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Tzanakopoulou, Maria (2019) Europe and constituent powers: ruptures with the Neoliberal consensus? In: Nanopoulos, E. and Vergis, F. (eds.) *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU*. Cambridge, UK: Cambridge University Press. ISBN 9781108598859.

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Europe and Constituent Powers: Ruptures with the Neoliberal Consensus?

Maria Tzanakopoulou

Abstract

The financial crisis has precipitated constitutional transformations and institutional shifts of power equilibrium both within and beyond domestic borders. Within Member States of the EU, the strengthening of the executive power has almost become a leitmotif as the safeguarding of austerity under the pretence of necessity and at the expense of democracy informs parliamentary routine. At the same time, austerity measures imposed by the Union render domestic constitutional principles of social justice virtually void of content. Domestic judiciaries, favouring as they do an economic-oriented reading of constitutional provisions and endorsing precarious interpretations of the 'national interest' in light of the need to shield the economy against the crisis, align themselves with dominant internal and external political imperatives. A parallel shift away from socio-economic welfare in Member States' political agendas can be read as both a trigger and a consequence of the institutional mutations. For all their importance, the above developments tell us only one part of the constitutional story of the crisis. Of no less constitutional relevance is the actual embedment of austerity in societies: the perception of austerity as necessary or, worse even, as normal. This embedment, which has long been encoded in the very gene of the Union, safeguards the dominance of austerity and neoliberalism to the same extent as does, for example, the introduction of budgetary constraints in domestic constitutional documents. It is therefore important that constitutional discourse does not limit itself to a defence of pre-crisis constitutional business as usual but rather expands to a wholesale challenge of the structures, logic, and rationale behind the crisis and austerity. To that effect, one needs to examine the constitutional tendencies, structural or not, of the EU, as much as those of the Union's individual Member States.

Keywords: constitutionalism; austerity; constituent power; European Union; state

Introduction

The European project has perhaps never been more thoroughly disputed across the whole range of the political spectrum, than it is today. From the far left to the far right, the ongoing crisis is precipitating robust reactions, sometimes caught up in extremist and xenophobic rhetoric and at other times motivated by progressive egalitarian demands. This analysis explores the constitutional relevance of the above developments with a special focus on the constitutional facets of the main outcome of the crisis, austerity, and the response given by European societies.

Constitutional discourse on the European crisis often tends to emphasise the constitutional mutations and institutional shifts of power equilibrium within both the Union and its individual Member States. Within Member States, the strengthening of the executive power has almost become a leitmotif as the safeguarding of austerity under the pretence of necessity and at the expense of democracy informs parliamentary routine. At the same time, externally imposed austerity measures render domestic constitutional principles of social justice virtually void of content. The judiciary, favouring as it does an economic-oriented reading of constitutional provisions and endorsing precarious interpretations of the 'national interest' in light of the need to shield the economy, aligns itself with dominant internal and external political imperatives. A parallel shift away from socio-economic welfare in Member States' political agendas can be read as both a trigger and a consequence of the institutional mutations. The above constitutional and institutional developments are frequently laid at the door of the European Union; an entity sometimes accused of being institutionally impotent to re-build democracy and welfare and sometimes charged with structural neoliberal bias. According to both of the above views, but notably according to the latter, the European project is almost hopeless.

For all its importance, the above discourse, which largely emphasises the institutional dimensions of recent developments tells us only one part of the constitutional story of the European crisis. Of no less constitutional relevance is the actual embedment of austerity in societies: the perception of austerity as necessary or, worse even, as normal. The following analysis argues that this embedment safeguards the dominance of austerity to the same extent as does, for example, the EU-driven introduction of budgetary constraints in domestic constitutional documents. It is therefore important that constitutional discourse does not limit itself to a defence of pre-crisis, allegedly sovereign, constitutional business as usual but rather expands to a wholesale challenge of the logic and rationale behind the crisis, neoliberalism and austerity.

This entails the need to point the finger at those responsible for the present precarious situation. The following analysis argues that while the Union, represented by its political and economic elite, bears considerable responsibility, liability lies primarily with domestic political actors and economic elites. In this sense, it is argued that, whether structural or not, the problems facing the European Union need to be attacked at both domestic and regional levels. However, the poor constitutional quality of the Union renders the latter possibility practically unattainable.

In section I, the analysis reviews and reframes constitutional discourse by placing at the heart of constitutionalism, broadly understood, the effort to secure social consensus with a view to maintaining the status quo. This reading of constitutionalism also invites an understanding of constitutional arrangements as predominantly national arrangements. According to this reading, a broad national consensus around austerity suffices to render it constitutional. This is so, irrespective of whether austerity measures have been entrenched in the constitutional document, and regardless of potentially anti-democratic practices on the part of governors. As the violence of austerity policies deepens, notably in the Southern

parts of the European region, the hitherto strong consensus around austerity shows signs of disintegration. Drawing on these challenges against the logic of austerity, section II encourages an understanding of constituent power as a living emancipatory body that can counterbalance the constitutional transformations by building strong social structures and adding agonistic forms of democracy in to the constitutional equation. In the final analysis, it is concluded that, if the new consensus challenges the neoliberal logic of austerity, constitutionalism will have to embrace it. And while such constitutional challenge might fall on deaf ears in the quarters of the ECB and Commission, as it has done in the past, one can never be entirely confident that this will be the case indefinitely.

