

Chronicle of a Death Foretold? Thinking About Sovereignty, Expertise and Neoliberalism in the Light of Brexit

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“The true nature of the international system under which we were living was not realised until it failed.”

Karl Polanyi
*The Great Transformation: The Political and Economic
Origins of Our Time*
(1944)

There is a certain degree of irony in writing about Brexit for a law journal- a read put together, hosted and read mostly, if not exclusively, by ‘experts’. The irony lies in the fact that the outcome of the UK referendum on the EU was, amongst other things, a rejection of experts; or rather, of current mobilizations of expertise and the political allegiances of a large number of experts. Despite this irony, or precisely because of it, I will reflect on three interrelated questions that, in my mind, determined the content and outcome of this historic referendum. First, I will discuss the discourse of ‘sovereignty’ and ‘control’ at the centre of the Leave campaign. Secondly, I will focus on the role of expertise and (technocratic) knowledge both in the construction of the European project and in the revolt against it. Finally, I will argue that given neoliberal hegemony and its heavily unequal distributive outcomes, revolts against contemporary structures of power, both national and inter/supranational are to be expected. Therefore, the question for progressive lawyers is how to mobilize our expertise so that these revolts do not become the exclusive playing terrain of the extreme right with unforeseen consequences.

The Return of Sovereignty? Mapping the Debate About Control

In 2011, Martti Koskenniemi was confidently stating that ‘we no longer see any magic in sovereignty’.¹ These were still the times of ‘functional interventionism’, responsibility to protect, humanitarian intervention, and the relatively uncontested expansion of international economic law. Therefore, it might come as a surprise that on the 23rd of June the ‘magic of sovereignty’ was decisive for the victory of Leave. As Will Davies already pointed out, the Leave campaign’s choice to make ‘take back control’ their central slogan, was a manoeuvre of political genius that ‘worked on every level between the macroeconomic and the psychoanalytic’.² Even though the discourse oscillated wildly between references to national, parliamentary and popular sovereignty (the last being a non-existent concept for UK constitutional law, anyway), a desire to reclaim control from the supranational level and to subject decision-making to some form of democratic control was a common, and successful narrative.³ It does not concern us here whether this was a realistic expectation, whether the leaders of the Leave campaign are staunch proponents of democratic participation (they are not), or whether the contemporary configuration of the UK political system is truly democratic and enabling of genuine popular control over decision-making (it is not). The point remains that this was a political battle won (and lost) on grounds of sovereignty.

My first observation focuses on the discipline of law, and more specifically, its orientation, political choices, methodological starting point, and unintended consequences. Being an international lawyer by training, I will primarily emphasize the role of international law. Since the early 1990s, a large part of the discipline devoted itself in arguing about the contemporary irrelevance and/or undesirability of sovereignty.⁴ The argument was (aspiring-to-be) descriptive as much as it was unapologetically normative: sovereignty is not, and should not, be the cornerstone of international law anymore; political authority over territories and populations is only legitimate when it serves the rights of individuals

¹ Martii Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT’L L. 61, 63 (2010).

² Will Davies, *Thoughts on the sociology of Brexit*, POLITICAL ECONOMY RESEARCH CENTRE (June 24, 2016), available at http://www.perc.org.uk/project_posts/thoughts-on-the-sociology-of-brexit/.

³ ‘Nearly half (49%) of leave voters said the biggest single reason for wanting to leave the EU was “the principle that decisions about the UK should be taken in the UK”. One third (33%) said the main reason was that leaving “offered the best chance for the UK to regain control over immigration and its own borders.”’ Lord Ashcroft, *How the United Kingdom voted on Thursday... and why*, LORD ASHCROFT POLLS (June 24, 2016), available at <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

⁴ See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841 (2003); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513 (2009).

