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ORIGINAL ARTICLE

Political constitutionalism in Europe revisited

MICHAEL A. WILKINSON

Law School, London School of Economics and Political Science, England

Correspondence
Michael A. Wilkinson, Law School, London School of Economics and Political Science, Houghton Street, London, WC2A 2AE, England
Email: m.wilkinson@lse.ac.uk

Abstract

This article traces the disconnect in the constitutional study of the European Union from the Maastricht era to the euro crisis. In the Maastricht era, a discourse of 'post-sovereignty' came to dominate theoretical enquiry, reflecting but also distorting a number of material developments: the 'end of history', the retreat of critical theory into discourse analysis and systems theory, and the prioritization of law over politics. Jürgen Habermas was a key intellectual figure in driving this ideological mix at the very moment when anti-systemic challenges began to return, both formally and informally, as exemplified in the German Constitutional Court and the French political scene. In revisiting the idea of political constitutionalism, we can foreground this constitutional disconnect and show how it contributes to the irresolution of the subsequent euro crisis conjuncture.

1 | INTRODUCTION

Since the onset of the euro crisis, a huge literature has emerged on the various crises faced by the European Union (EU) and its member states. Much of this – at least in political science and international relations – has focused on revisiting, and updating, the 'grand theories of European integration', particularly neo-functionalism and intergovernmentalism.[1] In constitutional theory, the focus has been on the idea of constitutional pluralism, a once-dominant theme that received

[1] For a recent survey of the crisis literature, see L. Hooghe and G. Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26 *J. of European Public Policy* 1113.

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sustained criticism in the wake of the pushback from the German Constitutional Court (GCC) and the turn to 'authoritarian populism' in Hungary and Poland.[2]

Both of these sets of literature take the events in the years from the 2008 global financial crisis to the COVID-19 pandemic as exceptional, or in a historical context of their own making. The period between the negotiation of the Treaty of Maastricht and the Treaty of Lisbon (ratified just as the repercussions of the global financial crisis were beginning to be felt in Europe) has received less scholarly attention in terms of its constitutional impact on the subsequent course of integration. However, it was a pivotal moment in setting the scene for the euro crisis conflicts and their irresolution – as is argued in this article.

In some ways, this lack of attention is surprising given the epochal transformations of the Maastricht era. In addition to the Treaty of Maastricht itself, the period saw the reunification of Germany, the collapse of the Soviet Union, and, on some accounts, the 'end of history'.[3] Nevertheless, at the time, and particularly towards the turn of the millennium, there was – as Giandomenico Majone has documented – a tremendous constitutional optimism in Europe, in the academic scholarship as well as among political elites.[4] This optimism extended beyond Europe. It was to be constitutionalism's 'global hour'.[5] However, it was in Europe that constitutionalism became a conscious and highly motivated scholarly and political *project*. It is worth noting that the ascendency of the constitutional idea was perceived even by those who were critical of it, suggesting that the phenomenon was more than merely wishful thinking.[6]

Yet beneath the constitutional topsoil, the political and social disquiet with further constitutionalization was evident. If the official narrative of European integration in the era of the Treaty of Maastricht was the 'widening and deepening' of the EU, the material reality was a 'decade of self-doubt', with challenges to the project growing in formal as well as informal spaces. This culminated in the failure and then abandonment of the Constitutional project in 2005, followed by the symbolic 'de-constitutionalization' of the Treaty of Lisbon,[7] which was ratified just as the global financial crisis began to place the whole construction under more severe pressure, with a series of financial and constitutional crises pivoting around the 'Greek question', after the election of the anti-austerity party Syriza in January 2015. This saga ended anticlimactically when Greece signed the third memoranda of understanding with the European authorities in July 2015 despite the Greek people having voted '*oxi*' ('no') in the referendum. Attention then turned to the 'rule of law crisis' and then the pandemic crisis.

[2] See M. A. Wilkinson, 'Beyond the Post-Sovereign State? The Past, Present and Future of Constitutional Pluralism' (2019) 21 *Cambridge Yearbook of European Legal Studies* 6. I have argued that the decade-long unfolding of the euro crisis itself revealed a form of authoritarian liberalism, with deeper roots in the inter-war period and the post-war reconstruction of Europe: M. A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021). This article focuses only on the Maastricht period, building on Part 3 of my book.

[3] F. Fukuyama, *The End of History and the Last Man* (1992).

[4] G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (2014) 58–87.

[5] N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Rev*. 317–359, at 317, citing P. Haberle, 'Verfassungsentwicklungen in Osteuropa: aus der Sicht der Rechtsphilosophie und der Verfassungslehre' (1992) 117 *Archiv des öffentlichen Rechts* 169–211, at 170.

[6] See for example M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (2000); M. Loughlin, *The Idea of Public Law* (2003). Martin Loughlin's was a relatively rare dissenting voice, but for some further scepticism, even at the 'high point' of European constitutionalism, see for example C. Harlow, 'Voices of Difference in a Plural Community' (2002) 50 *Am. J. of Comparative Law* 339. Later on, Peter Lindseth argued for a reading of the EU that was administrative not constitutional: P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010).

