Legalism at a Dead End or the (Br)Exit of Politics

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Back in 2007, the year during which, alongside others, Romania and Bulgaria joined the European Union (in January) and the world financial crisis began with the French global investment bank BNP Paribas terminating withdrawals from several sub-prime loaded hedge funds (in August), Perry Anderson concluded a *London Review of Books* essay entitled, "Depicting Europe," with words that today must be seen as prophetic: "the long-run outcome of [European] integration remains unforeseeable to all parties. Even without shocks, many a zigzag has marked its path. With them, who knows what further mutations might occur."[1] The narrow but decisive vote by the UK electorate on June 23 to "take their country back" represents just the latest, and arguably biggest, shock in what can only be described as a decade of seismic activity for the European project. Indeed, it is hard to believe in post-Brexit 2016 that only a little more than a decade ago, in 2004, Jeremy Rifkin could proclaim the "European Dream […] a beacon of light in a troubled world," beckoning, as it were, "a new age of inclusivity, diversity, quality of life, deep play, sustainability, universal human rights, the rights of nature, and peace on Earth."[2] Such lofty words must sound no less than ludicrous to the sober and cynical minds of contemporary Europeans who see seemingly entrenched post-War realities, many having to do with European integration, assailed head on. What makes this (again seemingly) dramatic change yet harder to digest is, of course, the fact that much of the damage is self-inflicted. It is decidedly not the same as some external oil-price shock to which an otherwise well-governed and self-conscious incipient political community has suddenly been exposed. Instead, the Brexit vote symbolizes more starkly than anything else the deep crisis that has been building up within the European project for a much longer time than its proponents would wish to admit.

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[1] P Anderson, *Depicting Europe*, 29 LONDON REVIEW OF BOOKS 13 (2007).

[2] J RIFKIN, THE EUROPEAN DREAM: HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004).

Indeed, the danger now is that in the ensuing barrage of self-reflection and soul-searching about the why and the what next, the forest is, again, going to be missed for all the individual trees to which disparate causal explanations can be nailed. Currently the most common of these, within and beyond the Brexit zone, is that this is the long-feared revenge of the EU's democratic deficit, which pits metropolitan Euro-elites across member states, represented in and through the Brussels institutions and especially the European Commission, against a diffuse mass of cognitive backcountry plebs who have been or at least feel economically threatened, culturally challenged, and politically disenfranchised. This is the (more or less enlightened) technocracy versus (more or less grassroots) democracy story that nicely resonates with similar conjunctures in other places, such as the contemporary United States. This thesis makes Brexit just one local manifestation of a global phenomenon from which Europe could not have really expected to be immune. The problem with this narrative is not its truth—it nails some crucial aspects of the truth head on—but its analytical middle-of-the-road position which avoids spelling out some of the wider implications of its point and, thus, runs the risk of going for the wrong sort of solution. In fact, as will be explored below, this middling-muddling-through attitude has been symptomatic for Europe's self-reflection (or lack thereof) for a long time, best characterized by a seeming inability or unwillingness to go beyond a schematic understanding of the underlying problems and to face up to their wider consequences with any kind of intellectual honesty. Some of the Leave voters certainly had this habit in mind. The democratic deficit hypothesis is a case in point. It has become an entrenched mantra in pre- and post-Brexit commentary but its wider implications are hardly discussed. It is neglected because, at least on the face of things, it is a counterfactual contention about the post-Lisbon EU. With a significantly strengthened Parliament, a new grassroots (European Citizens') initiative procedure, and, generally, a massive public consultation apparatus surrounding virtually all aspects of EU policy-making, there may be too many, rather than too few, means by which the EU's public can express its many voices. This is now an institutionalized cacophony deeply embedded in the EU's mode of governance of which hosts of interest group lobbyists (so called) in and around Brussels avail themselves. The overused image of besuited Eurocrats making backroom decisions to impose unpopular policies on defenceless national constituencies is simply a caricature. But this is why introducing yet more layers of participatory mechanisms, launching more information campaigns, and stuffing more citizens' rights into the existing governance mode is not a solution. The root cause of the deficit is democracy itself, or rather, its contemporary variant, which "people" around the world increasingly perceive as being no more than a smokescreen erected to generate popular legitimacy for outcomes determined by the global political economy of finance capitalism. In this sense, some of the more exasperated commentary by narrowly-defeated Remainers, namely that the Leavers voted less against

the EU than against globalization or, indeed, "the modern world" itself, articulates a deeper truth (even if it is not a conscious or deeply-reflected motive), given that the Leave camp illogically oscillated between fantasies of Britain outpacing the EU in (neo-)liberal commitment and of re-creating a cognitive British Empire.