and the functionality of the global neoliberal economic system. In fact, the two converged dangerously. Some commentators, or international legal/political initiatives did not explicitly reject sovereignty, but they defined it away. Of course, the thinking of international lawyers is not simply a matter of personal ideas. Thinking that sovereignty does not exist or does not matter is the first step for shaping reality according to this belief. In Philip Alston's words: 'International lawyers have, in many respects, served as me handmaidens of the changes wrought by globalization. Indeed, the characteristics of sovereignty have changed so much partly because of the role they have played in facilitating many of those changes and in seeking to reflect the new realities, both in their normative and institutional dimensions.'⁵ Arguably, this discursive and material move away from sovereignty is not *a priori* a problem. Nevertheless, it becomes one, if one acknowledges (and cares about) two intertwined realities: democratic participation and economic redistribution to the benefit of the poor have so far materialized effectively only on the national level. This is not to say that the Brexit vote was one in support of democracy or fairer economic distribution. Still, these cataclysmic events could be an opportunity for some reflection of the deeply elitist and detached character of the discipline, and much more so of some of its specific projects, including 'global governance' or 'global constitutionalism'.⁶

Between Neoliberal Elitism and Far-right Anti-intellectualism: The Role of Expertise in the Brexit Debate

This leads me to my second point about the role and representations of expertise in the debate preceding the referendum. Few pronouncements capture the spirit better than Michael Gove's aphorism that 'Britain had enough of experts'.⁷ In a nutshell, the debate can be summarized as a clash between neoliberal technocracy and far-right anti-intellectualism. Crucially, both positions are inherently inimical not only to some sort of emancipated society but also to liberal democracy, even though lawyers might be inclined to only blame the latter. For if blanket rejection of expertise shows contempt for informed debates and, more broadly, for the necessity to reflect seriously on the human condition and social questions, the unconditional reliance and praise of (certain forms of) expertise is anchored to the inherently conservative belief that certain people are fit for governing

⁵ Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 EUR.J.INT'L LAW 435, 435 (1997).

⁶ For a poignant critique see: Zoran Oklopcic, *Beyond Human Rights: Beyond a Convertible Vattelian?*, VOELKERRECHTSBLOG (Jan. 18, 2016), available at <http://voelkerrechtsblog.org/beyond-human-rights-beyond-a-convertible-vattelian/>.

⁷ Henry Mance, *Britain has had enough of experts, says Gove*, FINANCIAL TIMES (June 3, 2016), available at <https://next.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>.

while others only fit to be governed.⁸ In this respect, arguments about the purported inability of the public to decide on ‘complicated questions’, such as the one of the EU membership are commonplace among legal academics.⁹ Here, the political role of expertise at work becomes obvious. First, it is a common discursive strategy to emphasize the ‘ignorance’ of those voting against the EU, but not of those voting for it, even though there is no good reason to assume any major discrepancies.¹⁰ Secondly, such an approach frames the project of integration as one of highly complex macroeconomic targets and not of national/supranational identities, values or peace. Even though I do not necessarily disagree with such a framing, it is inconsistent with rhetoric supportive of the EU invoking common values, democracy or the existence of a European identity. Relatedly, unconditional reliance and invocation of expertise purposefully ignores that implication of such experts, be it economists or lawyers, in the construction of a structure of economic governance, including the EU, with profoundly unequal distributional effects. In terms of pure tactics, economists and other experts have not realized in full how their profession was discredited both by the 2007-2008 economic crisis, their inability to foresee it, and most importantly, its lasting impact on the lives of large sections of the public.

A Dysfunctional Order: The Rise and Destructive Potential of Neoliberalism

It is precisely the crisis of 2007-2008 that lies at the heart of the present turmoil, which is much broader than the Leave vote anyway. Even though the dismay of the British working class goes back to the years of Thatcher, and despite the fact that the genealogy of British Euroscepticism is quite distinct from its continental counterparts, it is at least doubtful whether a similar referendum would have had the same outcome ten or fifteen years ago. My point here is that the Leave vote is a reflection of the deep stratification of the UK society. Arguably, this stratification is multileveled and irreducible to a single explanatory scheme. Nonetheless, I cannot help thinking that the prevailing sense of ‘loss of control’ is at least partly the consequence of the neoliberal hegemony over both the EU and globally. Even though a comprehensive history and detailed analysis of neoliberalism surpasses the purposes of this short note, a working definition could be that neoliberalism is a model of capitalist accumulation that arose as a response to the Keynesian state and to 19th century

⁸ COREY ROBINS, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* (2011).

