Social Consensus in the EMU: The Constitutional Tenets of a Currency Union

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Abstract

Constitutions are juridico-political tools used to pacify social conflict and maintain conditions of social peace in a given political entity. They do so in many ways – from creating a political trade off between opposing social forces to forging unity through the idea of a common national belonging. Monetary integration of the kind advanced in the EMU could possibly be a promoter of constitutionalism in the region: it is a key element of political integration and thus a potential driver of a common pan-European identity. However, monetary integration cannot in and of itself satisfy the demands of constitutionalism. The European Union effectively blocks any expression of European-wide social conflict, and locks European masses in a battle of nation versus nation. It is therefore hard to see how constitutionalism in the EMU can dispose of its national ties.

1. Introduction

Any polity, in order to secure its survival, requires a certain measure of political integration based on social consensus. Similarly, a transnational currency union seeking to apply uniform monetary policies to states characterised by massive economic divergences also requires a certain degree of integration and underlying consensus. Based on the premise of this similarity, this article discusses the constitutional tenets of the European Monetary Union (EMU). In this context, it proffers an understanding of constitutionalism as a non-linear, dialectical process capable of achieving the fundamental condition required for the survival and smooth functioning of a polity: social consensus. Instead of approaching constitutionalism as a strictly legal phenomenon, the analysis outlined in these pages conceptualises constitutionalism as an ideology and a socio-political process. Constitutionalism, on this view of things, does not merely generate consensus: it is also over-determined by it, in the sense that the constitutionalist process absorbs the dominant ideas of the given polity while also according to this polity a corresponding meaning and content, thus (re-)generating the dynamics of social consensus.

In the capitalist world, a crucial facet of the constitutional configuration consists in its national element, an element which, being both material and conceptual, provides polities with the ideological cement which ties its people to one another and to the broader entity to which they belong. This reading of constitutionalism may suggest that a currency union, such as the EMU, cannot be properly regarded through the lens of constitutionalism, since it is, as a matter of definition, a transnational political entity. Such a conclusion is however premature. Rather than non-constitutional by design, the EMU once integrated on the basis of a wide pan-European consensus – once, in other words, it fulfilled the conditions of success for a transnational currency union – it would necessarily also be a constitutional entity. This, in a nutshell, is the main argument proposed and developed in what follows.

Analytically, there are two main parts to my argument. Section 2 addresses the question of constitutionalism. Section 3 applies the proposed conception of constitutionalism to the EMU.

Section 2 offers a broad understanding of constituionalism as a complex process generated out of, and re-generating, social consensus (Section 2.1). I explain this idea by looking at the relationship between law, ideology, and the nation-state in order to conclude that the essence of constitutionalism has to be sought in the management of social conflict through the promotion of fictional national unity, as well as through the legal establishment of a social trade-off, i.e. of a political compromise between the dominated and the dominant social forces. The constitutional document, though not a necessary companion of constitutionalism, often reflects the substance of the respective social consensus achieved within a given political entity (Section 2.2). Section 2 concludes with a rejection of theories of transnational constitutionalism currently on the rise. The transnational constitutionalism thesis downplays both the social element and the ideological significance of common national belonging. It should follow that a transnational currency union cannot be a constitutional entity (Section 2.3).

Having established the theoretical background, Section 3 then goes on to argue that, despite being a transnational entity, the EMU, nevertheless, remains constitutionalism-capable. The argument has two parts. It is first suggested that the Maastricht treaty, the document embodying the constitutional moment of the EMU, reflects a European social consensus, as that developed through the ideological battles that led to (i) the content (and dominant interpretations) of the Maastricht Treaty as well as to (ii) the current direction of the EMU (Section 3.1). It is then argued that this consensus, limited as it is to the European elite and significantly lacking any reference to the European people, remains fundamentally incomplete. The European people are in turn understood not as a unified homogenous group or as a body politic created at the moment of its official recognition, but rather as a body whose common sense of belonging can be constructed through a constitutional process of identity creation. A common currency could have significantly assisted such a process. However, the European leadership has falsely relied on the assumption that the common currency would in and of itself not just further, but also conclude, this process.

At this point the dialectical nature of the constitutionalist process re-enters the analysis. The process of identity creation cannot rely solely on the common currency. Instead, it should involve a common post-Maastricht transnational struggle on the part of the European people to win rights and to secure their enjoyment at the European level. Through their design and structural setup, the institutions of the European Union, however, have effectively foreclosed the possibility of any such struggle. This is exemplified, *inter alia,* by the CJEU's treatment of the notion of European citizenship and the barriers that it has set to any process of creation of a transnational alliance of European labour forces (Section 3.2). What we are left with, as a result, is a Eurozone where any prospect of collective pan-European political subjects remains absent. Consensus is visible only at the level of the transnational elite.

In conclusion, it is suggested that even though the European Union, of which the Eurozone represents an integral element, can be legitimately understood as a transnational entity that possesses all the requisite institutions and political dynamics necessary to set in motion a process of European identity building, in practice it has chosen not to pursue this avenue. In the absence of social forces constituted through the dialectics of a constitutional process, the latter loses its *raison d'etre.* If, by contrast, the social consensus surrounding the EMU

had been complete, a European constitutionalist dynamics would have been able to emerge and develop. In that case, however, the EMU would have also transformed into an entity that would be qualitatively similar to the traditional model of the nation-state.

