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EDITORIAL

Activist government redux: exceptional or structural?

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Experimented in the interwar period[1] and established in the aftermath of World War II, activist government consolidated in Europe as a successful form of political rule during *les trente gloriouses,*[2] owing to its commitment to industrial modernisation, macroeconomic stabilisation and redistribution.[3] Both the success and the decline of that idea are entwined with the process of European integration. If activist government could evolve and spread in the first two decades after World War II, it was due in no small part to the enabling capacity of the European Economic Communities.[4] Likewise, if it was discredited and weakened as from the late 1970s, much of the blame can be attributed to the constraining capacity of the EU treaties and their predisposition to tame state activism.[5] Especially after the Treaty of Maastricht, activist government came to be seen as a thing of the past destined to be gradually scaled down and replaced with the regulatory state,[6] a new form of political rule definitely more attuned to the predominant neoliberal *Zeitgeist*. Its fortunes were ever more on the wane during the Euro-crisis, when the combination of EU muddling-through and austerity policies seemed to put an end to that once venerable idea and its promise of economic security and emancipation. And yet with the COVID-19 pandemic, activist government made an unexpected return: the need to finance health care systems, to shore up large sectors of national economies and to sustain workers during lock-downs required massive state interventions and favoured the rediscovery of tools and policies that until recently had seemed obsolete.

Again, even in this revival of state activism EU institutions were deeply involved. In the context framed by the EU treaties, most state interventions would not have been possible without the *imprimatur* or active contribution of the Union. Indeed, state interventionism was unleashed by

[1]Activist policies came to the fore with particular intensity after the financial crash of 1929, and were not the preserve of liberal and democratic regimes, as Fascism, Nazism and, of course, the Soviet Union were all deeply involved in the experiment. However, especially after World War II, the Weimar and New Deal experiences were seen as forerunners, see M Goldmann and AJ Menéndez, 'Weimar Moments: Transformations of the Democratic, Social, and Open State of Law' (2022) Max Planck Institute for Comparative Public Law & International Law Research Paper No 2022-12, and KK Patel, *The New Deal: A Global History* (Princeton University Press 2016).

[2]J Fourastié, *Les Trente Glorieuses ou la revolution invisible* (Hachette 2004).

[3]G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' 17 (1997) Journal of Public Policy, 139-167.

[4]A Milward, *The European Rescue of the Nation-State* (Routledge 2000).

[5]A Mody, *Euro Tragedy. A Drama in Nine Acts* (Oxford University Press 2018).

[6]Majone (n 3).

loosening state-aid rules[7] and the Growth and Stability Pact.[8] The European Central Bank ensured access to the capital markets for the most indebted member states by purchasing debt securities in the secondary market for the record amount of 1850 billion Euro.[9] The European Council decided the adoption of Next Generation EU (NGEU), a plan of financial assistance of unprecedented dimensions that by the end of 2026 should foster the recovery and improve the resilience of national economies and societies[10]. In the hopes of many, this resurgence of activist government might even outlast the pandemic emergency: the green and digital transitions seem to demand more sustained levels of public investment than those originally planned in NGEU and other like-minded programmes, and developments associated with the war in Ukraine have already heavily engaged national governments on the economic side as well. To put it in a single line: the pursuit of 'EU strategic autonomy' – in the EU vernacular, the capacity of the Union to act in all strategic policy fields without being dependent on other countries[11] – could strengthen the trend begun with the COVID-19 crisis, consolidate state activism as the new policy baseline and, correspondingly, overshadow the Union's regulatory profile.[12] Or, at least, this is the scenario which we at *ELO* are currently dwelling upon with the ambition of encouraging a conversation with our readers and contributors in one of our forthcoming issues.

Several questions pop up in this respect. For instance, one may wonder whether a return of state activism is possible in a context in which the dogmas underpinning the Maastricht economic order (free movement of capital, central bank independence primarily focused on price stability, predominance of monetary policy over fiscal policy) resist seemingly unscathed in the face of evolving events. Moreover, doubts may emerge as to the capacity of the existing EU treaty framework to sustain on a stable basis a turn to state activism. However, the focal point of this Editorial is more modest and aims only to shed some preliminary light on the most noteworthy and pressing question: should the transition towards activist government be viewed as structural or was its resurgence only exceptional as tied to the pandemic emergence? To be sure, a comprehensive answer would require a broad multi-disciplinary discussion and, perhaps, some more time for observation given that the picture is still evolving. But from a purely legal perspective, several elements already allow at least an educated guess.

