructure. Criminal law clearly has such resilience. But it also means that authorities will only use criminal law to a very limited extent when it comes to migration policies. The dominant legal infrastructure remains administrative law. Ironically, the three types of law (i.e., ECHR, EU and constitutional law), which according to the country studies display the most legal resilience, signal two things. First, administrative law lacks the legal resources of its own to resist restrictive migration policies. Second, the rulings of the ECtHR, CJEU and constitutional courts legitimize this state of affairs. In particular, in the case where the ECtHR, CJEU or the constitutional courts intervened, they found nothing legally wrong with the legal infrastructure underpinning the restrictive migration policies. As a result, there is no legal incentive for administrative courts, practicing jurists and academics to re-examine and challenge the basic features of administrative law.

As a consequence, I cannot help but conclude on a pessimistic note. There are no signs that the legal profession will take up the task to challenge the legal infrastructure of immigration policies from within. So far, the basic features of administrative law in most European jurisdictions have remained unchallenged. Probably the clearest illustration is the widespread practice of alien detention. To date the legal profession has not come up with legal arguments from within administrative law to the effect that the institution of alien detention in itself as we know it, may be unlawful. At best, the legal profession can come up with legal arguments to make the *conditions* of detention more humane.[35] Domestic administrative law in cooperation with the ECtHR produced a sophisticated mechanism enabling long term detention of unwanted persons without a criminal trial while benefiting from an uncontested legality bonus. Though this mechanism was developed under liberal democracies and predates the new wave of populist governments, it constitutes a perfect tool for any authoritarian regime, populist or otherwise.

[34] See Schotel 2021 for references to reverse 'crimmigration' *supra* note 1, 217–219.
[35] Belgium 3.3.3.