I. The Constitution, the Crisis and Austerity: Re-framing the Discourse

At the outset, the relation between the European crisis and domestic constitutions appears to be anything but a dialectical one: the main byproducts of the crisis, budgetary discipline and increased austerity, seem to threaten the integrity of national constitutional arrangements while domestic constitutions seems completely unfit to curtail the violent forces of austerity politics. There is much talk about the constitutional mutations brought about by - notably externally imposed - austerity measures on EU Member States. The discourse often takes the form of description of substantive changes in the constitutional rules of Member States, with a view to proving the mutating effect of the politics behind the crisis on the long-established welfarist constitutional consensus in the region.¹ Within this context, constitutional rules are understood as the basic and relatively rigid set of checks and balances prescribing the main principles of organisation of a polity. In light of this reading, the argument is often that chaining the neoliberal economic model in the hard and fast rules of the constitution removes this model from the realm of politics and from democratic confrontation.² This is sometimes seen as a systemic failure of the Union;³ a failure that was bound to result in disintegration once the strong-arm tactics of blocking democratic conflict were felt within European societies. At other times, it is viewed with less hostility, as simply marking a shift from the political to the legal constitution. In this latter case, the proposed remedy is to re-introduce the basics of democratic politics within budgetary decision-making through, for example, procedural constitutional changes within a broader context of deliberative constitutionalism.⁴

¹ See, eg, M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) pt II, 151-296.

² See, eg, G Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French experiences' in M Adams, F Fabbrini and P Larouche (eds), *Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 181-204.

³ See, eg, E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 *Common Market Law Review* 683.

⁴ For example, the argument sometimes is that '[procedural] constitutional change through scrutiny by fiscal councils may avoid' the problem of decision-making behind closed doors and through secret letters by, say, the ECB. 'The more discursive nature of such constitutional reform can create

More specifically, much of the literature criticises the Union mechanisms for their failure to be effective and/or legitimate. According to this reading, the institutional machinery of the EU and EMU, as well as the constitutional framework of the Union, proved insufficient to withstand the pressures and institutional transformations brought about by the financial crisis.⁵ The democratic deficit deepens, so the argument goes, because intergovernmentalism, enabled by the Lisbon Treaty, replaces the weak institutional apparatus of the Union, and fails to produce effective and legitimate results.⁶ Proposed remedies range from the need to re-establish mutual trust between the EU and its citizens, to a call for abandonment of idealistic appeals to solidarity and for recourse to the constitutional responsibility of burden-sharing within the EMU.⁷

The discourse has taken a slightly different turn in light of Brexit referendum results. As it happens in times of major political change, polarisation fuelled more radical approaches. Constitutional critics have blogged, in a cry of despair, that the Union is not merely unable to withstand pressures. Instead, it is EU structures themselves that breed and perpetuate the crisis: 'EU Treaties not only contain procedural protections for capitalism, (...): they also entrench substantive policies which correspond to the basic tenets of neoliberalism.'⁸ Thus, according to which stance one takes towards the structural matter, proposed solutions range from more or less marginal institutional amendments to getting rid altogether of an entity structurally doomed to fail.

Alongside the above attack against the Union's structural flaws or mere impotence to carry out either input or output legitimacy, the literature also focuses upon the constitutional significance of the relevant developments for national constitutions. Valuable comparative research has been conducted on the (in)ability of domestic constitutional structures to absorb and effectively contain the Fiscal Compact's

opportunities for correction of errors, and most importantly for debate and a plurality of sources of information.' See T Prosser, 'Constitutionalising Austerity in Europe' [2016] Public Law 111, 129.

⁵ Many attribute this failure to the construction of the European Economic Constitution on the example of the German Ordo-liberal model and the inflexibility of its rules. See, notably, C Joerges, 'The European Economic Constitution and Its Transformation Through the Financial Crisis' (2015) ZenTra Working Paper in Transnational Studies No. 47/2015 <<http://ssrn.com/abstract=2560245>>.

⁶ See, eg, S Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro crisis' (2013) 46 Comparative Political Studies 1003.

⁷ On trust, see, eg, M Póiares Maduro, 'Foreword: Fiscal Capacity and Constitutional Reform in the EMU' in M Adams, F Fabbrini and P Larouche (eds), *Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) v-xiv; P Craig, 'Economic Governance and the Euro crisis: Constitutional Architecture and Constitutional Implications' in M Adams, F Fabbrini and P Larouche (eds), *Constitutionalization of European Budgetary Constraint* (Hart Publishing 2014) 19-40; On burden-sharing, see P Lindseth, 'Power and Legitimacy in the Eurozone: Can Integration and Democracy be Reconciled?' in M Adams, F Fabbrini and P Larouche (eds), *Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 379-398.

⁸ D Nicol, 'Is Another Europe Possible?' (*UK Constitutional Law Blog*, 29 February 2016) <<https://ukconstitutionallaw.org/>>.

distinctly German ‘balance budget rule’:⁹ not every Member State is ready to speak the language of the German constitutional legislator.¹⁰ The result is, *inter alia*, that the CJEU, which is now able to supervise the budgetary discipline of Member States, may have to dig deep into domestic constitutional systems that are unable to come up to the requirements for constitutional amendments tailored to the German constitutional model. It thus seems that even when the focus is on domestic arrangements, the blame bounces back to the EU and its structural fixation on a ‘Germanness’ often regarded as the main actor responsible for the crisis of the European project.¹¹

