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Law's Empire of Austerity: *De-politicisation of Economic Decision Making in the Twilight of European Democracy*

By Ioannis Glinavos

Abstract: Europe's unique place in western political economy (previously defined by its commitment to social-democracy) has recently transformed through adherence to a model of development that sees the separation of politics from economics as integral to stability. This report attempts to trace the place of law in defining and distributing power in the era of economic crisis. It suggests that law is being used to restrict policy discretion having an integral part in keeping power vested in corporate elites. The report argues that the crisis can be seen as being the consequence of the dis-embedding of the political from the economic, and it is this distance that causes legal frameworks to operate in unsatisfactory ways. The report concludes that the manipulation of law reform to impose and maintain what the orthodoxy of austerity considers 'rational' solutions, undermines the legitimacy of democratic institutions across the Continent and ultimately endangers the European project.

Law's Empire of Austerity

Plus ça change, plus c'est la même chose. While left-leaning academics are writing books about neoliberalism, the world is still dominated by financialised capitalism. For those who thought, for a second, that the financial crisis of 2008 offered a glimmer of hope for a rewriting of the rules of the game, 2014 has been another stark reminder of business as usual. Let us take one of many examples of capitalist excess, the pay-day loan industry. It would be interesting to see what the author of this passage in the Bible would make of modern personal unsecured loans: "If your brother becomes poor and cannot maintain himself with you, you shall support him as though he were a stranger and a sojourner, and he shall live with you ... You shall not lend him your money at interest, nor give him your food for profit" (Leviticus 25: 35–7). The British government has maintained throughout the years of austerity that offering a loan service with a representative APR of 5853%, such as wonga.com did in late 2014, was fulfilling a need. It took years of academic research as to the damage this type of lending causes (to those least likely to afford it) and an Office of Fair Trading review of the £2 billion pay-day lending sector in the UK, for the financial regulator (the Financial Conduct Authority) to announce in November 2014 a consultation for setting maximum costs for unsecured personal loans. Should we celebrate this as a major success, or lament the failure of decades-long critique of capitalist excess to deliver anything but changes in the margins?

This report enquires into the role of law in supporting structures of capitalist domination. It suggests that the law in financialised capitalism acts as a barrier separating the popular will from economic decision making, and suggests ways to overcome this, by 're-politicising' the role of law in market democracies. The following discussion offers an exposition of neoliberal orthodoxy, demonstrating how the separation of politics from economics is integral to what is understood as 'stability' by policy makers. An investigation

is offered of the role of law in modern capitalism, which is defined as a pre-occupation with the 'constitutionalisation' of economic interests in an attempt to define and distribute power. It is claimed that the law is used to cement neoliberal politics, such as austerity, with regulatory responses to the crisis aimed at protecting private property rights and corporate expectations (separating politics from economics) with little regard for democratic disenfranchisement. This is evidenced in the lack of substantive change in the operation of financial markets, and crucially, as this report suggests, in efforts to use private dispute resolution processes to protect investor rights and corporate expectations from policies aimed at safeguarding the public interest. We will start this reflection by defining what is meant by neoliberal law and explaining the role of law in financialised capitalism. We proceed by explaining constitutionalisation, seeing examples of how law is used to push aside democratic consultation. We conclude by considering avenues to resistance and democratic re-empowerment.

The Nature of the Beast: Defining Neoliberal Law

How has the supposedly European Social-Democratic State degenerated to acceptance of austerity and domination by supposedly a-political technocrats? When and why did economists replace politicians as the authors of the Continent's fortunes? How does one explain the disenfranchisement of social actors and the placing of power in the hands of self-declared benevolent, yet opaque and largely unaccountable groups, like the governors of the European Central Bank? Tempting as it may be to imagine a conspiracy of the right against the interests of the people, the truth is much simpler -and worse. The following report defines what neoliberalism means for law and explains how a creeping de-politicisation led to the technocracy that now imposes austerity on Europe, replacing democracy as the main tool in determining the shape of our political economy.