[7] C. Reh, 'The Lisbon Treaty: De-Constitutionalizing the European Union?' (2009) 47 *J. of Common Market Studies* 625.

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This article takes a step back and examines the deep disconnect in European constitutionalism in the period between Maastricht and Lisbon. After Maastricht, there was an acceleration of 'legal constitutionalization', pushed particularly vigorously in the academy as well as the courts, with the proliferation of theories celebrating a new liberal normative order: global constitutionalism, world constitutionalism, societal constitutionalism, and especially constitutional pluralism.[8] In different ways, these posited the transcendence of the state, or a movement 'beyond sovereignty', celebrating a version of the 'end of constitutional history'. This stance was not only restricted to liberal scholars but adopted even by critical theorists and, in variation, by some in the Marxist tradition, such as in Michael Hardt and Antonio Negri's celebration of the 'multitude', the flipside of the amorphous 'Empire' of global capital.[9]

In writing about political constitutionalism in the EU in 2012, I used the term 'freestanding constitutionalism' to convey this theoretical orientation, a term intended to capture claims that the authority of a constitutional order depends on its congruence with 'higher' cosmopolitan ideals of political morality.[10] I argued that this orientation evaded the real constitutional question – the question of what kind of constitution was materially developing in the EU – that was taking on considerable momentum as the euro crisis deepened. However, it also evaded the key strategic as well as foundational question of political sovereignty, understood as the capacity of the democratic constituent power to effect radical constitutional change.

Freestanding constitutionalism appeared increasingly *disconnected* from concrete geopolitical, political, and social developments, which diverged from the post-national tendencies of constitutional elites and scholars. These developments took place through formal constitutional channels, particularly in domestic constitutional courts. The very turn towards legal constitutionalization and judicial power supranationally came up against its own version domestically through the principle of constitutional identity, harnessed in particular by the GCC in Karlsruhe as it flexed its muscles in a tense relationship with the European Court of Justice (ECJ).[11] However, reaction to legal constitutionalization also occurred informally, through the rise of Eurosceptic parties and anti-systemic social movements, reflected in the French '*petit oui*' on the Treaty of Maastricht itself (when the French narrowly voted in favour of ratifying the Treaty by 51 per cent to 49 per cent) and in the rejection of the Constitutional Treaty in 2005 in France and the Netherlands, and culminating in the '*oxi*' referendum in Greece.

In this article, I revisit the idea of political constitutionalism in light of the material developments of the post-Maastricht era. In retrospect, it appears that political sovereignty, having been folded into legal constitutionalism and other forms of technocratic rule and regional institution building in the post-war period, began to re-emerge just at the moment that it was being declared obsolete by the academy. In sociological terms, to use Jürgen Habermas' expression, there appeared to be a growing mismatch between system and lifeworld. Ironically, it was a mismatch that his own theoretical and political moves only aggravated; his 'postnational constellation'

[8] For an edited volume of representative essays on these themes, see M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012).

[9] M. Hardt and A. Negri, *Empire* (2000).

[10] M. A. Wilkinson, 'Political Constitutionalism and the European Union' (2012) 76 *Modern Law Rev*. 191.

[11] For a survey of the use of identity provisions, see for example B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 *Yearbook of European Law* 263.

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presented the EU as a stepping stone to the constitution of a world society, increasingly removed from any *demos*, just as the actual *demoi* appeared to be shaken from their post-war passivity.[12]

This article thus revisits the reconstitution of Europe after Maastricht, paying particular attention to the question of political sovereignty and its alleged redundancy, which can only be fully grasped through a combination of political constitutionalism and material analysis.[13] In Part 2, I examine the discourse of 'post-sovereignty' under the influence of Habermas – a discourse that is increasingly reliant on law and detached from democracy. I then juxtapose this discourse in Part 3 with the return of sovereignty claims, played out in formal and informal settings, most notably in (1) the GCC and (2) the French political scene. In Part 4, I outline this constitutional disconnect, examining the void that emerged out of the passive authoritarian liberalism of the post-war era and that is (1) deepened by the accelerated decline of partisan politics and (2) widened in the process of the enlargement of the EU. In Part 5, I suggest that the response to this disconnect was asymmetric, the void filled rhetorically by the political right with the left having vacated the terrain by embracing an ideological Europeanism and post-sovereign position, and thus, as the article concludes, laying the ground for the irresolution of the euro crisis conjuncture.