As mentioned, during the pandemic many of the activist measures could be approved only by loosening, suspending, derogating and, sometimes, even straining key norms of the EU economic constitution. This course of action reflected an implicit political consensus, namely that the existing rulebook provided sufficient tools and flexibility to cope with economic consequences of the crisis. But the decision to rely on the flexibility built into the treaties rather than embarking on the more daring alternative – a complete reform of the treaties to allow the Union to switch to an activist mode on a more permanent basis – was not unproblematic in that it left the policy baseline shaped since Maastricht unchallenged. In other words, implicit in the very idea of suspending,

[7]Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' 2020/C 91 I/01.

[8]Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/> accessed 25 May 2023.

[9]Decision (EU) 2020/440 of the European Central Bank on a temporary pandemic emergency purchase programme, OJ L 91, 25.3.2020, 1–4. See also <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> accessed 25 May 2023.

[10]See European Council, Conclusions 17–21 July 2020.

[11]See Versailles Declaration, 11 March 2022, available at <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> accessed 25 May 2023, and European Parliament Research Service, 'EU Strategic Autonomy 2013-2023. From concept to capacity', EU Strategic Autonomy Monitor, available at <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf> accessed 25 May 2023.

[12]This trend is also reflected in other Commission policy initiatives including the Net-Zero Industry Act (https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1665) and the proposal to establish an EU Sovereignty Fund (https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_5543) accessed 25 May 2023.

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relaxing, etc the economic constitution was the tacit assumption that, once the emergency was over, there would be a return to the 'old EU normal', ie a neoliberal institutional framework in which the toolkit of state activism would be used only as a weapon of last resort.

A number of developments in some key EU policy areas suggest that this is the way forward – a trend that, if consolidated, would make the revival of activist government only an exceptional occurrence.

Take monetary policy: after having rescued for the second time in less than a decade the Eurozone, the European Central Bank has clearly opted for a normalisation of its stance. At the end of March 2022, it decided to discontinue the purchases of public bonds under its pandemic emergency programme, as a part of a broader disengagement process that already includes the gradual divestment of maturing government debt as of March 2023. The normalisation effort proceeded in July 2022 with the adoption of the *Transmission Protection Instrument,*[13] a decision laying down the conditions for future public bonds purchases. Accordingly, in the years to come the ECB will buy public debt securities only 'to ensure that the monetary policy stance is transmitted smoothly across all euro area countries' and only from member states 'experiencing a deterioration in financing conditions not warranted by country-specific fundamentals.' In this course of action, the idea is evidently that monetary policy should return to focus exclusively on the neoliberal imperatives of price and financial stability rather than contribute to the efforts of national governments to secure the countercyclical management of aggregate demand, as per the Keynesian textbook.

Admittedly, the normalisation of monetary policy does not in itself imply a disawoval of government activism, especially if the Union and the Member States could offset the monetary retreat with expansionary fiscal policies. But here, too, the commitment to state interventionism seems to be wavering.

Consider first of all the debate on the new fiscal rules and, notably, the Commission proposal for a new EU economic governance framework.[14] In this legislative initiative, the Commission seems keen on combining public debt reduction with the need to secure high levels of public investment.[15] Yet, beyond this declaration of intent stands a far less audacious proposal leaving the reader wondering if this time too the reform of fiscal rules will be a missed opportunity. Despite paying lip-service to the importance of public investments, the Commission seems still to regard public spending primarily as a cost to be contained rather than a useful tool to promote economic growth.[16] Thus, the proposal leaves the reference values for public deficit and public debt enshrined in the Treaties intact, although during the pandemic even institutions that certainly are not complacent about state activism had suggested their reform.[17] Only the rule on the reduction of public debt by 1/20 on a yearly basis is superseded and replaced with individualised debt-reduction paths, to be defined in 'national medium-term fiscal-structural plans' listing the fiscal targets, the economic reforms and the strategic investments that each Member State commits to implement in the medium term.[18] But while deficit and public debt are, at least on paper, on

[13]European Central Bank, Transmission Protection Instrument, available at <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html> accessed 25 May 2023.

[14]See, in particular, 'Proposal for a regulation of the European Parliament and of the Council on the effective coordination of economic policies and multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97', COM(2023) 240 final. The Commission had already aired these ideas in the 'Communication on orientations for a reform of the EU economic governance framework', COM(2022) 583 final.

[15]'Proposal for a regulation', recital 5.

[16]Tellingly, the proposal acknowledges its continuity with the substance of the Fiscal Compact, see ibid., 3–4 and recital 32.