In terms of purely internal constitutional arrangements, the relevance of the crisis reaches far beyond the need to incorporate fiscal constraints into hierarchically superior constitutional provisions. Of no less importance is the circumvention of already existing constitutional checks and balances, notably in those countries that have implemented the most harsh austerity measures, mainly in response to conditionality demands imposed, *inter alia*, by the Union. The Portuguese and Greek stories that have developed in parallel are indicative of this. In Portugal, the government under Prime Minister Coelho, formed in 2011, defended the 2013 state budget, when the latter was challenged before the Constitutional Court, by making a plea to the country’s state of emergency.¹² Worse still, in Greece ‘acts of legislative content’, supposed to be reserved for ‘extraordinary circumstances of an urgent and unforeseeable need’, have become a routine way of passing legislation implementing externally imposed austerity measures.¹³ National Constitutional Courts tend, as they do in times of crises, to defer considerably to the domestic legislator, especially as regards the latter’s initiatives related to compliance with EU or other international obligations.¹⁴

⁹ Article 3(2) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG); For a review of the methods of constitutionalisation of EU countries see, Adams and others (n 1) Pt II; Prosser (n 9).

¹⁰ L Besselink and JH Reestman, ‘The Fiscal Compact and the European Constitutions: ‘Europe Speaking German’ (2012) 8 European Constitutional Law Review 1.

¹¹ See M Everson, ‘An Ideal, Not a Place: A Euro-Critic’s Case for the UK Remaining in the EU’ (*VerfBlog*, 11 June 2016) <<http://verfassungsblog.de/an-ideal-not-a-place-a-euro-critics-case-for-the-uk-remaining-in-the-eu/>>.

¹² ‘Press Review: PM Invokes “National Emergency” to Defend State Budget in High Court’ *Portugal Daily News* (8 January 2013) <www.portugaldailyview.com/whats-new/press-review-prime-minister-calls-revision-of-state-budget-national-emergency> The review notes: ‘Prime Minister Passos Coelho is using the argument of “national emergency” to defend the coalition government’s 2013 state budget after it was sent by the president and all opposition parties to be reviewed by the Constitutional Court’.

¹³ See Article 44 Paragraph 1 of the Constitution of Greece, as revised by the parliamentary resolution of May 27th 2008 of the VIII Revisionary Parliament.

¹⁴ In this context, many note the exception of the Portuguese Constitutional Court. See, eg, M Canotilho and others, ‘Austerity Measures Under Judicial Scrutiny: The Portuguese Constitutional Case-Law’ (2015) 11 European Constitutional Law Review 155; For a comparative account of relevant case law, see C Fasone, ‘Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective’ (2014) EUI Working Papers (MWP 2014/15) <http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf>.

The constitutional discourse, as summarised above, tells a tale of two possible routes. One is to effectuate procedural change in the Union's institutional machinery. Such proposals may be essential, inasmuch as they highlight realistic amendments within the warp and weft of institutional arrangements in neoliberal political orders. The other route is to do away with the Union lock, stock, and barrel. This could be an equally valuable proposal to the extent that the Union suffers from systemic failures at the constitutional level, which block any possibility for genuine radical change, a change much needed for increasing sections of the population that suffer most severely from austerity politics. Yet, as will be explained below, both approaches, while offering necessary insights, seem inadequate in getting to the root of the constitutional significance of the crisis.

In particular, constitutional discourse appears to be dominated by three tendencies, which offer a narrow perspective of the constitutional setting of both the Union and its Member States. First, procedural accounts seem to be driven by a bureaucratic-oriented or instrumentalist reasoning.¹⁵ It is assumed that an adjustment of the constitutional and institutional machinery of the EU or of the Member States will improve, or even suffice to rectify, both European and domestic constitutional missteps. Secondly, a sometimes explicit and sometimes implicit conclusion of the above discourse is that 'globalisation in its regional variety of Europeanisation marks the end not only of the political Westphalian paradigm but, in its wake, the economic Keynesian paradigm as well.'¹⁶ The end of Keynesianism is at other times attributed to the untrustworthiness of the EU's institutional framework, which has forced Member States 'to push forward austerity measures as a precondition for financial support'.¹⁷ Here, the focus shifts away from the nation state. Instead, the main responsibility for the constitutional mutations, evident in the shift away from welfarism and towards austerity, is rediscovered in either the systemic institutional failure of the EU or, more broadly, in the forces of globalisation. Thirdly, there is an emphasis on the obligation of national courts to guard the constitution or, even, to become agents of political stability. This approach tends to disregard the fact that austerity policies usually go hand in hand with emergency situations in times of crises, namely with what has been termed 'mega-politics': 'core political controversies that define (and often divide) whole polities.'¹⁸ In cases such as these, as Tushnet points out, albeit in a different context, 'the constitutional law of emergency powers is (primarily) political rather than legal.'¹⁹

¹⁵ For a non-instrumentalist, socio-legal perspective, see K Nicolaidis, 'European Democracy and its Crisis' (2013) 51 *Journal of Common Market Studies* 351.

¹⁶ L Besselink and JH Reestman, 'The Fiscal Compact and the European Constitutions: 'Europe Speaking German'' (2012) 8 *European Constitutional Law Review* 6.

¹⁷ See M Adams, F Fabbrini and P Larouche, 'Introduction: The Constitutionalization of European Budgetary Constraints: Effectiveness and Legitimacy in Comparative Perspective', Adams, Fabbrini and Larouche (eds), *Constitutionalization of European Budgetary Constraints*, 4.

¹⁸ R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721, 727.

¹⁹ M Tushnet, 'The Political Constitution of Emergency Powers: Some Lessons From Hamdan' (2007) 91 *Minnesota Law Review* 1451, 1452.