2. Constitutionalism: a national state of affairs

2.1. The *raison d'etre* of constitutionalism: social consensus

Constitutionalism lacks a universally agreed upon definition. Depending on one's understanding of the term, constitutionalism can be seen as transnational or as an exclusively national phenomenon. Constitutionalism can be understood as a political or purely legal concept. Modern constitutional thinking converges on the idea that the essence of constitutionalism is the regulation of state power on the basis of the rule of law. According to this reading, constitutionalism concerns the limitation of government. Such limitation may or may not be accompanied by a formal written document, the Constitution.[1]

Commonly, it is held that the essence of constitutionalism is that of public power controlled by superior law regardless of the exact content of the constitutional document.[2] Accordingly, constitutionalism reflects the principle that 'the state's bodies act according to the prescriptions of law, and law is structured according to principles restricting arbitrariness.'[3] Other definitions refer to power in general rather than to state power in particular: '[constitutionalism] typically aims to tame man's quest for power, and aims to do so by providing legal limits.'[4] Constitutionalism has been characterised as an achievement because it rules out 'any sort of arbitrary power'.[5]

However, constitutionalism is hardly ever simply equated with limits to (governmental) power. Constitutionalism has also been described broadly as the post-war constitutional movement characterised by the establishment of constitutional courts, which can be seen as an effort of the liberal world to reinforce the already existing constitutional orders;[6] as the philosophical questions connected with the constitution, i.e. the *ethos* and *telos* of certain constitutional provisions;[7] as a theory of power or social decision-making;[8] as the fundamental rules of 'being together' (*Gemeinwesen*) in a public community;[9] and, in the final analysis, as the embodiment 'of a particular nation's democratically self-given legal and political commitments'.[10]

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[1] I choose not to examine the distinction between the written and unwritten constitution as it refers to form rather than substance and is, therefore, in my opinion, irrelevant to the discussion of constitutionalism. Today there is relative consensus that constitutionalism does not require the existence of a formal written document. See Tomkins (2003), p. 9. For an examination of, *inter alia,* questions of form and hierarchical status of the constitution see Grey (1979), p. 189.
[2] Kay (1998), p. 16.
[3] Sajó (1999), p. 205.
[4] Klabbers (2004), p. 31 (33) [emphasis added].
[5] Grimm (2012), p. 10.
[6] Craig (2001), p. 125.
[7] Weiler (1995), p. 219.
[8] Maduro (2006), p. 227. For more interpretations of constitutionalism and further bibliography, see Stone Sweet (2009), p. 621.
[9] Hesse (1995), p. 3.
[10] Rubenfeld (2003), p. 28.

Evidently, constitutionalism means different things to different people. By and large, the constitutional phenomenon has been described in broad and open-ended terms that usually lack a clear criterion that would, for example, distinguish a constitutional entity from a random political community functioning on the basis of rules that prescribe the limits of power of this community's members. The vagueness of descriptions is not unjustifiable. It is sometimes argued that that there is no way to construct a clear-cut and unambiguous definition of constitutionalism because the essence of constitutionalism does not lie in certain ideas or institutional devices, but rather 'in the mystery of its binding force'.[11] True, there is a certain symbolism in constitutionalism which bestows upon it the power to bind. But rather than a mystery or unfathomable force, the power of constitutionalism lies in something that is intelligible, even tangible: social consensus. Essentially, social consensus is another way to describe a situation wherein the limits of everyone's (positive and negative) power are agreed upon within a given legal and political order. However, the notion of social consensus introduces a new factor into the constitutional equation. That is social conflict and the need for its neutralisation, a need driven by the necessity of survival and reproduction of a given political entity.

The question of constitutionalism could therefore be articulated as one that explores the ways in which constitutionalism generates social consensus and thereby endows liberal constitutional orders with their longevity and stability. This conceptual exercise cannot take place in the abstract but only within the context of the current historical juncture – in other words, within the current context of our liberal capitalist societies. In the liberal capitalist world constitutionalism creates a framework, both symbolic and material, within which we exercise our liberties and understand ourselves. This is, at one level, the framework of liberalism where the common good is a value-neutral concept and individuals are free, equal and rational beings. At a second level, this is the framework of common national consciousness and national belonging. However, the question remains: how does constitutionalism embed these ideas in modern societies and how does this embedment ultimately create consensus?

2.2. Ideology, identity building, and the role of the constitutional document

To answer this question, it would be useful to replace the word 'symbolism' with the term ideology. Constitutionalism can generate consensus because it creates and reproduces an ideology that is dominant: that is the *ideology* of liberalism. In the liberal capitalist world, constitutionalism also endorses and promotes the *ideology* of a united and undivided nation. In other words, constitutionalism does not merely reconcile antithetical ends through the comprehensiveness and omnipotence of liberal values. It also upholds the idea of unity, an idea which, to date, only the ideological cement of the undivided nation has been able to impose. Consequently, constitutionalism serves its ultimate function: the flip side of consensus, namely the neutralisation and acting out of social conflict.