⁹ ‘There is ample scholarship on the limits if not perils of direct democracy when citizens too are asked to decide complex policy choices in the absence of a clear understanding of the available options and potential consequences of their vote.’ Laurent Pech, Maximilian Steinbeis, *Five Questions on Brexit to LAURENT PECH*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (June 26, 2016), available at <http://verfassungsblog.de/five-questions-on-brexit-to-laurent-pech/>.

¹⁰ See, generally, EUR. COM., *EUROPABOMETER, POST-REFERENDUM SURVEY IN IRELAND: PRELIMINARY RESULTS* (2008), available at http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf.

laissez-faire liberalism and it rests upon the idea of generalized competition and state intervention for the construction, guarantee and expansion of these competitive relations in an ever increasing sphere of social co-existence, including the structure and functions of the state itself.¹¹ Even though there are strong arguments about the links between ordoliberalism, the German 'stream' of neoliberalism, and the origins of European integration,¹² it is safer to assume that neoliberal hegemony over the project of regional integration in Europe was solidified with the Maastricht Treaty. Around the same period, a wave of liberalization redefined international law bringing about significant changes to international trade and investment law that solidified that position of big capital and diminishes the space for state intervention in order to minimize or channel the adverse effects of free markets.¹³ As I argue elsewhere,¹⁴ the quantitative expansion and qualitative refinement of international law (broadly conceived) after the 1990s is not a mere coincidence to the rise of neoliberalism, but rather a necessary precondition of neoliberal hegemony. Removing or at least disciplining democratic and popular control over economic decision-making has been a central concern for neoliberals. From Hayek's (neoliberal) federalism¹⁵ to Röpke's emphasis on the need to tame national and popular sovereignty through international law,¹⁶ the trend toward increasingly internationalized and legalized forms of economic decision-making is intrinsically linked to neoliberal thinking and practice.

However, a mere repatriation of sovereign powers will not solve the problem, especially in states like the UK, where neoliberalism is 'indigenous' and not externally imposed. This is partly due to the fact that, despite the hopes of aspirations of Leave voters, the leaders of

¹¹ For some good points of reference see: MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978-1979* (2008); PIERRE DARDOT, *CHRISTIAN LAVAL: THE NEW WAY OF THE WORLD: ON NEOLIBERAL SOCIETY* (2014).

¹² Michelle Everson, *Europe at the Crossroads: Professor Everson comments (Part 3)*, BIRKBECK COMMENTS (June 15, 2016), available at <http://blogs.bbk.ac.uk/bbkcomments/2016/06/15/europe-at-the-crossroads-professor-everson-comments-part-3/>.

¹³ DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

¹⁴ Ntina Tzouvala, *The Ordo-liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale*, EUR.Y'BOOK INT'L ECON. L. (forthcoming 2016).

¹⁵ Friedrich A. von Hayek, *Economic Conditions of Inter-state Federalism*, 5 *NEW COMMONWEALTH Q.* 133 (1939); Jorg Spieker, *F. A. Hayek and the Reinvention of Liberal Internationalism*, 36 *INT'L HISTORY R.* 919 (2014).

¹⁶ Wilhelm Röpke, *International Law and Economic Order*, 86 *RECUEIL DES COURS* 203, 250 (1954).

the Leave campaign were on average more neoliberal than the consensus on EU-level.¹⁷ In fact, this real sense of ‘loss of control’ is not only linked to the transfer of decision-making to supranational bodies, but also a direct consequence of the inherent logic of neoliberalism. This process of disenfranchisement and stratification works on many levels. First, because of privatization a growing number of functions, services, even material spaces are being removed from democratic control and subjected to market forces. Therefore, voters can even nominally decide an ever-narrowing range of questions. The convergence of political parties to the new neoliberal ‘centre’ further means that the electorate can only choose between different versions of essentially the same programme, while even the mildest Keynesian politics end up in political exile. Even in the world of expertize, economics departments have become so monolingual in their orientation that students began revolting.¹⁸ Secondly, the disciplining of the state in accordance with market principles means that citizens are re-imagined as customers driven by some (imaginary) rational desire to maximize utility and not as parts of a political community that liberate or clash for the greater good -elusive as this may be. Thirdly, the elevation of competition into the organizing principle of every singly aspect of human (co)existence comes with accepting the essential zero-sum nature of competition as an organising principle of society. In short, neoliberals were happy to acknowledge that unlike free exchange, free competition does not come with a promise of final equilibrium:

Instead of being frank about the fact that the extraordinary chances of gain which the game of the market economy offers for the good players are accompanied by chances of losing for those who are less capable or less fortunate, and that all those who want to participate in this game are obliged to take their chance, the propaganda [of classical liberalism] promised prosperity and happiness to all without exception.¹⁹

As Wendy Brown has argued convincingly, these ideas and practices of neoliberalism lead to the creation of a ‘permanent underclass’, since sizeable sections of the society are excluded from democratic participation, social integration, even genuine participation in

¹⁷George Eaton, *Farage tries to shed his Thatcherite skin*, NEWSTATSMAN (June 1, 2014), available at <http://www.newstatesman.com/politics/2014/06/farage-tries-shed-his-thatcherite-skin>.

¹⁸ *An international student call for pluralism in economics*, INTERNATIONAL STUDENT INITIATIVE FOR PLURALISM IN ECONOMICS (May 4, 2014), available at <http://www.isipe.net/>.

¹⁹ Alexander Rüstow, *The General Sociological Causes of the Economic Disintegration and Possibilities of Reconstruction*, in INTERNATIONAL ECONOMIC DISINTEGRATION 272 (Wilhelm Röpke ed., 1942).

the market.²⁰ The referendum results in the North East of England, a region rapidly de-industrialized, destroyed by Thatcherism, ignored by subsequent governments and let down by New Labour, can be explained and contextualized satisfactorily only if we accept the profoundly exclusionary and socially destructive effects of neoliberal governance both on national and on international levels. The victory of Leave was at least partly an angry and self-defeating anti-establishment rising of those who rightly feel that they have consistently been on the losing side for the last forty years. If this is the case, the result was less about the EU and more about the 'establishment' of the UK, ranging from the Prime Minister to condescending columnists and readers of the liberal centre-left Guardian.

Conclusion

This short note did not aspire to provide a comprehensive explanation of the outcome of the UK referendum. Undeniably, factors such as nostalgia for the British Empire,²¹ discomfort with 'multiculturalism' or unapologetic racism, collective hysteria over migration, a highly dysfunctional political system, and shamelessly misleading statements contributed significantly to the result. My contribution aimed to highlight the issues that I consider of direct interest to lawyers, particularly to international lawyers. Therefore, I emphasized the complex relationship between sovereignty (and its erosion), expertise and neoliberalism. My main argument is that the described complex relationship between the three (always coupled with other factors), created a 'perfect storm' for a fairly disastrous outcome. In this respect, we need to distinguish between root causes, contextual factors and outcomes of a process. My analysis above does not imply that the outcome of the referendum will help us solve any of the grave issues that paved that way for this very outcome. If anything, chances are that the situation will deteriorate both regarding xenophobia as well as the economic marginalization and political disenfranchisement. The total lack of a Brexit plan and the exceptionalism of the British ruling class mean that the Leave negotiations will be disastrous, if they ever happen in the first place.

However, the point remains. The outcome of this referendum was a warning for the rapid de-legitimization of a specific paradigm of governing the economy, organising public life and ordering spatial matrixes. It is not a great secret that in politics, as in nature, vacuums are filled quickly. With the far-right on the rise, progressive lawyers and citizens need to mobilize fast, in order to avert what looks very much like a looming disaster. Importantly,

²⁰ Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratisation*, 34 POLITICAL THEORY 690, 691(2006).

²¹ Nadine El-Enany, *Brexit as Nostalgia for Empire*, CRITICAL LEGAL THINKING (June 19, 2016), available at <http://criticallegalthinking.com/2016/06/19/brexit-nostalgia-empire/>.

this requires a degree of self-reflection about our own role in the construction of societies so unfair and unequal that exhibit signs of self-destruction.

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