2 | POST-SOVEREIGN CONSTITUTIONALISM

By the time of the Maastricht era, it had become commonplace to regard EU law as 'constitutional' in type. In 1996, Joseph Weiler and Ulrich Haltern had declared the alleged 'rupture' or 'mutation' of the EU legal order from public international law and its 'transformation into a constitutional legal order' as one of the 'great perceived truisms, or myths' of European integration.[14] The logic of constitutionalization had in effect been long developed by the ECJ as it turned itself into a supranational and de facto constitutional court in the post-war era through its seminal case law of the early 1960s, which requires no repetition here.[15]

However, though the juridical groundwork had long been laid, there was an increase in constitutionalist discourse between Maastricht and Lisbon that is hard to exaggerate. It was not only that commentators routinely described EU law and the ECJ as 'constitutional' in their academic texts on the 'constitutional law' or 'constitutional principles' of the EU.[16] It was also that this discourse was invested with a deep theoretical and normative significance, transcending national scholarly boundaries, and encompassing a range of schools, from legal positivists to Dworkinian interpretivists and social systems theorists.[17] Neil MacCormick – by no means the most exuberant

[12] J. Habermas, *The Postnational Constellation: Political Essays* (2001). There was, of course, a stirring of the *demoi* in the 1960s and 1970s, though, as I argue elsewhere, this was of little constitutional significance and was ultimately underlined by the left's turn away from material political analysis: M. A. Wilkinson, '*Authoritarian Liberalism and the Transformation of Modern Europe*: Rejoinder' (2022) 1 *European Law Open* 191.

[13] For an extended material analysis of the constitution, see M. Goldoni and M. A. Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Rev*. 567

[14] J. H. H. Weiler and U. Haltern, 'Constitutional or International? The Foundation of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in *The European Courts and National Courts: Doctrine and Jurisprudence*, eds A.-M. Slaughter et al. (1998) 331. It was, of course, a myth that Weiler himself had helped to create.

[15] See for example id.

[16] For a representative example and set of surveys, see A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2006).

[17] Armin van Bogdandy explicitly acknowledged the debt to Ronald Dworkin and his 'empire of law': A. von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 2 *European Law J*. 95. Systems theorists

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of the constitutional optimists – had already declared, in the emphatic conclusion of his Chorley Lecture in 1993, that we were 'beyond the sovereign state'.[18] Many others followed suit, without any of MacCormick's later nuances and qualifications.[19] So confident was the legal academy of its constitutionalist project that sovereignty was declared dead, redundant, or simply passé.

By the early 2000s, it was claimed that of all of the initial mysteries accompanying European legal integration, 'none of them are very mysterious anymore'.[20] Post-sovereignty had become a project to be pursued at all costs; '[t]he real lawyerly task' was, according to one commentator, 'to neutralise' the question of sovereignty.[21] Even supposedly critical theorists took this route, mapping out a projection of their constitutional vision beyond the state, legitimized by deliberative democracy or 'the right to justification'.[22] The translation into English of Habermas' *Between Facts and Norms* (and then *The Postnational Constellation*) had a profound impact on normative constitutional theory and gave a veneer of intellectual credibility to European, post-national, and cosmopolitan constitutionalisms.[23]

According to Habermas, popular sovereignty no longer 'circulated in a collectivity, or in the physically tangible presence of the united citizens or their assembled representatives'; it would, henceforth, take effect only 'in the circulation of reasonably structured deliberations or decisions', leading to the 'harmless' conclusion that there could no longer be a sovereign in the constitutional state.[24] By incorporating principles of deliberative democracy into the discourse of political justification and constitutional design, *Between Facts and Norms* legitimized the transcendence of constituent power, popular sovereignty, and concrete forms of mass democracy.

Similar projects aimed at transcending political sovereignty were pursued in various registers: an ethics of constitutional tolerance, legal-moral principles of adjudication, institutional harmony, and contra-punctual law. According to some schools of thought, notably those inspired by systems theory, whole societal sectors would become autonomously self-determining through their own processes of legitimation and self-constitutionalization.[25] Building on Habermas' work, Gunther Teubner's constitutional programme played the retreat from politics as its own trump card. Teubner reframed constituent power as having merely a 'communicative potential', thereby relieving it of any 'delusions of omnipotence'.[26] The reality, for Teubner, was that the political constitution

pushed this discourse beyond the nation state more generally: see for example G. Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State' in *The Twilight of Constitutionalism?*, eds P. Dobner and M. Loughlin (2009) 327.

[18] N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Rev*. 1, at 18.

[19] For MacCormick's later, more qualified position, see for example N. MacCormick, 'Sovereignty and After' in *Sovereignty in Fragments: The Past Present and Future of a Contested Concept*, eds H. Kalmo and Q. Skinner (2010) 151.

[20] U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Union' (2003) 9 *European Law J*. 14, at 15.

[21] A. Jakab, *European Constitutional Language* (2016) 116.

[22] J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (2012), building on R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (2012). Compare D. Nicol, 'Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer' (2012) 50 *J. of Common Market Studies* 508; A. Somek, 'The Darling Dogma of Bourgeois Europeanists' (2014) 20 *European Law J*. 688.

[23] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1997); Habermas, op. cit., n. 12.