In what follows, I elaborate on the above by examining the relationship between the nation-state, law, and ideology, in particular the ideology of constitutionalism of which the constitutional document can often be an indicator. I will argue that constitutionalism, understood broadly both as a legal/ideological device and as a socio-political process which demarcates the framework of social conflict, cannot be easily, if at all, detached from the

[11] Preuss (1996), p. 12 (24-5).

nation-state. This argument will lead to a seemingly irresolvable tension between the national project of constitutionalism on the one hand and the transnational entity that is the EMU on the other. I will seek to resolve this tension in Section 3.

2.2.1. The role of ideology

In one of his writings, Louis Althusser pictures the state as a motor transforming one form of energy into another:

> we would clearly say that the state is a *machine for producing power*. In principle, it produces *legal power* - not for reasons involving the moral privilege of legality, but because, even when the state is despotic, and 'dictatorial' to boot, it always has an interest, practically speaking, in basing itself on laws; (…) What, then, is this energy (…) that is transformed into (legal) power by the state-machine? (…) [This energy is] quite simply, the Force or Violence of class struggle, the Force or Violence that has 'not yet' been transformed into Power, that has not been transformed into laws and right.[12]

In the above passage, state, power and the law all intersect to produce a scheme fundamental to the smooth functioning of modern capitalist societies. According to Althusser, the omnipresent violence of dominant social forces against dominated ones is expressed through the nation-state's law, which is itself understood as a form of power. Still, this violence is effectively concealed and, in the face of social relations of subordination and domination, a certain form of social consensus is generated.

The simultaneous existence of violence and consensus within one and the same society can be explained if one looks at the phenomenon of social order through the prism of that order's dominant ideology. Ideology is effective in concealing violence because it is not limited to the level of ideas – quite the opposite, ideology cannot be separated from practice. Ideology is inscribed within our very understanding of the world and of our position in it because it is 'always reproduced and reconstituted in practice'. [13] Ideology becomes our version of reality, a reality which forms the basis of our sense of self, our place in societies and our relations to others. Legal ideology is a vital part of this configuration: it fixes 'the adjustment and cohesion of men in their roles, their functions and their social relations' and makes them appear justified, obvious, normal.[14] Here constitutionalism plays a key role. Deriving as it does from the supreme and foundational law of the state, constitutionalism becomes both a legal and ideological tool that is put in the service of established arrangements concealing violence by reproducing *in practice* a particular understanding of societies and of our place within them.[15] In short, by generating social consensus. What then is the content of the ideology of constitutionalism, how does it

[12] Althusser (2006), p. 105-7.
[13] Fiske (2004), p. 1269.
[14] Althusser (1990), p. 42.
[15] This reproduction in practice can be seen in the representative, juridical and bureaucratic apparatuses of the state. The ideology of constitutionalism promotes individual freedoms. This individualism is relativised through the representative and juridical systems. Where the representative system embodies the general will of the nation, the juridical system expresses this general will through universal laws. The bureaucratic system of the state then intervenes to re-individualise the general and universal rules. In this scheme, liberal values and the national general will are embedded in practice, thus materialising constitutional ideology.

generate consensus, and how, if it all, is this ideology made explicit?

2.2.2. Constitutionalism and identity building

As already remarked, the creation of national consciousness is an essential part of the constitutional ideology. Moreover, crucial in the process of creation of national consciousness is the constitutional demarcation of the 'inside' from the 'outside': the distinction between the 'internal' and 'external'.[16] Internal 'commonness' provides the basis on which social particularities are blocked out and the common good of the nation prevails. The demarcation of a polity's internal boundaries is to a great extent a task carried out by constitutional ideology and practice. Constitutionalism symbolises the opening act of the creation of a new legal order. The 'constitutional big bang', as it is sometimes called,[17] thus, becomes the material and institutional expression of the state's enclosure and separation from the rest of the world.[18] It is at the very same moment that the heterogenous multitude is transformed into a homogenous sum sharing, or willing to share, a common identity, 'the people'.

The above description is schematic – the conversion of the multitude into the people is rarely as straightforward or linear. Neither has constitutionalism always absorbed different nationalist tendencies nor has it compressed different pre-national communities into a single 'people'.[19] However, it has frequently constituted the *main channel* through which minor ethnic communities have united to form much broader collective national entities.[20] In other words, the transformation into distinct common identities never occurs automatically at the moment of constitutional creation. Moreover, it is difficult to offer a general or comprehensive explanation of the relation between identity building and constitutionalism. This is so because the relation is dialectical rather than linear or one-sided. Constitutionalism is much more than a legal ideology or device. As will be argued in more detail later, constitutionalism is a complex socio-political process permeated by contradictions. Within this complex process, the establishment of a constitutional entity may be the result of a pre-existing common (national/ethnic) identity. However, it is not at all unusual for nationalism to emerge after the creation of statehood through the constitution.[21] The rationale for this is simple:

> States in [the interstate system] have problems of cohesion. Once recognized as sovereign, the states frequently find themselves subsequently threatened by both internal disintegration and external aggression. To the extent that 'national' sentiment develops, these threats are lessened. [Those] in power have an interest in promoting this sentiment.[22]

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[16] Grimm (2012), p. 12

[17] Milewicz (1009), p. 413.

[18] Douzinas (2007), p. 272.

[19] Ernest Gellner opines that out of every ten ethnic groups normally only one tends to be accompanied by a constitutional nation-state. See Gellner (1983).