Neoliberalism is strongly associated with the concept of a minimal state. The role of the state, orthodox economic theory suggests, is essentially to facilitate the operation of the market and its rationality. Consequently, political interventions in economic processes should be kept to a minimum. From this perspective, the key roles for law are the definition, allocation and protection of private property and the enforcement of contractual agreements¹. The reason why law is seen as the guarantor of private property rights, is because market mechanisms (and the economic processes that lie at the heart of capitalism) are premised upon the existence of private property. Property forms shape the structure of the market because they are deemed to be essential to the operation of exchange and a necessary consequence of man's economic rationality. Policy makers in contemporary Europe seem unable to see human activity in terms that do not involve transactions of property rights in facilitation of market exchanges. This understanding of social relations (as forms of property) transcends physical goods as is evidenced in a range of legal constructs such as intellectual property. In adopting this stance as to the function of private property, neoliberalism combines two strands of traditional economic theory. It draws, on the one hand, from the Austrian economic tradition that views market individualism as the herald and prerequisite of individual freedom (the celebrated Austrian Economist Friedrich von Hayek being its central proponent) and, on the other, from the neoclassical economic tradition that emphasises the function of markets in promoting economic efficiency (as, for example, in the Chicago School of Economics).

The notion of incontestable private rights of property protected by law against both private and governmental interference is of pivotal significance to modern capitalism and is linked

to the fundamental notions of individuality, democracy and freedom. The above notions are also fundamental to western liberal theory. It is suggested that a legal system that allows individuals to order their lives, their personal behaviour, and their business conduct secure in understanding the rules that will apply to them provides a critical spur to the investments of money, of energy, of talent that promote progress in human endeavour². Consequently, the single most identifiable attribute of contemporary neoliberalism is its desire to extend markets and market mechanisms into as many aspects of human activity as possible. The widespread revival of Adam Smith's theories of economic development (and the belief in the centrality of property rights and of unregulated markets) has in the last three decades had wide-ranging effects on economic policy across the globe, not only in the 'west' but also in developing countries. Neoliberalism, with its revival of the 'laissez-faire' theories of the late nineteenth century, purports to offer not only a comprehensive account of how to achieve growth but of how to organise human relationships in general.

With its advocacy of policies aimed at rolling back the state and freeing the market (through measures such as the privatisation of state enterprises), the influence of neoliberalism as a development doctrine has been enormous. The spread of market solutions to all kinds of problems, as a result, is evident in the domestic and international sphere – from the privatisation of public utilities to the deregulation of financial flows. The marriage of the Austrian tradition and the Chicago neoclassical economics described above allows neoliberalism to lay a claim to the freedom allegedly promoted by free markets (in the spirit of Hayek) and to the suggested efficient results of unfettered exchange (claimed by the Chicago School). And, it gets even worse for a conception of the State as a positive player in development. Chicago economics provide not only the theoretical basis for the claim that markets are efficient in the allocation of goods but also a thorough exposition of market failure, reaching the conclusion that any market failure is a result of fetters or constraints on exchange imposed by state action. One of the most important representatives of this view was the US economist Milton Friedman, whose work, arguing in favour of freeing up markets, deregulation and reducing the influence of government, greatly influenced the UK's Thatcher governments in the 1980s.

In accordance with the thesis of the Chicago School that the state is to blame for market failures, the neoliberal project (and its European implementers) focuses on removing interference from the economy. Not only is the state to withdraw from the economy, but the capacity of state agencies to intervene in cases of market failure is seriously curtailed. On this basis, orthodox analysts assert that market failures, even though theoretically possible, happen only in specific environments (law enforcement, defence, large scale infrastructure) and this is used to promote the idea that nothing more than a limited state is needed. Further, it is argued that deciding on a course of action for the treatment of market failure is a matter for expert advice and as such it should be taken out of the realm of politics and the reach of politicians. This is done by employing the argument that even when failure is documented, state action is inappropriate because of its potentially adverse effect on the business climate and market expectations. This neoliberal model is, according to its proponents, 'ideology free' because it does not make any judgement about the initial allocations of wealth. It is important to reiterate here that according to neoliberal theory markets are not politically or legally constituted; rooted in human nature, they are purely economic and apolitical. Thus, the only function of the state and of regulation is to facilitate the operation of the rationality of 'the market'. Any wealth distribution is acceptable as it leads, via the market, to efficient use of resources as long as private

property rights are protected and contracts honoured. This 'attitude' to what is political and what is technical –and best left to the experts- is perfectly illustrated by Tony Blair's experiment with a British Third Way, supposedly overcoming the distinction between left and right, while handing power to experts in pursuit of market friendly policies. After all, why should we not believe Blair's spin doctor Peter Mandelson, who was famously 'intensely relaxed about people getting filthy rich'? Austerity and technocracy, as Europe's response to the Financial Crisis, indeed display little regard for inequality, social strife, or indeed, entrenching the power of the 'filthy rich'.