[24] Habermas, id. (1997), p. 170.

[25] G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (2012).

[26] Id., p. 63.

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had no privileged position; with the fragmentation of power, 'other social systems, too, establish themselves through self-referential processes by which, ex nihilo, they constitute their own autonomy'.[27]

In European constitutional discourse, these post-sovereign registers were often collated under the broad theme of 'constitutional pluralism'.[28] In each case, the assumption was that some normative order or system circling above the conflicting domestic and international systems could and would resolve (or at least defer) any deep-seated political or social conflicts. Order or system stability depended on the identification and thereby generation of a universal ratio; these projects were, in other words, essentially monist.[29] This monism was represented by principles of legality or subsidiarity, instrumental rationality, or economic rights themselves, though much of the constitutional scholarship of this era was completely detached from the ordoliberal and neoliberal moorings of the EU's actual economic constitution.[30]

According to this line of argument, constitutional authority – once freed from its Westphalian straightjacket and its false dichotomy of domestic and international, internal and external – could be extended to multiple layers of governance. This was a period of tremendous constitutional optimism in the academy, with constitutionalism set to 'rule the world', as one edited volume suggested, based on the authority of its universalist values.[31] Constitutional pluralism became the only game in town, Weiler later describing it 'as the only party membership card which will guarantee a seat at the high table of the public law professoriate'.[32]

Habermas' general work in democratic theory – presented as a dialectical resolution of republicanism and liberalism, popular sovereignty and human rights – was well suited to a transcendence of the state tradition.[33] His co-originality thesis of public and private autonomy, and his claim that democracy and the rule of law were 'internally related', were widely influential as abstract statements that built on his earlier theory of communicative action.[34] Habermas could still offer a critical, if increasingly blurred, perspective on the market liberal and authoritarian vision of rule that dominated the post-war constitutional imagination. However, when it came to European integration, it was not a renewal of radical democracy or republicanism that drove his narrative forwards, but a Kantian liberal universalism combined with a Weberian functionalism and a moralistic reaction to the nation state, formed by the historical (and perhaps also personal) experience of the Federal Republic of Germany. This cohered into an oddly *formalist* view of European integration, even as he became more publicly critical of the EU's neoliberal drift.

[27] Id., p. 65.

[28] Matej Avbelj and Jan Komarek identified six versions: M. Avbelj and J. Komarek, 'Introduction' in *Constitutional Pluralism in the European Union and Beyond*, eds M. Avbelj and J. Komarek (2012) 1, at 4–7.

[29] H. Lindahl, 'Democracy, Political Reflexivity and Bounded Dialogues: Reconsidering the Monism–Pluralism Debate' in *Public Law and Politics: The Scope and Limits of Constitutionalism*, eds E. Christodoulidis and S. Tierney (2008) 103.

[30] Teubner, for example, offered a normative critique of ordoliberalism (as well as neoliberalism), but did not perceive the strength of its grip over the actual economic constitution of the EU and undercut his critique by relativizing it against the opposite sin of over-politicization: Teubner, op. cit., n. 25, pp. 31–32.

[31] J. Dunoff and J. Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (2012).

[32] J. H. H. Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in *The Worlds of European Constitutionalism*, eds G. de Búrca and J. H. H. Weiler (2011) 8, at 8.

[33] J. Habermas, 'Three Normative Models of Democracy' (1994) 1 *Constellations* 1.

[34] J. Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3 *European J. of Philosophy* 12.

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Habermas thus opened his book *The Crisis of the European Union*, published in 2012, with the observation that Europe 'is now *more than ever* a constitutional project'.[35] The post-national constitutional narrative, which had become so popular with the 'end of history', had not been arrested by the failure of the Constitutional Treaty in 2005, nor even by the later advent of the global financial crisis and the contradictions of global and European capitalism that it revealed. On the contrary, the failure of the Constitutional Treaty and its symbolic difference from the Treaty of Lisbon often barely registered, and neither did the growing social contestation of the project's material trajectory.

In reflecting on the EU at the onset of the euro crisis, Habermas continued to present the sociological and political dynamics of globalization in highly naturalistic terms. These dynamics were unstoppable social-evolutionary forces bound up with capitalism. Even with the initial failures of the EU in the euro crisis laid bare, European integration, specifically in terms of the process of constitutionalization, still represented 'an important stage' – not any more to European unification, but along the route to a 'politically constituted world society'.[36] The political fragmentation and contestation precipitated by the euro crisis was merely a stumbling block to be overcome by the natural social-evolutionary force of constitutional law and supranational integration.[37] Law and system integration was now called on to operate without distraction from the political warning signs and social discontent, which was frequently presented and often dismissed as populist Euroscepticism.