[20] Chrysogonos explains that the reason for this was that ethnic communities were multiple while at the same time small in size. Such conditions would not guarantee the creation of sufficiently large internal markets, which, grew in a symbiotic relationship with both the state and constitutionalism. See Chrysogonos (2015).

[21] Hobsbawm (1990), p. 46-79.

[22] Balibar and Wallerstein (1991), p. 81-2. See also Bellamy and Castiglione (1996), p. 111. The authors refer to the 'ideological glue of the nation'. See also Loughlin (2000), p. 142.

Constitutionalism serves precisely this interest. It partly constructs and partly confirms the idea of a common identity – a common identity which has historically relied on a common denominator: the nation. If constitutionalism is understood as a legal/ideological device that serves the promotion of social consensus and if social consensus requires the existence of a common identity; if, in turn, this commonality is constructed through the demarcation, however incomplete, of the inside from the outside, then constitutionalism can only be national.

With that said, the development of common identities, whether national or otherwise, is not sufficient to generate and sustain social consensus in the long term. This is especially the case in societies permeated by extreme inequalities or persistent ethnic divisions. In order to secure survival, a trade-off is needed between those who dominate and those dominated. A convenient way to explain the meaning of this trade-off is to briefly look at the constitutional document, which in most modern nation states is the material accompaniment and institutional expression of the constitutional arrangement.

2.2.3. The constitutional document

At the outset, a formal written document is not a necessary component of the juridical, ideological and socio-political process that is constitutionalism.[23] However, the written constitution serves as an indicator of the constitutional quality of a political entity, or as a benchmark for judging the intensity of the social trade-off.

A constitution typically contains the basic principles and ideas upon which a polity is founded. A constitution grants to those within its ambit certain rights and liberties while also demarcating the field within which these rights and liberties are exercised. Constitutional provisions are, as a rule, broad and open-ended. Usually, the constitution is difficult to amend and, therefore, the meaning of its provisions must be able to evolve along with the social, political and economic climate of the polity it regulates. The meaning that constitutional provisions acquire at a given period is very much contingent upon a society's perception of the values underlying these provisions. For example, the dominant meaning of liberty in capitalist societies is economic liberty.[24] The field of exercise of liberty is therefore construed accordingly. Given that the constitution is interpreted according to dominant ideas and values it also reflects, even if not always faithfully, the balance of powers within a given society. The constitution, expressing as it does the dominant ideology of a polity, also embodies that polity's consensus. Yet this consensus is not complete unless the constitution achieves to accommodate demands which are different, rival to the dominant ones, and, as such, potentially dangerous to the status quo. Here is where the constitution proffers a trade-off: freedom of speech, social entitlements, freedom of assembly, the right to strike and collective bargaining in exchange for consensus. The list is, of course, much longer but it indicates the essence of constitutionalism: a social compromise necessary for the maintenance of societies. When

[23] Tomkins (2003), p. 9

[24] In the US, for example, liberty is by and large equated with the right to acquire, possess, and protect property. This equation, which is made explicit in many states' constitutions, has historical roots. It derives from the juxtaposition between liberty and slavery given that slavery was considered as a predominantly economic relation, a condition of economic deprivation. However, liberty continues to be a primarily economic concept to our day. See, eg, Barnett (2012), p. 1 (6-9).

the trade-off is successful enough to generate social consensus a polity is socially and politically integrated and therefore constitutional.

This understanding of constitutionalism exposes its internal contradictions – a tool for maintaining the status quo while sanctioning real rights. Discussion of this internal anomaly within the constitutional project is, however, beyond the scope of the present discussion.[25] Notwithstanding debates concerning whether constitutionalism is an exclusively hegemonic or potentially emancipatory process, the question remains whether constitutionalism, as described so far, fits with the historical development and current state of the EMU. As will seek to explain, constitutionalism and the successful functioning of a currency union are largely based upon the same condition: they are both closely linked to, if not contingent upon, political integration on the basis of social consensus. Before moving on to explain this in more detail, this section turns to the seemingly irresolvable tension described earlier: how can a transnational currency union ever be constitutional if constitutionalism is, as a matter of definition, a national state of affairs?

2.3. The constitutional capacity of the transnational space

The national element is part and parcel of constitutionalism. In capitalist societies, social consensus cannot be generated in the absence of a common feeling of belonging that is mainly produced through the fiction of national unity. The argument that constitutionalism can only be national contains no normative assessments – only a reading of reality. Moreover, it is an argument that comes into conflict with the robustly defended idea that constitutionalism can and should be replicated at global/transnational level.

In the past decades, a constitutional line of argument has developed according to which constitutionalism should be extrapolated to the global/transnational level. Anything short of a separate article dealing exclusively with the numerous theories of global/transnational constitutionalism cannot do justice to the arguments that have been put forward in the context of this academic discourse.[26] Suffice it to say for present purposes that by and large theories of global/transnational constitutionalism seek to respond to new developments brought about by the forces of economic globalization, coupled with the global diffusion of political authority and the involvement of non-state actors in domestic affairs. If political authority transcends nation state borders, so the argument goes, constitutionalism must be equally set free from its statist ties. In other words, transnational diffusion of political

[25] See Poulantzas (2014), p. 76 ff, 84-85.