For one, codified constitutions usually tend to express some inclination, whether explicit or de facto, towards a particular economic system. Nevertheless, as critics correctly point out, the Fiscal Compact's requirement for constitutionalisation of budgetary restrictions and fiscal constraints takes the neoliberal bias of European constitutions to unprecedented levels.²⁰ It is therefore both significant and necessary to explore the constitutional and institutional mechanics of implementation of austerity measures, as it is significant to examine the systemic depth of the problem. However, there is one element of constitutional significance that none of the above three tendencies touch upon – perhaps understandably so, given their different focus.

Next to the technical constitutional difficulties faced by the Union and its Member States, there is, domestically, a parallel construction of a discursive field that presents the choice for austerity policies as mirroring a state of exception. Within this context, domestic elites seek to legitimise austerity under the pretence that there is no alternative.²¹ At this juncture, one has to pause and, first, re-evaluate the primacy (or not) of the nation state vis-à-vis the shift away from welfarism. Is austerity truly an externally imposed duty that Member States are coerced into implementing? Or is it, rather, a choice of Member States themselves? Secondly, in terms of the constitutional entrenchment and, therefore, de-politicisation of a particular economic model, one has to reflect upon what it is that differentiates the 'no alternative' narrative from the actual introduction of fiscal constraints or substantive neoliberal policies in constitutional documents. Once the 'no alternative' narrative is embedded in societies and treated as an irrefutable truth, the constitutional entrenchment of austerity offers no more and no less than a formal, if not merely symbolic, testimony of what has already occurred at a social level. Seen in this way, the constitutional significance of austerity is at least as much a matter of political discourse as it is of constitutional doctrine. Accordingly, even if one accepts the systemic nature of the crisis and the unavailability of the changes precipitated by it, one must also accept that there is more to the constitutional story than simply the question of structure. What seems to be lacking in the constitutional discourse on austerity is an actual challenge to the underlying rationale of austerity *itself* and, concomitantly, an effort to infiltrate such a challenge into a constitutional narrative. Critically, this requires a shift away from thinking about the crisis in terms of European and domestic constitutional rules and a redirection of focus towards what is a broader concept, namely constitutionalism. The latter, as understood in this analysis, retains its relative autonomy from constitutional rules and is instead conceived as a project, which being permeated by the force of ideology, secures social consensus by acting out social conflict. Unlike analyses that focus on constitutional rules, the concept of constitutionalism offers the advantage of adding

²⁰ M Sah and T Daintith, 'Privatisation and the Economic Neutrality of the Constitution' [1993] Public Law 465.

²¹ See, for an analysis of the discursive framework, P Fonseca and MJ Ferreira, 'Through "Seas Never Before Sailed": Portuguese Government Discursive Legitimation Strategies in a Context of Financial Crisis' (2015) 26 *Discourse & Society* 682; On the use of the 'no alternative' rhetoric by MSs as an excuse to implement labour law reforms see, S Clauwaert and I Schömann, 'The Crisis and National Labour Reforms' (2012) 3 *European Labour Law Journal* 54.

an extra element into the discourse, namely social relations. In the following sections, I explore the idea of constitutionalism and explain the importance of introducing the element of social relations within constitutional narratives of the crisis and of austerity.

A. Recasting Constitutionalism

Constitutionalism has been used so extensively and divergently that it has become associated with virtually everything, from the empowerment of citizens and democracy²² to the depoliticisation of politics at national and transnational level,²³ and from the universal triumph of liberalism and the rule of law²⁴ to the alleged demise, or 'total crisis', of the nation state.²⁵ Constitutionalism has almost become a hackneyed concept; a concept the content of which appears to have been progressively frittered away. It is therefore not easy to give an account of constitutionalism without becoming caught up in the whirl of truisms and/or contradictions that accompany the concept. In fact, the following account does not claim to distance itself from any of the clichés of constitutional thinking. It merely seeks to frame constitutionalism in a way that is consistent with the latter's *raison d'être*.

In what would be a typical definition of constitutionalism, the latter would be presented, in the main, as prescribing the idea of specified political authority and of limited government.²⁶ Constitutionalism is about the marking off of the limits of public power and the removal from the latter's reach of 'certain favoured private activities.'²⁷ Constitutions reflect the will of people in their sovereign capacity and it is precisely for this reason that they can limit and control government.²⁸ According to this reading, constitutionalism marks the transition from the feudal society's irrational imposition of authority to adherence to the rule of law, checked, balanced, and constrained state power, as well as to the guarantee of a minimum amount of personal autonomy for the people. It should follow that, when the constitution is no more capable of constraining state power, because the latter no longer resides in the state, then constitutionalism ceases to fulfil its purpose and must perhaps be revamped at supranational level.

²² U Preuss, 'The Political Meaning of Constitutionalism' in R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty* (Ashgate Publishing 1996), 12.

²³ J Gray, *Enlightenment's Wake* (Routledge 1975) 76.

²⁴ See, eg, L Diamond and M Plattner, 'Introduction' in L Diamond and M Plattner (eds), *The Global Divergence of Democracies* (John Hopkins University Press 2001) xxi.

²⁵ L Ferrajoli, 'Beyond sovereignty and citizenship: A Global Constitutionalism' in Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury 1996) 151.

²⁶ G Schochet, 'Introduction' in R Pennock and J Chapman (eds), *Nomos XX: Constitutionalism* (New York University Press 1979) 10.

²⁷ R Kay, 'American Constitutionalism' in L Alexander (ed), *Constitutionalism* (Cambridge University Press 1998) 22.

²⁸ See C Fritz, 'Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate' (1997) 24 *Hastings Constitutional Law Quarterly* 287.