[17]The ESM Managing Director endorsed the proposal to lift up to 100 per cent the debt/GDP ratio, see K Regling, *Impulses for Growth and Stability in Europe*, available at <https://www.esm.europa.eu/articles-and-op-eds/impulses-growth-and-stability-europe-article-klaus-regling> accessed 25 May 2023.

[18]'Proposal for a regulation', (n 14), Art 11 and Annex II.

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the way to a sustained reduction on the basis of 'technical trajectories' put forward by the Commission,[19] the same commitment is not visible on the side of public investments. Only in words are the latter considered worthy of attention, because the proposal avoids introducing a 'golden rule', that is, the rule that, through the decoupling of investment expenditure from the calculation of the deficit, could encourage public spending in that direction.[20]

Against this emerging backdrop, the fate of activist government in the Union seems largely to rest on NGEU, whose positive outcome is widely seen as the *conditio sine qua non* for the reiteration of similar activist initiatives. However, even here considerable political and legal hurdles stand in the way. Remember first of all that the approval of NGEU was possible only by virtue of its exceptional nature[21] and the insertion of macroeconomic conditionality as a *quid pro quo* for financial assistance.[22] The constraints on state activism imposed by the latter requirement become clear as soon as the Recovery and Resilience Facility is read in the light of the above-mentioned proposal to reform fiscal rules.[23] The significance of the former requirement, instead, was recently reinforced by the German Federal Constitutional Court.[24] In reviewing the EU own resources decision, German constitutional judges cautioned against an all-too-sudden enthusiasm for state activism, making clear that in the current treaty framework the Union can borrow on the capital market only in exceptional circumstances and under rather strict conditions.[25] Of course, especially after *Weiss,*[26] it has become fashionable in EU circles to dismiss Karlsruhe holdings as lacking any real bite. However, it seems harder to forget that the mobilisation of the EU budget or the issuance of EU public debt remains subject to unanimity vote[27] – a requirement that in the case of NGEU could be attained due to the pressure of the pandemic emergency, but that in a more normalised scenario seems more difficult to fulfil.

Admittedly, economic and political realities evolve towards a consolidation of EU activist government. As said, the need to increase the Union's strategic autonomy in crucial areas such as the green transition, technological development and defence could soon lead EU institutions down paths already trodden during the COVID-19 crisis, such as the relaxation of state aid rules and the approval of an 'EU Sovereignty Fund'.[28] The success of similar attempts would lead to a NGEU-like scenario: member states with 'sound finances' will continue rather unhindered to pursue their fiscal and industrial goals, while the others will have to rely on more or less substantial EU fiscal transfers to be invested under strict managerial supervision.

It is impossible to predict at this stage which of the above scenarios is the most likely. Not least given the current Treaty framework, in the absence of a profound ideological shift and sustained

[19] *Id.,* Art 5–6.

[20] Debt reduction trajectories will focus on governments' 'net expenditure', ie government expenditure net of interest expenditure, discretionary revenue measures, expenditure on programmes fully funded by the Union and unemployment benefit expenditure, see *Id.,* Art 2 (2) and Annex II (a).

[21] Especially visible in the use of Art 122 TFEU as legal basis for the EU Recovery Instrument, see Council Regulation (EU) 2020/2094, establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ LI 433/23.

[22] See Art 10, 18 and 19 of the Regulation (EU) 2021/241 of the European Parliament and of the Council establishing a Recovery and Resilience Facility, OJ 18.2.2021, L57/17.

[23] See Art 10 of Regulation 2021/241.

[24] German Federal Constitutional Court, Judgment of the Second Senate of 6 December 2022 – 2 BvR 547/21.

[25] The ruling rejects the constitutional complaints on the grounds that the issuance of debt securities by the EU cannot be regarded as *ultra vires*, since it fulfils the following conditions: the debt is authorised for the benefit of the EU; the funds raised are used exclusively in pursuit of specific objectives within the EU's competence (and not for the general financing of the EU budget); the borrowing is subject to limits both in terms of duration and maximum amount; the amount of the loans does not exceed the total revenue through own resources.

[26] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15.

[27] Art 311 TFEU.

[28] J Allenbach-Ammann, 'Commission President: EU Sovereignty Fund will be proposed in summer', *Euractiv,* 14 December 2022, available at <https://www.euractiv.com/section/economy-jobs/news/commission-president-eu-sovereignty-fund-will-be-proposed-in-summer/> accessed 25 May 2023.