[26] Theories of global/transnational constitutionalism take many forms and derive from many theoretical traditions, including, for example, cosmopolitanism, as well as from many legal fields, including, primarily public international law and public law. At one level, global constitutionalism is understood by international lawyers as a remedy to an alleged recent paradigm shift in international law. This movement focuses on the twin issues of fragmentation of international law and globalisation, conceived primarily as a shift towards increased cooperation between international actors. See, eg, Dunoff and Trachtman (2009), p. 5; Schorkopf and Walter (2003), p. 1359; Klabbers (2004). At a second level, international lawyers invite us to see the United Nations Charter as the equivalent of a formal and all-inclusive global constitution in operation. For a typical illustration, see Verdross and Simma (1976). Currently, the leading advocate of this view is Bardo Fassbender, who draws on an understanding of constitutions as 'constituent documents' with an element of inherent dynamism. See Fassbender (1998), p. 529. See also Ferrajoli (1996), p. 151-60. Others challenge the view that the UN Charter is the global constitution and argue for a kind of multi-level constitutionalism that will compensate for the weaknesses of state constitutionalism. See, eg, Peters (2006), p. 3; de Wet (2006), p. 611. Perhaps, given the richness of theories, global constitutionalism should be more appropriately conceived as a mode of thought or a mindset. This mindset denotes the application of liberal democracy principles at the global level: human rights, transparency, accountability, due process and the need to limit uncontrollable sources of political power. For an incisive literature review, see Schwöbel (2010), p. 611.

authority must be accompanied by constitutional control and limitation of transnational political power.

The above theory rests on the premise that constitutionalism is primarily concerned with setting limits to political authority. This premise is not easily reconcilable with the current approach to constitutionalism because a transnational version of constitutionalism downplays the element of social consensus, which is here identified as the main purpose of the constitutional arrangement. But if constitutionalism cannot be transnationalised then we must foreclose at the outset the possibility of constitutionalism in a currency union – an entity which is by definition transnational cannot be constitutional. Yet as will be shown in the following section, such a conclusion may be rushed. In contrast, it will be argued that a successful currency union cannot *but be* constitutional.

3. The Constitutional Quality of the European Monetary Union

It is hard to find historical examples of currency unions that managed to survive in the absence of political integration.[27] All things considered, the EMU so far presents a relatively successful record, having been able to absorb economic shocks and having dealt with the economic downturn of the Southern countries of the European region. Success is a relative standard, however, and once the cost of the EMU's survival is considered, the Union ceases to seem that successful. With hindsight, heavy austerity and probably some permanent post-crisis constitutional damage that the EMU's survival has caused to some of its Member States,[28] invite a look into the broader picture. When the crisis broke out, to many analysts the EMU shock was not surprising. On the contrary, a single currency zone applying uniform monetary policies and exchange rates to countries characterised by fundamental economic divergences was more likely than not to be unsuccessful.[29] Leaving aside political considerations, it makes sense to look at whether the EMU, representing the only current example of a currency union, has been or could be coupled with European constitutionalism. The concept of political integration is key to addressing this question.

The legal basis of the EMU is the Maastricht Treaty which laid down the requirements for participation in the monetary union and for the adoption of the single currency. Requirements included monetary convergence of the Member States, price stability and sustainable public finances.[30] The Treaty, having created the European Union, is often seen as a major step in the process of European constitution building.[31] However, rather than

[27] The failed East African Community, Latin Monetary Union, and Scandanavian Monetary Union are some obvious (non-exhaustive) examples of monetary unions which were unsustainable partly due to the lack of political integration. For an early comparative review see Cohen (1993), p. 187.
[28] Vlachogiannis (2018), p. 82.
[29] Moravcsik (2012), p. 54.
[30] Consolidated Version of the Treaty on European Union [2002] OJ C325/5 (Treaty of Maastricht). See Chapter 4, Transitional Provisions, especially Article 109e
[31] This view is not shared by everyone. In the well known *Maastricht* and *Lisbon* decisions, the Federal Constitutional Court of Germany (BVerG) held that it retains its competence to declare European law invalid if the latter is incompatible with the German Constitution. Even in these cases however the Court recognised that the Treaties 'pass constitutional muster'. See Judgment of 30 June 2009, 2 BvE 2/08 [Lisbon decision] and Judgment of 12 October 1993, 89 BVerfGE 155 [Maastricht decision]. See also Arato (2015). The CJEU saw the constitutional status of the Treaties long before Maastricht. In Case C-294/83 *Les Verts v Parliament* [1986] ECR 1357, 1365 the Treaty is characterised as 'the basic constitutional charter'. The same view is adopted by a series of scholars, notably Neil MacCormick, who has argued that the Treaties 'contain the highest order of valid rules and principles'. See MacCormick (1993), p. 1(7). See also Palermo (2015), p. 42.

seeing Maastricht as something akin to a constitutional opening of the EU, it is more potent to examine whether and how it reflected a social consensus among the European social forces, insofar as the creation/ political-economic paradigm promoted by the EMU is concerned. Equally, rather than focusing on whether Maastricht managed to create an institutional system of checks and balances or limitations to the political authority/power of Member States and European institutions, the focus should for the sake of consistency be on whether the Treaty set the basis of a constitutional trade-off capable of absorbing social conflict within the Union. The answer to these questions will be an indicator of the level of political integration and, in turn, of constitutionalism within the Union.