A slightly different reading would approach constitutionalism not merely as a response to the need for setting constraints to state power, but rather, primarily, in tandem with capitalism and the related demand to secure the peaceful co-existence of citizens and the smooth operation of national markets. Once constitutionalism is approached in this way, the weight of its purposes shifts from adherence to the rule of law to the need to create social consensus. Seen in this light, constitutionalism, seeking as it does to appease social conflict and to secure consensus, demarcates the legal framework within which this conflict materialises. Citizens are granted rights and freedoms in exchange for their harmonious coexistence in the face of social inequality. Constitutionalism can therefore be approached more as a political instrument that assists in the maintenance of the status quo and less as a legal tool that establishes the rule of law. It is in this sense that constitutionalism retains a relative autonomy from the constitution. While the latter is a strong indicator of the quality and resilience of social consensus, it cannot always be relied upon as a measuring device of the status of social relations within a polity. This is so, not least because it is the very point of the constitution to be subject to divergent interpretations following, at best, the changing socio-economic and political climate but, at worst, the political project of any given political elite.

On the above account, it can be inferred that constitutionalism acknowledges the omnipresent existence of conflicting social interests, regardless of whether such conflict is conscious or not. This acknowledgment is, in and of itself, important. It is important, first, because it bespeaks an unbreakable link between constitutionalism and the nation state. The resolution of conflicting social interests cannot easily be attempted, let alone achieved, at extra-state level.²⁹ The German worker does not, and will not in the foreseeable future, be on the same wavelength or identify their interests, with the Romanian or Spanish one. This is only understandable. Different states, regardless of whether they belong to the EU/EMU or not, have different characteristics: insurance policies, taxation systems, employment relations, social rights, and the institutions that protect them, prices and governmental budgets, wages and, in general, the factors that determine how profit is made, are not homogenous in the different Member States of the Union. The structure and content of the above institutions reflect different national histories. Certainly, they also reflect different outcomes of the social struggles, and the balance of powers that emerged therefrom, within each national formation. Finally, they determine the scope and size of social conflict, the dimensions of which are therefore dissimilar within the Union's various Member States. This means that, if constitutionalism is seen primarily as a tool that acts out social conflict, its purpose cannot easily be fulfilled unless constitutionalism is located in the nation state.

The acknowledgment on the part of constitutional arrangements of the ubiquitous existence of social conflict is important, secondly, because it indicates that, without a

²⁹ Even strands of the literature that support the internationalisation of the state and of collective social forces are hesitant to admit that anything akin to democratic conflict resolution is occurring at the global level: See, eg, A Demirovic, 'NGOs, the State, and Civil Society: The Transformation of Hegemony' (2003) 15 *Rethinking Marxism* 213; S Gill, 'New Constitutionalism, Democratisation and Global Political Economy' (1998) 10 *Pacific Review: Peace, Security & Global Change* 23.

minimum legal recognition of conflicting social interests, social coexistence is non-viable. One might then wonder how constitutionalism achieves consensus so effectively, given the pervasive quality of social conflict. The answer is to be found in the notion of constitutionalism as ideology, in particular the ideology of the united and undivided nation, a nation with common interests and characteristics. The demarcation of the inside from the outside is vital for constitutionalism as it minimises the outward show of social antagonisms and the potential for eruption of violent conflict uncontrollable by law.³⁰ The national interest is the idea upon which the state builds its unity and emerges as the representative of its people.

It is on the basis of the above understanding of constitutionalism that the present analysis sees the political offspring of the crisis, austerity, as a matter of constitutional importance. This is so, not so much because of the entrenchment of fiscal constraints in constitutional documents, but rather because of the attempt at legitimisation of austerity in political discourse and practice through the rhetoric of austerity as national interest.³¹ When austerity becomes legitimised and therefore unchallengeable in the social body; when, in other words, austerity becomes part of the social consensus, it has already become constitutionally anchored.

Before closing this section, two remarks need to be made. First, we need to accept that the effort to justify and endorse austerity could never succeed were it to be undertaken by the Union alone. This endeavour has to be filtered through the national institutions. The maxim of austerity as national interest, if it is to be at all persuasive, must be expressed by state representatives acting in the name of this interest. It is therefore indispensable to reevaluate the extent to which the political project of austerity challenges sovereign state powers. In particular, it is significant to reflect upon the question of primacy in this bundle of political developments. National authorities are no less busy trying to prove that austerity is unavoidable than are, for example, the European Central Bank or the Commission. Without rejecting the major influence of external actors in national austerity tactics, the role of the nation state has to be reappraised. In fact, the role of the nation state has to be recognised as predominant, not least in terms of legitimisation of austerity in the nation's collective unconscious.

At the same time, it is difficult - indeed, it would be inaccurate - to claim that the Union plays a minimal role in the breakthrough of austerity in EU Member States. Legitimising a political project in the eyes of the masses would be devoid of any tangible effects without this project's actual political and legal institutionalisation. Here the Union emerges as a catalyst for the surfacing of a debased form of European constitutionalism, which seeks to create pan-European consensus around

³⁰ See, eg, D Grimm, 'The Achievements of Constitutionalism and its Prospects in a Changed World' in M Loughlin and P Dobner (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2012) 12.