Habermas' new-found functionalism coincided uneasily with a formalist turn in evaluating the EU. He distinguished the EU from previous federations, empires, and alliances on the basis that, unlike them, the EU *declares itself to be democratic*, as if democracy could now be satisfied by its sheer pronouncement. The democratic deficit of the EU were emphasized by Habermas elsewhere, but this only added to the aura of cognitive dissonance. Such deficits must be overcome by sheer force of moral reason, Habermas having persuaded himself (and many of his readers) to overlook them and focus instead on a future horizon of pan-European democracy.

Even though he started from the presumption that states were responsible for the initial project, Habermas came to see European integration as entirely freestanding, based on 'individuals who are (simultaneously) citizens of the states and of the EU, as the only subjects of legitimation'.[38] Democracy would be entirely imagined or projected into the future. Apparently disregarding his own co-originality thesis, the asymmetry beyond the state – of strong juridical protection of (some aspects of) private autonomy and weak democratic expression of public autonomy – could be overlooked. There was no obstacle to proceeding 'as if' a European constitution had been brought into existence by a double sovereign (the individual as citizen of the EU and as citizen of a member state),[39] despite everything that we knew about the democratic deficit and the lack of a European public sphere.[40] The notion of constituent power was thus relegated to the status of a

[35] J. Habermas, *The Crisis of the European Union: A Response* (2012) 1, emphasis added.

[36] Id.

[37] Id., pp. 1–12.

[38] Id., p. 36, citing A. von Bogdandy, 'Grundprinzipien' in *Europäisches Verfassungsrecht*, eds A. von Bogdandy and J. Best (2009) 13, at 64.

[39] Id., p. 38. See further J. Habermas, *The Lure of Technocracy* (2015) 40.

[40] Even if we take only the Franco-German space as an example, the absence of a real public sphere has been well documented: see U. Krotz and J. Schild, *Shaping Europe: France, Germany, and Embedded Bilateralism from the Elysée Treaty to Twenty-First Century Politics* (2013) 112.

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counterfactual, an individual (European) constitution-founding subject.[41] A constitution-making power that exists only in the mind of intellectuals could finally stand in for the unruly masses of modern democracy.

This manoeuvre also reflected a significant departure from Habermas' earlier views on the ambivalent role of law in modern society.[42] With the publication of *Between Facts and Norms*, law became the privileged mode of integration among strangers.[43] By *The Crisis of the European Union*, the process of juridification – instead of corrupting or colonizing the lifeworld – acted not only as 'a rationalizing but also a civilizing force',[44] and as a language that circulates throughout society unifying all other subsystems, including the political sphere. The priority of law over politics was firmly established; the constitution connects them through the 'legal medium', Habermas emphasizing the triumph of the juridical component and its style of abstract rational discourse. Any trace of the Marxist critique of the 'real abstraction' of law, or of its colonizing effects on the lifeworld, was gone. It was now – decisively – modern law that was supposed to perform the role of de-differentiating the functional subsystems, capable of reversing Max Weber's narrative of modernization. Law was called on to re-enchant the modern imagination and to offer a substitute for the absent politics of transnational solidarity.

3 | THE RETURN OF SOVEREIGNTY CLAIMS

Ironically, given the thousand ships of post-sovereignty launched in its wake, Maastricht was precisely the moment that sovereignty began to mark its European return, after a hiatus of half a century, during which it had been displaced by the geopolitics of European division and Cold War superpower rivalry, the language of constitutional rights and counter-majoritarianism, and the material compromises and political de-radicalization of late capitalism.[45] Sovereignty returned in a geopolitical sense, with inter-state asymmetries exacerbated by the return of the 'German question' following reunification in 1990 – namely, whether there can be a balance of power in Europe in light of Germany's semi-hegemonic position.[46] However, sovereignty also returned in constitutional politics, which is the focus here, examined through (1) claims in formal legal channels, particularly the GCC, and (2) contestation in informal political and social channels, notably in the French constitutional context.

3.1 | Who is the guardian of the constitution?

In the juridical arena, the constitutionalization of European rights through the jurisprudence of the ECJ had not led to the perfection or triumph of liberal constitutionalism but to increasing

[41] For a discussion and rejection of the dual constituent power based on a reading of the Lisbon Treaty, see D. Grimm, 'Sovereignty in the European Union' in *Constitutional Sovereignty and Social Solidarity in Europe*, eds J. Ellsworth and J. W. G. Van der Walt (2015) 39.

[42] J. Habermas, *Theory of Communicative Action, Volume 2* (1985).

[43] Habermas, op. cit., n. 23. See further D. Loick, 'Juridification' in *The Cambridge Habermas Lexicon*, eds A. Allen and E. Mendieta (2019) 208.

[44] Habermas, op. cit., n. 35, p. 8.

[45] Wilkinson, op. cit., n. 2, Part II.

[46] H. Kundnani, *The Paradox of German Power* (2014).

