# Contribution to the online symposium on Poul F. Kjær (ed.), The Law of Political Economy: Transformations in the Function of Law (CUP 2020)

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## What Comes After Neoliberalism?

For some, the term neoliberalism has acquired "such toxic connotations that nobody concerned with their public reputation would identify with it" (T.Biebricher, 'Ordoliberalism as a Variety of Neoliberalism', J.Hien & C.Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics*, Hart, 2017, 104). At the same time, though, no term better than neoliberalism is reputed to design the ideology prevailing worldwide since the 1980s.

Rather than capturing the sense of such ideology, *neo*-liberalism signals prima facie a return to an ideology of the past such as the *laissez-faire*. Similarly, *post*-modernism avoids to design directly a certain hegemonic ideology or culture. It is as if we had lost the capability of defining the ideologies or cultures reputed as prevailing in our time vis-à-vis, say, 'liberalism', 'capitalism', 'welfare state', or 'socialism'. Nor it is for chance if a flourishing literature emphasized meanwhile 'the end' of familiar pieces of the constitutional landscape, such as nation-state, history, geography, politics, democracy, territory, work, and power, without correspondently announcing 'the beginning' of something else.

The vagueness of the term is confirmed by the widely held view that neoliberalism did not simply consist in re-establishing the market's pre-eminence over the state. As Marija Bartl has observed in her contribution to the volume, 'Above and beyond the free market, as a 'private sphere' that should be left free of governmental regulation, neoliberalism was also a broader critique of state institutions. In this imaginary, 'more market' was presented as a means of rationalisation of state institutions (government failure) and the economy', and even 'as a model for shaping social relations in order to achieve increased efficiencies across the social world' (239). Furthermore, in the neoliberal epoch the economic debate was for long focused on the traditional conflict between states and markets, neglecting the power of 'giant firms', that are 'so dominant in their markets and so close to governments that they break most of the rules of what economists understand by the free market.' (C.Crouch, *The Strange Non-Death of Neo-Liberalism*, Cambridge, Polity, 2011, 75).

In the financial market in particular, the relationship between operators and regulators became characterized by coalescence, with the effect of weakening 'the form of stability

and restraint imposed by public regulation *vis-à-vis* economic processes' and of revealing the neoliberalism's paradox of 'reducing the reach of the political system through political means and within the framework of a political universe' (P.F.Kjaer, *Law and Order Within and Beyond National Configurations*, P.F.Kjaer, G.Teubner, and A.Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective*, Hart, Oxford, 2011, 418 ff.). The issue at stake is no more whether politics should respect the market, as emphasized from theorists of the neo-liberal paradigm, nor is whether states are able to maintain economic practices within the framework that they have established. Both these accounts presuppose that the action of global financial players is limited to the economic domain. Their practice reveals instead clearly an encroachment into the field of politics.

These elements suffice to demonstrate the poor heuristic capacity of the label 'neoliberalism' and, at the same time, the need to go beyond a merely terminological dispute. Whether a post-neoliberal scenario can be conceptually prepared, depends on our view of a dramatic shift in the realm of power from democratically elected authorities to private companies, which attempts of regulation appear for the moment inadequate to deal with.

We know that it was provoked by a general retreat of politics no less than by the action of global markets and of the new communicative system. For some, "While worrying incessantly about the menace of populism, elitist liberal democrats don't see large concentrations of private power in the hands, for example, of Big Tech (Google, Facebook) or Big Finance as threats to freedom, or as narrowing or even manipulating human choices." (R.Howse, 'Epilogue: in defense of disruptive democracy – A critique of anti-populism', *I•CON* (2019), 649.) But what about populist governments? Are they prone to contrast large concentrations of private power in the people's name? Global corporations, we should rather conclude, have little to be worried of the reciprocally fierce adversaries of the moment.

As for jurists, including those committed to constitutional democracy's principles, their attitude towards the formation of unchecked global powers was at best cautious. I struggle to follow the hypothesis that their defence of 'the law as it is' was due to a reaction to the hegemonic 'hermeneutic of suspicion', as Duncan Kennedy affirms in chapter 4 of the book, or to the lawyers' propensity to maintain the rule of law and a vibrant economic system (R.P.Buckley, 'Reconceptualizing the Regulation of Global Finance' (2016) 36 *Oxford J. of Legal Studies* 242, at 271.).

The point is that controversies over constitutionalism – whether it should be grounded on limiting power and/or on legitimizing it through democratic means – regularly presuppose its connection with the political power of the state. Even the fragility of constitutional democracies was always denounced upon such premise. From time to time, the cause was viewed in the emergence of 'the military-industrial complex', as denounced by the US President Eisenhower in the 1961 Farewell address, or to the contrary in the 'overload' that the 'democratic expansion of political participation and

involvement' might have created on government, as asserted in the 1975 Trilateral Commission's Report. But the state's political power remained a crucial reference for these approaches.

In the neoliberal epoch, new power relationships arose however from society, not from public institutions, with the effect that the constitutional design was formally unchallenged. In addition, the realm of economic global power or of the communicative system, being inter alia inextricably connected with technological change, appeared to constitutionalists far more elusive than that of political power. Hence their difficulty in attempting theories of a 'global constitutionalism'.