³¹ It is indicative, for example, that one of the countries most severely hit by austerity, Greece, has not proceeded to any constitutional amendment in order to include budgetary constraints within the constitutional document. Note that the relevant rhetoric reaches beyond the Eurozone. For an account of austerity-as-national-interest in the UK, see N Ritchie, 'Whose National Interest?' in T Edmunds and others (eds), *British Foreign Policy and the National Interest: Identity, Strategy and Security* (Palgrave Macmillan 2014) 91.

the institutionalisation of austerity without acknowledging conflict. The result of this peculiar process of European constitutionalisation is the coming together of European elites and the knocking down of any possibility for pan-European struggles at the level of European societies. The latter increasingly tend to conceive conflict as a battle of nation versus nation. Enter Brexit.

The largely nationalistic and xenophobic discourse that has surrounded and driven the Brexit vote brings me to my second point. While the source of austerity, neoliberalism, is now deeply embedded at the social level of Member States and has informed the ways in which we understand our role in the world and our relations with our fellow citizens, the recent violent outbreak of austerity is not equally well received in societies.³² As already remarked, at pan-European level this challenge more often than not tends to take the form of fearmongering about the European 'other'. At Member State level, there is an apparent inefficacy of even the all-powerful idea of the national interest to fully absorb the enormous austerity-driven dissonance between different national social fractions. Crucially, this is the case regardless of whether budgetary and fiscal constraints have taken the form of constitutional provisions, and notwithstanding Constitutional Courts' proclamations that austerity and the national interest go hand in hand.³³ And, one might add, this will remain the case, whatever improvements, marginal or not, are made to the institutional framework of the EU and/or the Member States, as long as austerity remains the determinant factor of the organisation of societies. Herein lies an indication that the 'political' cannot always be contained by the 'legal'.

Most importantly, however, it becomes evident that, if constitutionalism is about the acting out of social conflict, then austerity has not been constitutionalised in a successful manner. In fact, far from securing social consensus and the maintenance of the status quo, austerity, despite the attempts at constitutionalising it, seems to have achieved precisely the opposite: an upswing in extreme rightwing ideology and activity on the one hand and a surge in public support for political powers that challenge the established order of things on the other. Coupled with the second tendency is an increase in social solidarity movements, notably in the states whose citizens are suffering the most. This situation brings Europe before an impasse that might always have existed, but which has come into view more strikingly than ever with the outbreak of the crisis, with both of the above tendencies undermining the

³² On the dominance and embedment of (neoliberal) ideology, see L Althusser, *On The Reproduction Of Capitalism: Ideology And Ideological State Apparatuses* (GM Goshgarian tr, Verso, 2014); M Foucault, *Power/Knowledge: Selected Interviews and other Writings 1972–1977* (C Gordon ed, Harvester Wheatsheaf 1980) 119; A Gramsci, *Prison Notebooks Volume III* (JA Buttigieg tr, Columbia University Press 1975) 171. I say 'recent outbreak', because austerity is not a new phenomenon. However, it is only in its recent more intense form that it is being challenged to such an extent. On perceptions on austerity during the 1970s and the then powerful Italian Communist Party's Enrico Berlinguer's contentious reactions, see D Sassoon, *One Hundred Years of Socialism: The West European Left in the Twentieth Century* (Tauris 2010) 589-592.

³³ See, eg, Case 668/2012 (para 10) of the Council of State (Greece's Supreme Administrative Court) on the constitutionality of the first Memorandum of Understanding signed by the Greek Government in 2010.

foundations of the European project. The former, far right ideology and nationalistic rhetoric, drives a coach and horses through the ever closer Union of its people, the only truly emancipatory feature of the European endeavour. The latter tendency, social movements, debunks the basis of the neoliberal European economic and political project, as expressed and realised by the austerity agenda of national governments.

As the weak, one-sided European constitutionalism seems unfit or unwilling to curtail nationalistic tendencies and to enable a pan-European struggle that would allow European social fractions to come together and make possible the re-imagining of a European idea, we are possibly left with one alternative: filtering political action and disobedience through national constitutionalism. Before I explore how constitutionalism can play an active and, this time, progressive role in the above state of affairs, it is important to explain austerity not merely in terms of budgetary constraints, limitations to sovereign decision-making, and technical details, but rather in terms of its effects on the social body.

B. A Note on Austerity-Knitting Austerity and Constitutionalism

The endeavour to legitimise austerity is largely connected with the rhetoric of necessity. Austerity appears necessary because it will guarantee a state's economic survival; because it will ensure the smooth functioning of the economic system and hinder a bailout; because it will secure a state's participation in the EU and/or EMU; because it will save the common currency; because, finally, it is a condition for external economic assistance. This rhetoric, revolving as it does around necessity, is reminiscent of the state of exception. Such state, says Agamben, tends to become the dominant political paradigm in the largest part of the Western world, for reasons ranging from the need to respond to financial crises to the need to return to conditions of political normality.³⁴ It is so much so, that the state of emergency tends to become normality in itself. Austerity thus emerges as a quasi-state of exception, which, instead of suspending the constitution, is aspiring to become a constitutional norm itself.

Be that as it may, once austerity is seen in broader terms than simple economic or legal technicalities, the disruption of social cohesion becomes almost self-evident. Austerity might bring with it the violent repression of any expression of opposition, but the story does not end there. As austerity deepens and jeopardises survival, its persuasive potential deteriorates. It is then possible that austerity becomes accompanied by recourse to threats, intimidation, and moral dilemmas, which build up an impression of spread out war and which reconstruct society as a force disseminated by precisely this sense: of spread out war.³⁵

³⁴ G Agamben, *State of Exception* (K Attell tr, University of Chicago Press 2005) 1-31.