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conflicts over its terms.[47] In the absence of supranational political channels, these played out as *domestic* constitutional conflicts between branches of government.[48] From the Treaty of Maastricht itself through to the Treaty of Lisbon, there were various complaints made against European integration, the most significant of which was the pushback from the GCC in Karlsruhe, harnessing its own juridical authority in an attempt to thwart closer integration by placing 'red lines' on the further transfer of powers. Though precedents could be traced back to the 1970s (the famous *Solange* jurisprudence),[49] Karlsruhe's judgments grew more constitutionally challenging after Maastricht. The *Maastricht* judgment itself generated enormous academic controversy over its so-called 'no *demos* thesis', bringing back into the spotlight the jurisprudence of Weimar, and of Carl Schmitt and Hermann Heller in particular[50] – themes that had been largely overlooked in the intervening years.[51]

It was curious that the GCC cited Heller for the proposition that democracy required homogeneity – which, without any reference to Heller's insistence on the centrality of socio-economic equality, was disingenuous. However, reactions to the allegedly ethnonationalist tones of the judgment were still more curious, given the absence of any actual reference to ethnicity.[52] A more apposite criticism was made shortly after by Habermas himself; given the court's concern with the democratic legitimacy of the European construct, it was perverse to have given the green light to the Treaty of Maastricht at all, in light of the increasing democratic deficit of the EU.[53] However, instead of drawing the obvious conclusion – that the court should have been bolder in halting the integration dynamic rather than reluctantly greenlighting it – Habermas (and his followers) overlooked his own counsel and saw only transnational, and ultimately global, constitutional progression on the horizon. This neo-Kantian orientation stood in for a philosophy of history, a 'linear postulation of a future constituted ultimately by more of the present', as John McCormick presciently diagnosed.[54]

The GCC took a very different route from Habermas, and in its later *Lisbon* decision it erected an even more decisive obstacle in the path of any putative transnational democracy.[55] It departed from its emphasis in the *Maastricht* decision on the social and cultural preconditions for constitutional democracy – the 'no *demos* (yet) thesis' – and moved towards a more legalistic reading of

[47] Compare M. Kumm, 'How Does European Union Law Fit into the World of Public Law? *Costa*, *Kadi*, and Three Conceptions of Public Law' in *Political Theory of the European Union*, eds J. Neyer and A. Wiener (2010) 111, at 125.

[48] The judicial empowerment thesis, developed by Karen Alter, shows how constitutional doctrines of EU law strengthened lower domestic courts vis-à-vis higher national courts and other domestic institutions: see K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2003).

[49] Case 11/70 *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Solange I*) [1970] ECR 1125.

[50] B. Schlink and A. J. Jacobson (eds), *Weimar: A Jurisprudence of Crisis* (2000).

[51] *Brunner* v. *European Union Treaty* [1994] 1 CMLR 57, para. 44. Weiler's extraordinary reaction to the Maastricht decision set much of the tone, accusing it of an ethnic reading of national sovereignty despite the actual text of the decision: J. H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos, and Ethos in the German Maastricht Decision' (1995) 1 *European Law J*. 219, at 248.

[52] Weiler, id.

[53] The democratic deficit, Habermas noted, was 'expanding day by day because the economic and social dynamics even within the existing institutional framework perpetuate the erosion of national powers through European law': J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) 1 *European Law J*. 303, at 304.

[54] J. P. McCormick, *Weber, Habermas, and Transformations of the European State: Constitutional, Social, and Supranational Democracy* (2007) 291.

[55] *Lisbon Case*, BVerfG, 2 BVE 2/08, 30 June 2009.

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the constitutional restraints placed on further integration by the German Basic Law (that is, the right to vote for Members of the German Parliament).[56] If the concern in the *Maastricht* decision was for the necessity of a degree of social and political homogeneity of the *demos*, combined with a principle of *openness* towards the process of further European integration, the emphasis of the *Lisbon* decision was on sovereignty, expressed as constitutional identity, and the *closure* of the process of integration by virtue of the constitutional guarantees protected in the eternity clause.

Less criticized by European constitutional scholars than the *Maastricht* judgment, the *Lisbon* ruling in reality presented a more solid obstacle to democratization of the European project. The door left open by *Maastricht* – the possibility that the German Basic Law might permit the gradual development of a democratic European state that included the Federal Republic of Germany – was firmly closed.[57] Permission to transform the EU into a federal state, the court suggested, 'can only be given by the people through a new constitution'.[58] No amount of gradualism could mark a break with the post-war state – only something akin to a constitutional revolution, an exercise of original constituent power. However, the very notion of constituent power as a political power to replace the constitutional settlement was precisely meant to have been displaced in the post-war constitutional imagination.

The question of sovereignty, in the sense of who is the 'guardian of the constitution', so central to the debates in late Weimar, had marked its return to the European stage. In offering itself as the guardian of the post-war constitutional settlement, the GCC was not merely defending a formal constitutional identity, or one without implications for the substantive constitution of the EU. On the contrary, it was guarding a constitutional settlement that functioned to constrain the dynamics of popular or even parliamentary sovereignty and, since Maastricht, insisted on economic integration as an apolitical phenomenon. In reality, this meant the supranationalization of ordoliberal and neoliberal principles of 'sound finances', a restraint that was operationalized through the euro crisis less than a decade later, albeit often evaded through executive discretion.[59] The GCC thereby indirectly restricted democratic options in other member states, protecting a form of 'militant democracy in one country'.[60] The same constitution towards which commentators such as Habermas had urged patriotic loyalty in the post-war era came to thwart their very European federalist ambitions.