Law Beyond Our Reach: Constitutionalising Market Freedoms

The main preoccupation of European policy makers seems to be the sustainability of market friendly reforms, in the face of opposition to austerity. It is at this point that a fundamental rift between market promotion and democratic development becomes apparent. If in a democratic society the public has the power through the electoral process to challenge all aspects of economic organisation and policy, then the reform process could in principle be modified or, indeed, reversed by the election of governments with less faith in fiscal discipline, or generally in markets. The only way to avert this danger and cement reforms is by limiting the reach of the political process; by immunising the economy from political interventions. One of the ways this is achieved is via efforts to decommission the political reach of the state in an expanding zone of policy and regulatory activities. According to Kerry Rittich the motivation of a great deal of legal reform is to bind the state into the future so that reforms agreed to at one point in time with one administration cannot be undone, at least without considerable expense and effort, at a later date³. Developing the ideas that led to granting independence -from governments- to central banks (and mimicking the position of the World Bank in relation to developing countries) many now in Europe propose that tasks such as tax collection and trade policy might be taken out of the political or legislative arena as well. The debate as to an EU Fiscal Union and the signing of the Fiscal Compact is an excellent example of this trend⁴.

Processes such as those described above involve the constitutionalisation of reform. Such constitutionalisation operates by placing market norms beyond the reach of political institutions. This is achieved by locating the sanctity of property and contract (together with definitions of human rights that include the un-assailability of individual property rights) in constitutional-like structures that are impossible -or near impossible- to amend, such as Bilateral Investment Treaties. The market protective framework is then completed by the subsequent creation of 'politically independent' dispute resolution mechanisms that can bypass government legislation that allegedly violates corporate and investor rights. The most obvious example, perhaps, is the International Centre for the Settlement of Investment Disputes (ICSID) whose arbitrators routinely condemn states for violating investor expectations. This legal/ institutional framework safeguarded by a pro-market bench means that state policies with social objectives and redistributive aims are very difficult to implement if they offend the basic pro-market politico-economic status quo. In short, the ideological and methodological straitjacket of neoliberalism is leading to the adoption of policies (and, more importantly, to a framework of rights) that make it very difficult to broaden the policy debate to include social and distributive concerns. It is for this reason why Investor-State Dispute Settlement (ISDS) clauses are so controversial, as evidenced in the widespread reaction against the proposed Transatlantic Trade and Investment Partnership (TTIP).

Ran Hirschl suggested that the current global trend towards judicial empowerment through constitutionalisation is part of a broader process, whereby self-interested political and economic elites, while professing support for democracy and sustained development, attempt to insulate policy making from the vagaries of democratic politics⁵. By this method, the promotion of the rule of law becomes a way around the democratic and participatory vacuum created by the financial crisis and leads to a tendency towards authoritarianism as a requirement for the survival of the capitalist system. Instead of allowing direct popular control over economic decision making Europe, following the neoliberal creed, places the legitimacy of the system in the hands of non-state, 'independent' institutions like supposedly independent arbitrators, trained to uphold the neoliberal economic order. However, this constitutionalisation of pro-market economic decision-making renders legal frameworks inflexible. When stress is applied, as for example by the European sovereign debt crisis, these inflexible structures risk breaking under intense political pressures. Politics inevitably can be constrained by legal frameworks only for certain periods of time and under certain circumstances; their resilience reaches its limits when the disconnect between economic decision-making and democratic choice becomes too wide⁶.