³⁵ M Markantonatou, 'The State of Financial Crisis and the Rhetoric of Emergency, Economic War and Downfall of Sovereignty' (2012) 118 *Theseis*. Available at: www.theseis.com/index.php?option=com_content&task=view&id=1172 [in Greek].

Here, positive constitutional provisions play a diminished role, if any role at all. Instead, what seems to prevail is the penetration of authoritarian and militarist elements within the very structure of the state. If one now looks at the European history of the last century one will find out that such penetration in liberal regimes has constituted the necessary condition for the ultimate dominance of fascism.³⁶ This does not merely explain the upsurge of extreme right and nationalist forces throughout Europe. It is also a reminder that the constitutional relevance of austerity is not limited to its constitutional entrenchment. We must, therefore, construct a constitutional narrative capable of absorbing the eminent dangers inherent in the modern politics of austerity. This narrative must pertain both to the Union, as the primary driver of austerity politics, and to its Member States, as the zealous enablers and facilitators of this political project. That said, the Union does not easily fit within a constitutional narrative that seeks to have an emancipatory dimension. This will be discussed in what follows.

II. Reclaiming Constituent Power

It was argued above that constitutionalism is a legal and political instrument that facilitates the maintenance and longevity of established political arrangements, ergo of the status quo. To this end, constitutionalism seeks to achieve consensus. One therefore needs to explore the prerequisites for consensus and conditions of its maintenance. Aristotle, for example, a robust advocate of respect for the law and of political stability, taught that active disobedience was essential when it was driven by the need to preserve harmony.³⁷ For Machiavelli, enforced consensus would block out the antagonisms and dissent in society and, by preventing the creation of mobilised social forces able to further democracy, would result in bloodshed.³⁸ The same underlying idea appears to have been relied upon by many constitutional scholars who, in their study of the constitutional dimensions of austerity, have argued that constitutional entrenchment of budgetary constraints will prevent economic policies from being negotiated in the political arena.³⁹ This reading of post-crisis developments is largely correct. It does, however, seem to imply that constitutional crystallisation of a policy suffices to render that policy inalienable. Here, the constitution is equated with constitutionalism. However, the two need to be distinguished because the former is a document while the latter can be understood as a project comprising not solely the rules enshrined in the document but rather a whole range of social processes and dynamics capable of turning rules on their head.

What does it mean for a policy to be negotiated in the political arena? And, crucially, who negotiates it? Herein lies the need to conceive constituent power, not as a

³⁶ N Poulantzas, *Fascism and Dictatorship: The Third International and the Problem of Fascism* (Verso 1979) 65-66.

³⁷ J Frank, 'Aristotle on Constitutionalism and the Rule of Law' (2006) 8 *Theoretical Inquiries in Law* 37.

³⁸ N Machiavelli, *History of Florence and of the Affairs of Italy: From the Earliest Times to the Death of Lorenzo the Magnificent* (The Pennsylvania State University Press 2007) 121; F Ankersmit, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford University Press 1996) 171-172.

³⁹ See the discussion of Pt II of this contribution.

producer of constitutional norms who ceases to exist as soon as these norms are created, but rather as a living body that is ready to renegotiate constitutional certainties through democratic conflict. Surely, to reconcile such an understanding of constituent power with constitutionalism presents difficulties. Here is Antonio Negri:

'To acknowledge constituent power as a constitutional and juridical principle, we must see it not simply as producing constitutional norms and structuring constituted powers but primarily as a subject that regulates democratic politics. Yet this is not a simple matter. In fact, constituent power resists being constitutionalized: "Studying constituent power from the juridical perspective presents an exceptional difficulty given the hybrid nature of this power.... The strength hidden in constituent power refuses to be fully integrated in a hierarchical system of norms and competencies. Constituent power always remains alien to the law." The question becomes even more difficult because democracy, too, resists being constitutionalized: democracy is in fact a theory of absolute government, while constitutionalism is a theory of limited government and therefore a practice that limits democracy.'⁴⁰

Negri is right in claiming that 'the political' possesses a horizon not always able to be framed by what the constitutional order prescribes. He shows intellectual bravery in denying the constitutional, and therefore, according to his reading, also conservative quality of both the constituent power and of democracy: constituent power 'presents itself as the continual interruption of the constitutive rhythm and as revolutionary becoming with respect to political constructions and constituted being.'⁴¹

Can we make Negri's version of constituent power compatible with constitutionalism? I believe that we can. Constitutionalism, even in its version as an instrument directed towards protection of the status quo, leaves this possibility open. If we accept that the results of austerity policies reach further than mere economic and constitutional technicalities, into the very conditions of integrity of the social body; and if we further accept that constitutionalism is partly about preserving this integrity by allowing the acting out of conflict and the expression of dissent, then we have to detect within the constitutional arrangement a possibility for rupture in the established political order, when the latter is no longer viable. Such rupture will often be able to take the form of an eclectic challenge against all dominant logics that co-occur with post-crisis developments. In particular, it may be able to challenge established constitutional understandings of principles whose meaning has been determined by a distinctly neoliberal rationale.

⁴⁰ A Negri, *Insurgencies: Constituent Power and the Modern State* (M Boscagli tr, University of Minnesota Press 1999) 2-3. The quote inside the quote belongs to G Burdeau, *Traite de sciences politiques*, vol. 4 (Librairie generale de droit et de jurisprudence, 1983), 171, as cited in Negri.