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political mobilisation, the possibility of approving activist measures in the Union will rest only on occasional intergovernmental compromises and creative legal engineering – conditions that seem all too precarious to call the EU's ongoing turn towards activist government structural.

In this Issue

The Core Analysis pieces in this issue address different legal aspects of internet regulation and artificial intelligence, as well as two 'classic' topics of EU law: reverse discrimination and effective judicial protection.

Internet hate speech, especially when compounded with sexism and racism, is a pervasive menace to people, society and democracy. It is particularly harmful when directed at those participants in public discourse who already suffer from various types of structural injustices, such as women of colour. Yet does law do enough to discourage and remedy the harm caused by sexist and racist hate speech? Focusing on lived experiences of women in colour, Tjon Soei Len and De Ruijter argue that private law is currently inapt to redress serious material and immaterial harms suffered by the already disadvantaged targets of sexist and racist internet harassment. They call thus for a new tort law provision that would enable courts to redress health and relational harms that heighten both material and immaterial damages suffered by women targeted by sexist and racist hate speech.

Griffin, in turn, interrogates the dominance of fundamental rights in the theory and practice of social media regulation. Are issues such as discriminatory content moderation, profiling, and the relentless promotion of stereotypes adequately addressed in a normative framework of 'rights talk'? Griffin takes aim at not just the obvious problem – individualized rights as a means to face collective issues – but also at conceptions of fundamental rights as structural conditions or as embodying collective values. As a matter of pragmatic politics, it is hard to avoid relying on human rights; yet, she argues, as a matter of scholarship, we should really do better in developing more explicitly political critiques.

With the piece by Van den Brink we move into one of the most furiously discussed topics on EU law: reverse discrimination. He throws new light on the matter by means of decomposing the problem. Or, better put, instead of regarding reverse discrimination as a single question, the author distinguishes three different types of reverse discrimination, which should be analysed and tackled separately. A variegated phenomenon requires variegated responses, we are told. Van den Brink has certainly new things to say concerning the cases of reverse discrimination resulting from mutual recognition and from domestic federalist arrangements. But the Article breaks highly interesting and polemical new ground on what concerns the instances of reverse discrimination which he characterises as resulting from the normative and intellectual confusion over the point and purpose of free movement on the side of the judges of the European Court of Justice. Such confusion results in serious normative and functional risks, which should certainly be avoided in the view of the author.

Technological developments oblige us to rethink the concepts we work with. What does 'transparency' mean in the regulation of artificial intelligence algorithms, characterised by technical complexity and proprietary interests? Busuioc, Curtin and Almada argue that the Draft AI Act shows a drift away from a logic of visibility to a logic of communication 'where the *target* of transparency determines, shapes and influences the content of what is made visible to the outside world'. Transparency thus runs the risk of becoming a regulatory device requiring little more than explanation, legitimizing secrecy. The authors argue forcefully for a more robust regime of disclosure, especially of public authorities using AI, in an effort to reclaim transparency as a meaningful precondition for any notion of accountability.

When it comes to online platforms, the EU seems trapped in a path-dependency that guides its regulatory choices. Farrand argues that ordoliberalism lives on in the EU's approach to regulating

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online platforms, and, as a result, the regulated self-regulation persists in the EU's cyberspace governance. An economic rationale continues to pervade the law that governs online platforms, and interferences of regulating public powers must be limited to avoid distorting competition in the market. Why is this a problem? This approach is at odds with a shift in discourse since at least 2016, whereby the 'security-threatening behaviours' of online platforms, including risks of radicalisation and disinformation, seem to prevail over their 'market-facilitating function'. Exploring how ideas ('often unspoken and not contentiously acknowledged') shape law and policy, from the perspective of constructivist institutionalism and engaging with interpretive structuralism, Farrand shows that ordoliberalism has served as a 'cognitive filter' to the choices for appropriate measures designed to combat hybrid threats online. That applies also, so he argues, to the Digital Services Act, which, despite the changes it heralds, remains largely anchored on a 'regulated self-regulation' model, where a market-preservation logic shapes the identification of the problems and of the measures that can address them.

Effective legal protection, both a fundamental right and the basis for a burgeoning rule-of-law case law, has spurred some of the most spectacular developments of EU law, from the mid-1980s *Les Verts* to the *Portuguese Judges* judgment of 2018. Gentile takes stock of its function in the EU legal order, from a principle guaranteeing individual protection to protecting the rule of law in the EU, and of the copious literature that has dealt with effective judicial protection before and after the *Portuguese Judges* judgment. She identifies the questions of 'analytical, procedural, theoretical and political nature' that the 'double soul' of effective legal protection raises and shows the risks of the progeny of *Portuguese Judges*. While effective legal protection reflects the role of courts 'in the construction of the EU legal order's ethos', will it become 'too procedural' and thin, pushing the rule of law in the same direction?