In a different vein, after having connected the prospects of the constitution to 'the continued existence of its preconditions', Dieter Grimm has distinguished preconditions that are still operative, such as questions of political order and the idea of limited government, from the blurred boundaries between internal and external and between public and private, where the state relies increasingly on negotiations with private actors rather than legal orders addressed to them, and these actors share public power without being legitimized and rendered accountable according to the constitutional requirements established for public actors ('The Constitution in the Process of Denationalization', *Constellations*, 2005, n. 2, 460 ff.).

It remains to be seen, however, whether the growing erosion of the boundaries between internal and external and between public and private threatens as such 'the modern constitution', or whether it is rather scholars, being accustomed to think at constitutionalism as related to political power, that are not at ease with a deep reassessment of the realm of power such as that we are assisting at in the last decades. Think at credit rating agencies, that for long interposed successfully First Amendment objections in civil litigation, being exempt from liability for statutory and common law private claims. Or think at judicial classifications tending to justify with freedom of speech arguments the enormous power acquired by private companies in the US and European electoral campaign.

The assumption that the role and function of law is to set limits and restraints on the exercise of power, whatever its provenance and form, lead some to recommend an 'integrated approach' to the mechanisms of public and private law, which emphasizes the protection of fundamental values over a clear-cut distinction between public and private in the law (D.Oliver, *Common Values and the Public/Private Divide*, Butterworths, London, 2000, 248). However, it has been objected, private values

> "need a public sphere in order to be identified, defined, and most importantly, *protected.* The absence of a public sphere, which would result in dispensing the notion of public and private in the law, means that the private values of autonomy and dignity, which human rights law aims to protect, would be without clear definition or significance. In a world without a 'public', privacy makes no sense." *(C.Mac Amhlaigh, 'Defending the Domain of Public Law', C.Mac Amhlaigh et al. (eds.), After Public Law, OUP, 2013, 127).*

Public law, this is the main assumption, is unlikely to meet the challenges posed by a neoliberal view of society by simply extending to private actors the constitutional values of dignity, autonomy, respect, status, and security. These, I would add, are not fixed entities, but need to be re-interpreted in the light of social needs varying over time and, in constitutional democracies, such re-interpretation is not monopolized by public actors.

It is true that, "with the rise of neoliberalism, the mood of politics might well turn hostile to the very assumptions about equality and socially just allocation of resources upon which social and economic rights depend" (C.Gearty, 'Human Rights Law', R.Masterman and R.Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge University Press, 2019, 306). My point is however that, even with a less hostile politics, the structural decisions regarding allocation of resources are unlikely to be substantially reversed, as far as these depend now more on power relationships arising from society than on the will of democratically elected authorities.

The issue of checking those relationships, and of the mechanisms that could be forged to this end, is not political, but constitutional, in the sense of constitutive of a certain legal and economic order. We are still far though from dealing with it, not least because of the difficulty of constitutional lawyers in abandoning the traditional presumption that power is intrinsically connected to politics and to the public sphere.

Such presumption was not abandoned even at the apex of the neoliberal epoch, with the shift from 'government' to 'governance' affecting the EU mainstream studies, which further exemplifies the jurists' denial of the dimension of power affecting social relationships. The post-national discourse praises such a shift because it relies on the postmodern presumption that whichever institution involved with 'stateness' is a relic of the past, whereas the new informal social relationships that are believed to characterize the European polity should reflect per se the dawn of the future.

In this perspective the settled rules and devices referred to as 'traditional' constitutionalism appeared to be merely formal constructions vis-à-vis the informal and therefore reversible relationships and processes that characterize our time. And the EU, as a never-ending project, was believed to reflect this far better than the old European states. Scholars launching the post-national discourse did not simply aim, therefore, at integrating the study of governmental institutions with that of new forms of citizens' participation in public policies, or of dialogic forums. Their openly asserted ambition consisted rather in re-shaping the paradigms of constitutionalism. However, it was objected before the rise of populist parties and governments, the 'governance turn' goes to the point of acting "as an 'anti-politic machine' in which accountability becomes progressively blurred, decision-making increasingly remote and obtuse, and the citizens of Europe – in whose name the EU claims to speak – ever-more voiceless." (C.Shore, 'European Governance or Govermentality? The European Commission and the Future of Democratic Government', 17(3) *European Law Journal* (2011) 303).

In Emilios Christodoulidis's words, far from considering the weakening of political representation as a weakening of democracy, the literature on new governance "is resplendent with references to empowerment, 'bottom-up' deliberation, experimentalism, all clearly distinct from the stale and inward-looking *cul-de-sacs* of national democratic regimes and of states that have become poor aggregators of their citizens' interests." (74). Leaving aside its important implications for the EU institutional system, the 'governance turn' is thus likely to have diverted the scholarly attention from the less resplendent, and seemingly less innovative, task of responding to the paradigm change launched by neoliberalism along the path, and with the tools, of democratic constitutionalism.

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