It is not fully appreciated how market-friendly law reforms have a trajectory that leads to ever decreasing policy discretion. Locking up market-friendly policies with legal means is not always desirable. A democratic polity is based on the ability to change course, and the fundamental *raison d'être* of a democracy is to allow the people to determine what are public goods and how they ought to be obtained and distributed. Elevating issues of economic decision-making beyond the reach of the democratic process may be positive for the 'investment climate' in the short run, but can lead to instability and threaten the very existence of a market in the long run. It is not therefore anti-market to suggest that market democracy needs to retain policy discretion on issues of economic governance. Policy discretion is a shock absorber, without which advocates of increasing liberalisation (and the further use of law to cement pro-market reforms) may find themselves faced with a revolution. A good example of what happens when economic rights are lifted from the national domain is the trouble countries in the European periphery are facing in investment treaty tribunals as a result of investor actions challenging measures adopted to combat the crisis.

ISDS clauses in Bilateral Investment Treaties (BITs), which were mentioned above, create a parallel legal system that exists beyond the reach of domestic courts and operates under a set of rules defined by the provisions of the treaties themselves⁷. BITs are aimed at encouraging foreign investment and for that reason make a series of binding promises to investors. They may, as a result, offer a more varied menu of options to someone wishing to sue, than mere reliance on domestic constitutional and human rights provisions. Also, very significantly, ISDS is embarrassing for governments at the international level, which increases the pressure sovereigns feel when they attempt to re-enter bond markets after a period of exclusion, as is the case for those European nations in receipt of assistance by the IMF and the EU. Greece, offers a good example of how those complaining of losses during the crisis can use ISDS to bypass domestic and EU legislation. An illustrative case is that of the Slovak Poštová banka that purchased Greek bonds with a face value of over half a million Euros in 2010, after Greece was plunged into market turmoil (post the 2009 election), but at a time when European and Greek policy makers were loudly proclaiming the utter security of Greek debt. By 2012, the bank allegedly lost almost half of their investment. Upon discovering that a BIT existed between Slovakia and Greece, promising

a host of nice sounding things, including compensation for expropriation, the bank hired Cleary Gottlieb and headed to ICSID seeking to recoup its losses (Case No. ARB/13/8 Poštová Banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic).

It is not only investors in Greek bonds that are heading to investment tribunals, however. Cases have been lodged with ICSID against Cyprus on account of the dissolution of Laiki Bank (Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus, Case No. ARB/13/27), alongside multiple actions against Spain for significant changes in incentive structures for clean energy (implemented as a response to the country's economic crisis). The Energy Charter Treaty secretariat registers 11 such cases against Spain, with ICSID having registered 8 cases since 2010 -all still pending. The Spanish cases are significant both because they reveal a deep appetite for ISDS, and for the link they offer between issues of energy policy and investor attitudes towards sustainability. It seems that investors instead of protesting environmental measures that potentially harm their profitability (like they did historically), are now suing states in investment treaty tribunals for the withdrawal of support from clean energy projects. This leads to a recasting of ISDS as a protector of the environmentally friendly investor who ought to be shielded from intrusion by the state (or protected from changes in policy) when the state drops its commitment to green energy. While, from a sustainability perspective, one may applaud such use of the investment treaty regime, what should be the position if the change in regulatory policy comes as a necessary response to the crisis? Are investors actually going to win in these cases? The precedent of Argentina may be indicative of how ISDS tribunals may decide in the European context. We know for instance that arguments based on economic necessity have hardly swayed tribunals in the case of Argentina. Should we extrapolate that investors suing Spain for the cancellation of photovoltaic subsidies are confident that the Spanish economic collapse did not constitute enough of an 'emergency' to lead to a legitimate rewriting of their contracts? It is possible that these actions are not coming to tribunals because investors expect to win substantial amounts in compensation. Rather, they could be surfacing at increasing volumes because they help generate political leverage. Countries battling economic crises, like Greece, Spain, Cyprus, need investors on their side. As Argentina has discovered, keeping claims pending is not conducive to market stability. Investors are therefore probably involved in these actions not because they genuinely expect to gain compensation, but do so in order to keep the shadow of a Griesa type judgement (see Republic of Argentina v. NML Capital, Ltd. 573 U.S. 2014) over European policy makers, hoping that this forces settlements with holdouts and vulture funds.