So the real issue is the prevailing sense that politics, and with it democracy, has been largely neutered by technocratic path dependencies dictated by market functionalities, with the EU providing a convenient scapegoat for being (slightly) less ephemerous than globalization or modernity. Yet, there is a deeper point about this scapegoating. After all the EU can actually be seen as a model for the type of governance that dominates our (neo-)liberal age. It is a form of governance that emerged from the collapse of the post-War economic consensus that had enabled social democratic welfarism and that was based, as Richard Seymour recently pointed out, on "unprecedented growth rates and a business class willing to cooperate in corporatist bargaining and state coordination," conditions, he added, "that are unlikely to return."[3] Hence, while the economic base of that consensus gradually evaporated, its political fabric has been much more resistant, thus creating a permanent disconnect between expectations about what states, governments, and politics, in general, could and should be able to do, and what they have actually been able to deliver. This process was arguably accelerated, but not exclusively produced, by openly (neo-)liberal governments, not least in the United Kingdom. The structural shifts in the global political economy have simply meant that all states were required to fundamentally re-define their relationship with global markets and their primary actors, even if merely to preserve the minimum fiscal space to domestically maintain basic welfare structures. The rest, one might say, is history. In the case of Europe it is the history of European integration, which, in its structural components, is one of a collective and highly sophisticated adaptation effort that has, arguably, succeeded in preserving at least the outer forms of traditional European (welfare) statehood.

Yet the price of that success has been the confinement of politics into a highly circumscribed (public) space and the parallel rise of law as the main *de facto* mode of governance. In fact, adapting Metternich's well-known quip on (pre-unification) Italy (notably of it being a mere "geographical expression"), one might call the EU a quintessentially "legal expression" in which law does not merely provide the constitutional architecture within which politics takes place, but in which it actually takes over from

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[3] R Seymour, *They Want Their Party Back*, VERSO BLOG (June 27, 2016), *available at* http://www.versobooks.com/blogs/2728-they-want-their-party-back.

politics. Hence, in a sense, the EU is an embodiment of the liberal legalism that pervades late modernity's mode of (self-)governance, a mode that now seems to approach its hybris in such seemingly irrational gestures as the Brexit vote. The rise of law as governance (or "lawvernance")[4] in Europe and through the EU had, of course, already been diagnosed nearly twenty years ago by, amongst others, Giandomenico Majone as the shift from what he termed the positive to the regulatory state.[5] In a (simplified) nutshell, the latter is a state that is no longer directly involved in the running of the economy and other policy fields. Instead, the state merely provides and enforces the legal frameworks and instruments through which decentralised, largely (competitive) market-based distributional (policy) decisions can be made. The state, thus, retains an indispensable role in the maintenance of market functionality and in the cushioning of market failure (now recognized as at least occasionally unavoidable even by the neo-classical economic orthodoxy), though it is actually a very different state from the one "the people" tend to have in mind when they elect their representatives. It is a state that is ruled less *through* than *by* a law that is closely tied to functionalist premises and that, therefore, must be kept highly autonomous and immune from political meddling. It is, therefore, a state in which the old European corporatist entanglement of capital, labour, and government, is replaced by formalised legal relations and independent regulatory agencies and courts that are meant to safeguard the functional requirements of competitive markets. It is, finally, a state that is meant to embody what have come to be known as the principles of good governance: accountability, transparency, and participation through a hegemonic rule of law. It does not exist in any pure form in reality. But, as a sizeable literature on the American adversarial legalism and its purported role in the emergence of the European regulatory state argues, it may bear some likeness to the United States and the predominant role law is seen to have historically played in the American polity and in its specific variety of capitalism.[6] It has, in any case, never existed in a pure form in the old European states, although this may be one of the key reasons for European integration, as the EU represents just such a regulatory superstructure.

There is, of course, a Himalaya of literature on the intricacies of that process: what and who, precisely, caused it; and what and who are now behind its crisis. This is not the place

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[4] I thank my friend and colleague Russell Miller for suggesting the concept to me.

[5] G Majone, *From the Positive to the Regulatory State: Causes and Consequences in the Mode of Governance*, 17 JOURNAL OF PUBLIC POLICY 139 (1997).