3.1. The constitutional quality of the Maastricht Treaty and the EMU decision

As has been noted above, a constitutional document is a polity's yardstick for constitutionalism when it crystallises the general balance of power within the given society. A constitutional document potentially expresses the dominant principles and ideas that can guarantee consensus within a polity. Measured against this benchmark, the Treaty of Maastricht, particularly the EMU decision, has constitutional status because it reflects the Union's balance of powers during the early 1990's.

Maastricht and the decision on the creation of the EMU came as a result of an ideological struggle initiated in the 1960's between the so-called 'economist' and 'monetarist' views.[32] According to the former view, creation of a single currency zone required convergence in the inflation and budget deficit rates. This view, notably supported by Germany, insisted on strict macroeconomic management. 'Monetarists', by contrast, represented, *inter alia* by France, were more concerned with economic integration and rejected Germany's demand for strict discipline, as this allegedly contradicted their interests. It has been argued that 'these differences were rooted not so much in different philosophical assumptions or tactical considerations but rather in significantly divergent material interests and circumstances'.[33] However, to the extent that the economist-monetarist battle has defined the purpose and character of the EMU, it was a battle of ideas. Indeed, the outcome of this ideological battle culminated in the nature and quality of today's monetary union. It was, finally, a battle with losers and winners, today reflected in the European balance of powers. Moreover, the text of Maastricht also reflected the Delorist social-democratic ambitions of which the EMU was a central plank. For the Delorist project, the EMU would establish democratic control over financial markets and open up the way to federalism and political integration.[34] The fact that the above aspirations were defeated is largely the result of a European consensus; a consensus which is expressed in the dominance of the neo-liberal perspective and the defeat of social-democratic aspirations.

Like statist constitutional documents, Maastricht was open to different interpretations. The prevailing interpretation, however, expressed the ideology of the dominant forces of the EU. Consequently, Maastricht as well as the decision about the establishment and content of the EMU give expression to the dominant ideology of the European project. They do therefore express a consensus. But does this consensus *per se* render the currency union constitutional? It will be argued that it does not.

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[32] See Tsoukalis (1997), p. 178. For further bibliography see Verdun (2002), p. 75.
[33] Kaelberer (2001), p. 109.
[34] van Apeldoorn (2008), p. 155.

3.2. The incomplete consensus of the European public space

The current form and character of the EMU reflects the balance of powers in Europe because it is the outcome of a prolonged battle of ideas regarding the future and political direction of the European Union. However, the consensus that sealed the qualities and properties of the monetary union is incomplete. It is incomplete because this consensus only embodies the result of political processes that occurred at the level of the Union's political leadership and central bankers with any sense of the 'European people' being absent. At this juncture, a very important clarification must be made regarding the meaning of 'European people'. Authors often remark that,

> [the] EMU process was dominated by political leaders and their officials and by central bankers. It was a relatively enclosed environment. [There has been] no significant policy impact in the EMU process on the part of either domestic or European private interest groups, whether at domestic or EU levels.[35]

Others, when commenting on the creation of the EMU, note that

> inadvertent globalization in the region has dispossessed European peoples of many of the democratic prerogatives to which they had become accustomed and to which many had been initiated, in the period after the World War II.[36]

These approaches to the process that created the EMU invite a focus on the propriety and openness of procedures and point attention to the well known democratic deficit of the European Union.[37] At the same time, the approaches appear to assume that important decisions about the future and political-economic orientation of a political entity are sometimes taken at a level different from that of political leadership. In other words, with the participation of, what is a cloudy and vague notion, of 'the (European) people'.

Notwithstanding the legitimacy of the above arguments, including the longstanding need to deal with the European Union's non-transparent undemocratic decision making processes, a general appeal to the people and to the need for public participation in fundamental decisions about the future of a polity does not offer much to a discussion on the constitutional tenets of the EMU. Constitutional assemblies have never been composed of the 'people' although they have always spoken in their name. Abbé Sieyes, when commenting on the Constitutional Assembly of the Declaration of the Rights of Man, the constitutional manifesto of the French revolutionaries, presented the Assembly as deputies who

> in arrogating to themselves the right to give [France] a constitution, [and] (…) entrusted with legislative power (…) will seize constituent power on behalf of the nation even in the absence of any explicit charge to do so. In this revolutionary usurpation of power, the gap

[35] Dyson et al (1994), p. 17.
[36] Ross (1998), p. 180.
[37] For an early account and for further references on the initiation of the 'democratic deficit' debate, see Featherstone (1994), p. 149.

> in legitimacy will be filled by presenting the peoples with the table of their essential rights, under the title of *Declaration of Rights.*[38]

The extract is important not only because it confirms that it is inaccurate to equate the constituent power with 'the people' but also because it suggests that 'the people' are constituted retrospectively at the moment of constitutional creation. Indeed, the relation between constitution-making and the creation of a people united under a common identity is never a linear process. Accordingly, the incomplete consensus embodied in the EMU and the Maastricht Treaty should not be taken to refer to the lack of public participation in the constitutional moment of the European and monetary union. It should rather be understood as calling attention to the fact that the 'European people' were never constituted as such, whether retrospectively or otherwise. But here one needs to pause and ask what the 'European people' would be, were they constituted as such, and how their non-existence impinges upon the constitutional quality of the EMU. I will deal with these two questions in the following two sections.