In reality, the GCC was rhetorically protecting a domestic democratic sphere that was already in steep decline. Its move was paternalistic, purporting to empower a parliament that did not really want the power, much less know how to use it, just as in the *Miller* litigation that later occupied centre stage in the United Kingdom after the Brexit vote.[61] What the Karlsruhe Court was doing

[56] It is only because the GCC reads Article 38 of the German Basic Law in a broad and substantive way, demanding that the body elected by the German people retains substantial influence over policy choices in important areas, that it is able to draw a chain of inference to Article 20 and then Article 79(3).

[57] According to Grimm, an amendment to the German Basic Law to provide for a referendum on a European state would suffice; 'a new constitution, as the Court thinks, would not be indispensable': D. Grimm, 'Defending Sovereign Statehood against Transforming the Union into a State' (2009) 5 *European Constitutional Law Rev.* 353, at 368.

[58] Id., p. 359.

[59] See for example C. Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' (2014) 15 *German Law J.* 985.

[60] M. A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *European Law J.* 313 at 331.

[61] M. A. Wilkinson, 'A Constitutionally Momentous Judgment that Changes Practically Nothing? The UK Supreme Court's Decision on the Prorogation of Parliament' *Verfassungsblog*, 25 September 2019, at <https://verfassungsblog.de/a-constitutionally-momentous-judgment-that-changes-practically-nothing/>.

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was mounting a defence of the *sovereignty of the court*, attempting to fill a void that had emerged with the disconnect between rulers and ruled, standing in for a democratic culture that had been 'hollowed out' – in part by the ascendency of the very same juridical power and authority that it was asserting.[62]

The GCC's judgments were always 'more bark than bite' in respect of their capacity to constrain the exercise of European powers, as many commentators noted.[63] In other words, though erecting barriers against the transfer of democratic powers, the judgments did little to prevent the exercise of executive powers, as would be revealed in the euro crisis itself. In *OMT* and then *Weiss*,[64] when the stakes were much higher, and the GCC triggered its authority in a preliminary ruling for the very first time, rhetorically castigating the ECJ for its interpretation of the exercise of the powers of the European Central Bank (ECB), Karlsruhe's profound weakness was ultimately revealed even as its substantive concerns were assuaged (the ECB promising to respect the ordoliberal agenda, even as its de facto powers increased).[65]

OMT and *Weiss* confirmed that the real winner of the euro crisis saga was not the ECJ, whose exercise of authority merely confirmed suspicions about its integrationist agenda and its weakness as a guarantor of the 'rule of law'; it was the ECB. Throughout the critical institutional tussles of the decade, the ECB had succeeded in expanding its mandate, as well as its institutional prestige. It had managed a transformation in political economy, from the Maastricht focus on maintaining low inflation to the fight against deflation. It had turned the exception of unconventional monetary policy into the norm. Even though it was still denied the possibility of direct government financing (prohibited by Article 123 of the Treaty on the Functioning of the European Union (TFEU)), the ECB and its technocratic authority, it turned out, acted as the guardian of the European constitution. However, this transformation – far from being a transcendence of sovereignty, as the European constitutionalists had hoped – involved a sovereignty claim par excellence, the ECB even claiming to speak for the 'people of Europe', however democratically disconnected and dis-embedded from them.[66]

3.2 | A growing social cleavage

Though the formal constitutional challenges to the project and the reassertion of judicial sovereignty came from the GCC, it was the French scene that exposed the political discontent with European integration and the growing social cleavage associated with its liberalizing trajectory. The counter-discourse of political sovereignty was harnessed predominantly by the political right, however, with the liberal left almost universally adopting a position of ideological

[62] The 'hollowing out' of democracy is a term associated with Peter Mair, examined in Part 4 below: P. Mair, 'Political Parties, Popular Legitimacy and Public Privilege' in *The Crisis of Representation in Europe*, ed. J. Hayward (1996) 40.

[63] See for example C. U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7 *European Law J.* 95; J. H. H. Weiler, 'The "Lisbon Urteil" and the Fast-Food Culture' (2009) 20 *European J. of International Law* 505.

[64] *Judgment of the Second Senate*, BVerfG, 2 BVE 2728/12, 21 June 2016; *Judgment of the Second Senate*, BVerfG, 2 BE 859/15, 5 May 2020.

[65] M. A. Wilkinson, 'Constitutional Pluralism: Chronicle of a Death Foretold?' (2017) 23 *European Law J.* 213.