⁴¹ *ibid* 318. Negri eventually drifts into equating constituent power with an almost metaphysical idea of an undifferentiated multitude, a coming together of the people. This version of the constituent power is not accepted here. See, for a critique, L Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice* (Springer 2011) 34-37 and D Dimoulis and S Lunardi, 'Constituent Power Beyond Liberal Constitutionalism and the Impotency of the Multitude' (2012) 120 *Theseis* www.theseis.com/index.php?option=com_content&task=view&id=1192&Itemid=29 [in Greek].

The logics of self-determination as self-help and of freedom as a natural universal certainty, rather than as a demand fought for and won at the political level, are a case in point. Although one could not by a long shot claim that collective projects of social solidarity are becoming a dominant practice, some of the European states that are most severely hit by austerity offer examples of collective movements that progressively challenge dominant understandings of principles, which conceptually back the idea and practices of austerity.⁴² The Greek solidarity clinics test the neoliberal ideas of individualised risk, self-as-enterprise, and charitable activity by putting forward a philosophy of communal action and social solidarity in order to meet collective needs.⁴³ Similarly, the Spanish indebted homeowners movement questions, in practice, dominant conceptions of individual property and of economic freedom as the only available understanding of liberty.⁴⁴

These are examples of how constituent power, understood, not as an undiversified multitude, but instead as collective social forces united under their common interests and needs, can produce cracks in the domestic constitutional order while remaining within its framework. Perhaps, we should be opting for a wholesale paradigm change. Perhaps, with Negri, we should demand that constituent power brings about the revolutionary conversion into what is beyond the vision of constituted being. But such conversion will occur neither instantly nor abruptly.

Constitutionalism does have a role to play in the meantime. This role should not be limited to an instrumentalist defence of pre-crisis adherence to the constitutional letter. The letter of the constitution is never too clear and never too firm to guarantee success of such a claim, however right it might be. This role should even less be linked to a fixation with institutional and procedural changes that will make austerity policies more transparent while leaving them, in principle, unchallenged. The constitutional dimension of the crisis lies more in the embedment of austerity and its paraphernalia in societies, in its appearance as a normality or necessity. Let us therefore renegotiate what is normal and necessary both in theory and in practice. The constitution will embrace the outcome of this renegotiation - it cannot do otherwise.

This process is difficult to replicate at European level. It is difficult, first, because the multi-tier system of states coexisting within the Union stands in the way of identification of common interests and of the building of pan-European movements from below. It is difficult, secondly, because the EU is immune from popular control. This is not so much a result of the (in)famous European democratic deficit and the lack of institutional transparency and accountability. It is rather a pragmatic

⁴² There is much talk about such movements operating mainly in Spain and Greece, with the notable exception of Portugal. See C Príncipe, 'Hope for the Portuguese Left' (*Jacobin*, 10 August 2015) <www.jacobinmag.com/2015/10/left-bloc-portugal-austerity-social-democracy>.

⁴³ For the relevant concepts, see, eg, N Rose and P Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173.

⁴⁴ For more details on the activity of these movements, see M Zechner and BR Hansen, 'Building Power in a Crisis of Social Reproduction' *Roar Magazine* (2015) <<https://roarmag.org/magazine/building-power-crisis-social-reproduction/>>.

conclusion emanating from the fact that the Union seems to be untouchable by domestic contestation.⁴⁵ Whether structurally flawed or simply politically unscrupulous, the Union is nowhere near enabling the formation of a European constituent power able to challenge its neoliberal rationalities, normalities, and routines. Perhaps then the solution lies in spreading constructive opposition through the domestic route. Unlike the xenophobic and reactionary resistance that accompanied the largest part of the Brexit vote, such opposition can and has to be akin to a form of disobedience, defending rights and upholding the power of citizens to be involved in decisions that affect them. Another Europe might or might not be possible, but this is something that cannot be pre-empted. Lest we forget that structures, however difficult, are not impossible to shake.

Conclusion

The constitutional significance of austerity may well lie in the constitutional entrenchment of austerity rules in the constitutional document. Yet, the constitution can be seen in either technical terms, as the highest law of an entity or in broader terms, as the mode of organisation of social and political life. In the former case, the constitutionalisation of austerity refers to what the law prescribes. In the latter case, austerity insinuates itself in the social body emerging as the order of things, a routine or a normality. The preceding discussion argues that this latter form of constitutionalisation poses a far greater threat to societies. Interrupting embedded ideologies is always a process more tenuous than changing legal prescriptions. The threat has already materialised in Europe. Regardless of the degree to which different states have rendered austerity a constitutional command, austerity is constitutionalised. The European Union's neoliberal fundamentalism has been conducive to this process. Whether structurally designed as a neoliberal order or, simply, driven to pursue the goal of austerity by its political leadership and its Court's neoliberal agenda, the Union seems to always point to a predetermined winner in the battle between dominant and dominated social forces: the market. One response could be that, where winners are predetermined, there is no point in taking up arms. Another response could be to rethink of the European endeavour as one that could have never succeeded without the mediation of the state. The Union may be successful in imposing rules or conditionalities, but it is through the mechanisms of the state that these work their way into the level of dominant truths and hegemonic ideas. It may, therefore, be that Negri's continual interruption of the constitutive rhythm of austerity should commence at state level. Besides, until we are able to discern anything akin to a genuine constituent power at EU level, the state may be the only constitutional order able to be disrupted.

⁴⁵ See, eg, L Jones, 'The EU Locked in Neoliberalism and Locked Out its People. Brexit is the Alternative' (*LSE Blog*, 10 June 2016) <<http://blogs.lse.ac.uk/brexit/2016/06/10/the-eu-locked-in-neoliberalism-and-locked-out-its-people-brexit-is-the-alternative/>>.