3.2.1. The missing people of Europe

As already remarked, the term 'people' does not denote a homogenous sum. For the purposes of the present discussion the people are understood as distinct social forces with divergent interests and unequal power, where power amounts to one's ability to influence, shape, and intervene with one's social environment. In the context of the nation state 'the people' has been traditionally constituted as a homogenous sum, be it the 'ethnos' or the 'demos'. This constitution has relied on the ideological ties created by the idea of belonging to the same nation. Europe, despite its declarations to the opposite, manifested mainly in its famous appeal the 'European people',[39] has not successfully established an equally powerful narrative to rival the idea of the nation. As a result, Europe has failed to create a common identity or common belonging.

There was a very strong assumption on the part of Union leadership that the project of common identity building would be promoted with the creation of the currency union. It has been pointed out that 'European politicians reasoned that the use of a common currency would instil in their publics a greater sense of belonging to a European community'.[40] This aspiration was not unjustified. In the words of the Commission, 'reinforcing an economic and monetary union paves the way towards a political union'.[41] True. As has been repeatedly argued, the processes of political integration, identity building, and so forth are not linear. In all likelihood, a monetary union would create a political one. However, judging from the result, European leadership was hoping against hope that a common currency could in and of itself bring political integration to the region.

The failure of the project of common identity building has largely been the result of the Union's institutions. The latter have effectively blocked any potential for divergent pan-European forces to build alliances and unite in transnational solidarity to one another. The

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[38] Baker (1992), p. 169 [emphasis in original]. See also Baker (1989), p. 313-323.
[39] Article A of the Treaty of Maastricht proclaims that '[this] Treaty marks a new stage in the process of creating an ever closer union among *the peoples of Europe*, in which decisions are taken as closely as possible to the citizen.' [emphasis added]
[40] Feldstein (2012), p. 105.
[41] EC (2014), p. 11.

Court of Justice of the European Union has played a dominant role in this development. To begin with, the Court has disposed of a unique chance to bestow European citizenship with a liberating and emancipatory dimension, one that would have disconnected citizenship from its bonds with the nation state. Despite a number of early progressive decisions related to European citizenship,[42] the Court has applied double standards in its interpretation of the status and entitlements of the European citizen.[43] More recently, in *Dano* the Court has punished the poorest fractions of the European region, in particular those living in a host country without being economically active even when they have a right to permanent residence.[44] Additionally, the Court has foreclosed any possibility of transnational alliances to be built between European labour forces. For example, in a series of cases, the Court has fuelled a legal conflict between the right to work in a host state on the one hand and the host state's national system of labour rights protection, including collective bargaining and the right to strike, on the other.[45] This is not to say that anything akin to a pan-European social policy or labour legislation is easily, if at all, achievable. Rather, it is to say that in a region of increased social imbalances – imbalances that have accelerated after the introduction of the common currency – the absence of a 'minimal tuning' of social policy able to 'generate consensus on the content of the European social model'[46] will solidify national sentiment to the expense of a much desired but not yet visible European identity.

The detrimental impact of Union policies on the prospect of a collective European identity draws on T.H. Marshall's conception of social citizenship. According to Marshall, citizenship requires '(a) direct sense of community membership based on loyalty to a civilization which is a common possession. It is a loyalty of free men endowed with rights and protected by a common law. Its growth is stimulated both by the struggle to win those rights and by their enjoyment when won.'[47] The kind of citizenship that Marshall referred to was directly connected with the struggles of workers of the 19th century. These struggles which first established the right to collective bargaining and later to material social

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[42] In *Baumbast* the Court detached the right to permanent residence in a host state from one's economic activity. See Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. In *Chen and Ruiz Zambrano,* the Court recognised, despite the lack of a cross-border element, that the carers of EU citizens are entitled, *inter alia* to reside in the Union. See Case C-200/02 *Zhu & Chen v Secretary of State for the Home Department* [2004] ECR I-9925 and Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177. In *Martinez Sala, Grzelczyk* and *Trojani,* EU citizens residing in host Member Sates have been declared eligible for social assistance on the basis of their EU citizenship status as well as of the principle of non-discrimination on the basis of nationality laid down in article 18 TFEU. See, respectively, Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR 1-2691; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193; Case C-456/02 *Trojani v CPAS* [2004] ECR I-7573

[43] Compare Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-00000 with *Ruiz Zambrano* or *Chen.* While in the latter cases the Court allowed the carers of minor EU citizens to reside in the Union on the ground of the need for protection of the right to family life, established in Article 8 of the ECHR, in *McCarthy* the same right was considered to be inapplicable as the case concerned an adult spouse rather than minor children. Based on this inconsistency, commentators have criticised the Court's approach as at best philanthropist and as emotionally-guided rather than politically constitutive. See Everson and Joerges (2012), p. 644 (657).

[44] In the recent case of *Dano,* the Court seems to overturn previous (progressive) case law by (re-)placing the status of the economically active individual above that of the EU citizen. See C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:23. See also C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597.

[45] See Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2008] IRLR 143; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160.

[46] Vanderbrouken (2015).

[47] Marshall (1963), p. 93.

provisions had an integrating effect not only within labour forces themselves but also between them and their respective nation states. Social citizenship strengthened national consciousness because it strengthened the labour forces' feeling of belonging.