Our Dialogue and Debate section is dedicated to a symposium on the book by Emilios Christodoulidis, which, while not directly on EU law, provides important food for throught on the current state of EU law, as Menéndez shows in the introduction to the symposium. By teasing out its innovations, its richness and its weakenesses, the symposium invites critical constitutional thinking that can be most useful to EU law.

Steininger detects two blindspots in Christodoulidis's argument, namely, his conception of law and his understanding of who the worker is and what labour is. The first line of critique points to the insufficiently critical character of the conception of law which underpins the book, not least because it ends up being inattentive to the material conditions under which law is produced and reproduces itself. There is a call for a non-reductionist Marxist approach to law, which seems to contain an implicit critique to reliance on a Luhmannian legal theory. Steininger is also of the view that the concepts of labour and worker that underpin the arguments of the book are stuck in mid-20th century realities, and are not based on a proper reconstruction of the sociological and normative realities of the present.

Skrbic considers that *The Redress of the Law* assumes a characterisation of the social conflicts resulting from the legal unleashing of capital in the EU, dramatised in *Viking* and *Laval*, that only apparently protects the rights of all workers and the normative and functional foundations of democratic labour law. Forms of what objectively is selective protectionism are not the right responses to the challenge of capital *triumphans*. What is needed is radical democratic action conceived and put in action at a wider scale, hopefully European.

Nicola's piece zooms in on one of the techniques through which market constitutionalism has been projected into actual legal and political practice, namely, governance indicators, a key component of the project of governance through numbers. This focus allows the author to push Christodoulidis beyond himself, and in the process, imagine new strategies of redress of common action norms through new forms of law capable of tackling neo-imperialism, patriarchal domination and racial discrimination. Particular attention is paid to the global level of governance/government, which is regarded as having played a key role in entrenching and widening hierarchical socio-economic, political and cultural structures.

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Golia praises the conceptual innovations at the core of *The Redress of Law* which contribute to a new constitutional imagination beyond what he regards as the asphyxiating constraints characteristic of liberal political theory. The occasional apparent incompleteness of the arguments put forward by Christodoulidis is actually part of the commitment of the author to encourage the reader to think by herself, even, if needed, having recourse to irritation. Golia raises two critical points, focusing on the complex intellectual fabric of the book. The first concerns the extent to which The *Redress of Law* contributes to a critical turn in systems theory. The argument is found rich but still wanting in terms of its conceptualisation and imagination of both the economic and the political. The second point regards legal pluralism, the rise of which Christodoulidis rightly associates in the view of the author with the neoliberalisation of constitutional theory. That however, fails to take into account the pluralistic character of constitutional structures, and leaves untapped the critical potential of legal pluralism.

Somek engages in a decidedly critical spirit with the theoretical foundations of *The Redress of Law*. He starts by showing the core tension at the heart of the book, between the embrace of Marxist politics and the choice of a systems-theory legal theory, which results in 'the almost vulcanic set up of the political constitution' becoming 'locked up in a Luhmannian conceptual cage'. This is followed by the expression of deep doubts on whether a democratic constitutional theory can be developed from a Luhmannian mould, and whether, when that is attempted, the results are satisfactory (for example, there is a serious risk of confusing deconstitutionalisation with the deeper and wider phenomenon of delegalisation). That leads Somek to sad reflections on the emancipatory potential of critical theory at present, largely reduced to a form of 'unhappy consciousness that pledges allegiance to inherited ideas in the awareness that they no longer persuade'.

Finally, Christodoulidis replies to the contributors of the symposium. In some cases, he endorses the criticism, agreeing with the need of exploring in more detail the dark shadow cast by gender and race discriminations on the Social and Democratic states of the *trente glorieuses* and accepting Golia's emphasis on the untapped normative potential of constitutionalism from below. In most others, the firm reply to critics allows a further elaboration of the topics of the book, from the understanding of the dogma in legal dogmatics to the role played by Luhmannian legal theory in the architecture of *The Redress of Law*, from the tired character of the distinction between political and legal constitutionalism to the importance (and urgency) of a critical strategic constitutional thinking which transcends the Habermasian unrealistic rendering of the political.

Competing interests. The author has no conflicts of interest to declare.

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