Consequences of De-politicisation and Acts of Resistance

The main message of this report has been a call for more politics or, if you prefer, more political input into economic decision-making. The reason offered for this has been an assumption that a closer connection between the democratic political process and economic decision-making will help both alleviate some of the harsher aspects of capitalism and reaffirm a social contract (albeit one accepting of capitalism) that guarantees peace and prosperity. It is difficult to resist the perception that the people of Southern Europe reject austerity. One could argue, however, that the rejection is not simply of austerity, but of something greater. The rejection is of the lack of ownership of policy, it is a condemnation of powerlessness and of disenfranchisement. When the predominant response to financial crisis has been to hand the keys to supposed experts, then what is the reason for the public to accept the expert medicine, especially when it

does not seem to be working? Indeed, there is scant evidence that it is, and as Joseph Stiglitz recently noted: "To say that the medicine is working because the unemployment rate has decreased by a couple of percentage points, or because one can see a glimmer of meager growth, is akin to a medieval barber saying that a bloodletting is working, because the patient has not died yet"⁸. If the prescription is correct, why not argue its merits in the political arena and convince the public as to its adoption? Isn't that what a democratic polity is supposed to be about, choice? Why are we all so keen on choice, yet restrict it to our consumer experience? Why indeed do European governments (especially in Britain) assume we need to choose schools and health providers, to rate our GPs and get rid of our schoolteachers, yet it considers us unable to debate and vote on the content of economic policies? Why are we meant to be intelligent enough to pick insurance and financial products that would baffle a maths professor, yet we are considered inadequate to follow a debate on the best way to climb our way out of the hole the financial collapse has left us in? Is this all a little convenient? Are we being flooded with information about things that do not matter so that we acquiesce about the things that do? The fictional fire-station captain in Ray Bradbury's 1953 classic *Fahrenheit 451* perhaps describes best the elite's attitude to citizen choice: "If you don't want a man unhappy politically, don't give him two sides to a question to worry him; give him one. Better yet give him none ... Give the people contests they win by remembering the words to more popular songs or the names of state capitals or how much corn Iowa grew last year. Cram them full of non-combustible data, chock them so damned full of 'facts' they feel stuffed, but absolutely 'brilliant' with information. Then they'll feel they're thinking, they'll get a sense of motion without moving. And they'll be happy, because facts of that sort don't change". Are we being told to fear the markets so that we keep quiet and do not challenge a legal system that allows sentiment and market whim to govern our fates?

Is the universe of technocracy, that has so quickly descended upon Europe as a response to the economic and debt crises, a blessing or is it a cloak for the imposition of a 'dictatorship of finance'? Are our new (unelected) rulers benign or are they disinterested in the fate of those who have less, who are unemployed or studying at the wrong school? Is the system we have one that can persist, or one that will crumble? At which point does the reaction to capitalist excess turn into a revolution or, in the absence of a motivating ideology that can channel reaction to creativity, just anarchy? Ultimately, how does one resist faceless technocracy and shake the domination of economic orthodoxy? An open debate about what capitalism is for, what financial markets are for, what should be the rewards for those that run the commanding heights of the economy and to what degree wealth should be redistributed, forms the basis upon which a better system can be built. In order to have this debate we need political platforms that propose different visions of social and economic organisation. For this to happen, we need to break through the fear of reprisals from the markets. We need to reassert our status as *homo sapiens*, rather than *homo economicus*, to allow ourselves to think without being boxed in by neoclassical assumptions. We should be free to be economically irrational if we are to remain socially engaged.

The solution is not therefore to withdraw from law, in its traditional incarnations, but to embrace it. In order to avoid having the corrosive effects of de-politicisation combining with the crisis to threaten the stability of the political system through a lurch towards extremism, we need to recapture the role of law as a tool to achieve social peace, as a conduit to equity and the defender of justice. If this entails a shrinking of market freedom, then so be

it. Now is the time to stop arguing about the means to achieve ill-defined outcomes and to have a discussion about the goals of a market economy. Now may be the last opportunity we have to offer an opinion, as a democratic society, about what economics, finance, the law, are for and how they are used. If we choose not to ask these questions we may have in front of us a future of scientific technocracy that may or may not be benign, or worse, a future where the pretence of democracy is abandoned and with it our freedom is lost. Now is the time to stop asking for choices for consumers and start demanding choices for citizens.

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