[6] *See, e.g.,* R Kagan, *Adversarial Legalism: Tamed or Still Wild*, 2 NYUJ LEGIS. & PUB. POL'Y 217 (1998); D KELEMEN, EUROLEGALISM:THETRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (2011).

to review and assess that literature. But I would like to underline the fundamental point that EU governance is essentially governance by law, with that law operating like an ideology become (institutional) flesh, notably by projecting a normative utopia (see Rifkin above) while simultaneously obscuring the material asymmetries on which it is based. What is important to the post-Brexit debate is that, like all (liberal) legalisms, Eurolegalism, as Daniel Kelemen has called it, performs a double quarantining of politics.[7] First it reduces the meaning of politics to a realist caricature in which self-interested individuals and states maintain their identities through permanent antagonistic differentiation. Then it fragments the political agency of this *Volk von Teufeln* ("people of devils")[8] into a large atomized private sphere in which political vocabularies are generated and a much smaller public sphere where these vocabularies are "mainstreamed to the lowest common denominator consistent with a (reasonably) peaceful coexistence (that is, collective self-preservation)."[9] Politics is, thus, made to appear as a dirty affair marred by particularism and eternal compromise, while law—and its lawyer-high priests—stand for universality and integrity, antidotes to (realist) politics, and, therefore, the better politics all together. That this ideological work of liberal legalism is deeply ingrained in the late modern mindset is evidenced by the global trend from the US to Brazil and onto the UK to disdain politics and politicians, and to, instead, believe in the redemptive work of law and lawyers, and especially judges. Indeed, the creeping judicialization of politics observable in virtually all mature and emerging democracies is the surest sign that liberal legalism has become dominant alongside the economic scheme that underlies it.

To be sure, the Brexit vote, as much as all the other neo-nationalist tantrums that have flared up across the continent, cannot simply be considered a straightforward attempt to resist legal technocracy by reclaiming the primacy of politics. There are several reasons why this is the case. First, for many of those who voted Leave, the grassroots politization for which they clamour is, in reality, either a mere desire to re-affirm national, cultural, ethnic (or whatever further essentialized category offers itself) identity clichés, or it is an all together un- or even anti-political craving for authenticity, immediacy, and clarity. Second, because, legalization and judicialization have been rather popular, not the least in those EU member states, like the UK, where Euroscepticism has been rife. Often it is judges who are seen as Camelot-like heroes when they go after the political class (so called) in the

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[7] KELEMEN, *supra* note 5.

[8] *See* I KANT, ZUM EWIGEN FRIEDEN (1795).

[9] F Hoffmann, *International Legalism and International Politics*, *in* THE OXFORD HANDBOOK ON THE THEORY OF INTERNATIONAL LAW 982 (A Orford & F Hoffmann eds., 2016).

wake of corruption allegations. Likewise, during the Euro crisis, British public opinion joined Germany's in favouring a strict rule-based system of fiscal governance over more flexible political bargaining; and constitutionally entrenched public spending limits are as popular as independent central banks, even though they clearly restrict the political space of manoeuvre well beyond any reasonable foresight.

So if the Brexit vote can, be seen as an expression of opposition to the hegemony of liberal legalist technocracy, then it is much less clear what politics it really wants to substitute the latter with. Two overarching issues are, however, crucial to any further reflection. The first is the growing frustration, felt by many across Brexit lines and elsewhere, about the aura of inevitability and hermeticism with which the liberal project, and with it the EU, surrounds itself. It entails the mentioned impoverishment of politics, now increasingly a kabuki-style theatre production that seems only to be about lowest common denominators and middling-muddling through, and which always paints over the real issues and the real divisions. This was well illustrated during the global financial crisis when, despite the extreme fiscal fallout and stark rhetoric on the part of governments, states could not agree to fundamentally reign in the current paradigm of finance capitalism; they clipped the banking sector's wings, but clearly had no interest in interrupting the cash flow to their economies and consumer-citizens. Of course, this position was never openly stated or justified, nor was it properly opened up for public debate. The second issue concerns the role of law, or rather, the degree of autonomy it is accorded. As I have argued here, the EU stands for the highly autonomous legalism that inheres in the paradigm of the regulatory state that serves the functional interests of (neo-)liberalism. To divest the law from this colonization—to resurrect the language of the early Habermas[10]—and to reassert the primacy of politics over law, and of the rule *with* law rather than *by* law, the concept of politics has to be divested of both its realist distortion and its liberal impoverishment.[11] In fact, the spell will only be broken if law and politics begin (again) to be thought together, with law serving as both a *nomos*, a de-limitation of political action, and a *lex*, an instrument for creating linkages amongst political actors.[12] It is, in any case, a project that, as far as that geographical expression called Europe is concerned, can only take place within a political European Union which, given Europe's genocidal legacy, continues to be the only way any of its current member states can legitimately continue to exist.

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[10] J HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (T McCarthy *trans*., 1989).

[11] Anne Orford offered a critical review of Daniel Kelemen's book *Eurolegalism*. *See* A Orford, *Europe Reconstructed*, 75 MODERN LAW REVIEW 275 (2012)

[12] H ARENDT, ON REVOLUTION (1963); Hoffmann, *supra* note 8, at 984.