Europe misses a historical opportunity to set loose those social forces whose transnational struggles would have been a crucial step towards a European identity and towards transnational political integration.[48] What we are left with is a currency union wherein one class, a transnational elite, is by and large united, while the rest are virtually non-existent.[49] Where do these developments leave constitutionalism in the currency union?

3.2.2. The anti-constitutionalism of the EMU

In the absence of competing social forces, constitutionalism becomes void of content. If constitutionalism is about political integration on the basis of social consensus, then the Eurozone is far from becoming a constitutional entity. While one class, a transnational elite, is constituted and organised on the basis of its common interests no other political subject is visible in the European region in general and the Eurozone in particular. The result is that political integration is absent and social consensus incomplete, limited solely to the European elite.

If the relation between constitutionalism, political subjects, common belonging and social consensus is not linear, it would be more precise to treat it as a dialectics. To understand the relation between constitutionalism and its constitutive elements and results in a dialectical way one must acknowledge the possibility that a transnational entity like the EMU is at least constitutionalism-capable.[50] In the context of the EMU, constitutionalism would intervene to provide the necessary trade-offs needed for the creation of consensus. Through this process it would have also laid the groundwork for the creation of political subjects on the basis of characteristics that would have won over national identities.

It is not possible to generalise this process, related as it is to the particularities of the European Union. Not every currency union can be constitutional. The EMU is part of a transnational entity which, for more than two decades, has been struggling towards political integration, however unsuccessful its efforts might have been. The EMU is furthermore part of a Union which possesses the mechanisms that can render a polity constitutional. That is, the European Union and particularly the Eurozone, i.e. the territorial basis of the monetary union, comprises the instruments and institutions needed for the creation of political integration based on wide social consensus. These include common regulation, a parliament, a supreme court, a common market and common currency, and importantly also territorial enclosure.

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[48] The European elite is keenly aware of the need for political integration as demonstrated in the 2015 Commission's Report on the EMU co-authored by Jean-Claude Juncker, Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz. See EC (2015), p. 4-5, 7.

[49] This is not to say that there are no conflicting interests within one and the same class. Every class is permeated by internal contradictions which, however, do not impede the prospects for alliance on the basis of common interests.

[50] Balibar makes a similar argument although his approach focuses on issues of citizenship rather than constitutionalism. See Balibar (2004), p. 51-77.

The above elements, whether taken individually or together, cannot render the Eurozone constitutional unless one further condition is met: the Union must create space for the region's social forces, including labour forces, the disadvantaged and oppressed, and the increasingly larger parts of society struggling for survival. In other words, the Union's legal and institutional apparatus must provide these forces with the necessary space to struggle, make demands, and succeed, in a process of transnational democratic social conflict. Such conflict is indispensable in a society marked, as capitalist societies are, by massive inequalities and opposing interests. Without social conflict and without the ability to 'struggle to win those rights and enjoy them when won', as Marshall has put it, there can be no consensus, and no political integration. A Union that ceaselessly blocks off the expression of social conflict simultaneously impedes any process of constitutionalisation.

Such a process would not be restricted to the domain and narrow limits of legal conflict and argument. It would rather be a lengthy socio-political process permeated by dissensus and antagonisms, one in which losers and winners would not be irrevocably predetermined. As has been the case with the nation state, constitutionalism would play a dialectical role here, one which determines and is over-determined by the respective power of different social forces. Accordingly, constitutionalism embodies within its ambit all competing forces of society and prescribes the framework of social conflict in order to create peace out of conflict, consensus out of dissensus, political subjects and common identities out of a heterogenous multitude. Europe, and in reflection the Eurozone, rather than following this path has in contrast relied on a weak incomplete consensus by leaving society, and therefore constitutionalism, out of the picture.

4. Conclusion

A number of conclusions are readily available. First, if the Eurozone became a constitutional entity its structure and content would have necessarily taken a form qualitatively similar to that of the nation state. It would be a territorially enclosed politically integrated entity composed of a population which, although heterogenous, would be tied to the polity by means of a common identity which would have been established through the dialectical process of constitutionalism. Secondly, it becomes clear that constitutionalism and a successful, i.e. politically integrated, currency union, by and large, share the same prerequisites and/or results. Where constitutionalism generates consensus and political integration, a successful currency union requires such integration of which it can itself be a strengthening factor. Constitutionalism and a common currency are therefore different sides of the same coin. When seen from the perspective of political integration and social consensus, a successful currency union cannot but be constitutional. Drawing from the above discussion, the EMU appears to possess a poor constitutional quality not because a currency union, as a transnational entity, has no prospects of constitutionalisation, but rather because the EU chooses not to avail itself of the legal mechanisms and political choices that would promote constitutionalism in the region.

It was argued above, with Althusser, that the state is a machine producing legal power. This power was depicted as the transformed energy of class struggle. The state, or rather those who possess state power, have an interest in transforming the energy of class struggle into law in order to maintain the status quo. The statement, if read in the light of the current arrangements in the EMU, points to an opportunity to take social conflict into account in order to transform social conflict into law. While Europe has missed this opportunity, it

nevertheless remains possible to rethink and rebuild social consensus and in the final analysis, to develop the political integration needed for the successful functioning of its currency union.

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