[66] H. Lokdam, '"We Serve the People of Europe": Reimagining the ECB's Political Master in the Wake of Its Emergency Politics' (2020) 58 *J. of Common Market Studies* 978.

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Europeanism. This requires some contextualization, and specifically an examination of the political economy of the era after the 1970s and the so-called 'crisis of governability' that haunted it.[67]

To explain the post-Maastricht narrative, we need to look at the previous traumatic ideological and political defeat of the French left in the early 1980s, when François Mitterrand performed a U-turn on Keynesian policies and embraced austerity in anticipation of the reaction of the financial markets. Mitterrand's decision to keep the franc inside the European Monetary System (EMS) in March 1983, accepting its constraints, marked a 'historic break in French economic policy'; after this policy U-turn, 'France had to forego any autonomy in monetary policy-making'.[68] It was not only that this marked the end of a *dirigiste* approach 'in favour of an "ordo-liberal", anti-inflationary and market-conforming solution', but that once the 'appropriate' path was conceived in these terms, it set the path for future development, even though in France the wider framework of corporatist institutions on which German ordoliberalism was predicated did not exist.[69]

Mitterrand's U-turn anticipated the turn of the French liberal left to a politics of Europeanism, under the promise, represented by Jacques Delors, of building a European social policy on top of the single market. However, in reality, the capture of the integration process by neoliberal forces and their harnessing of the 'big market' project had closed any openings that may have existed for the development of a different kind of union. It effectively redefined the EU in purely market terms, 'as a huge field for the free play of private interests, increasingly open to global trade and investment flows and only minimally supervised by the tiny apparatus of the Commission'.[70] According to Stefano Giubboni, through the 'metamorphosis' of the Single European Act and Maastricht periods, the new laws of the transnational economy had become 'direct and explicit constraints that – aided by the supremacy of Community law – prevailed over (formerly protected) national sovereignty in social policy', signifying a substantial reduction in member states' de facto autonomy and 'overturning the original constitutional balance'.[71] Given that Delors' prescriptions, were, in the words of Ralf Dahrendorf, 'an astonishing mixture of Keynes and Friedman, and conservative and traditional in inspiration',[72] it is quite extraordinary that his bargain was bought by such a large part of the European left.[73]

Market liberalization was now the meaning of economic modernization. It occurred in a context of trade union decline, with membership of unions falling and use of industrial rights having already been weakened in the Western nations, with little or no compensation for this through EU-level measures.[74] On the contrary, 'the years after 1992 marked a progressive move away from policies of harmonisation in the social and labour fields' and a shift from hard law to soft

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[67] See further H. Lokdam and M. A. Wilkinson, 'The European Economic Constitution in Crisis: A Conservative Transformation' in *The Idea of Economic Constitution in Europe*, eds G. Grégoire and X. Miny (2022) 458.

[68] Krotz and Schild, op. cit., n. 40, p. 190.

[69] B. Clift, 'The Political Economy of French Social Democratic Economic Policy Autonomy, 1997–2002: Credibility, *Dirigisme* and Globalisation' in *In Search of Social Democracy: Responses to Crisis and Modernisation*, eds J. Callaghan et al. (2009) 73, at 78–79.

[70] S. Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (2006) 25.

[71] Id.

[72] Cited in J. Gillingham, *European Integration 1950–2003: Superstate or New Market Economy?* (2003) 160.

[73] H. Thompson, 'Returning to Democracy: The British Left and the Constitutional Temptation of the European Union' in *Judicial Power and the Left: Notes on a Sceptical Tradition*, eds R. Ekins and G. Gee (2018) 62.

[74] J. Visser, 'More Holes in the Bucket: Twenty Years of European Integration and Organized Labor' (2006) 26 *Comparative Labor Law & Policy J.* 477.

governance methods of regulation in the social policy field.[75] The European Trade Union Congress (ETUC) could not compensate for the lack of social legislation; even if it had been sufficiently competent to organize industrial action at the supranational level, the possibilities for transnational strike action were 'limited by the profound difficulties involved in forging and re-forging transnational solidarities between "European" citizen-workers'.[76]

Divorced from domestic democratic politics, the language of post-state law and constitutionalism was tracking the global flows of capital and international trade and their universal economic rationality.[77] This was exacerbated by the financialization of the economy and the securitization of assets, as semi-autonomous transnational fields of corporate governance developed in the 1980s, contributing to the de facto erosion of state sovereignty just as the Economic and Monetary Union (EMU) contributed to its de jure erosion by limiting monetary and fiscal autonomy.[78] While in its initial formulation in early Weimar the notion of an 'economic constitution' pointed towards the democratization of the economy, in the European context it had come to mean the opposite: keeping democracy at bay, closed off from the economic sphere as far as possible.[79]

The fact that a European social policy failed to materialize even when social democratic parties occupied the seats of power in a majority of member states in the late 1990s demonstrated the structural difficulties – if not the impossibility – of Delors' stated mission. This was compounded after Maastricht by a German Chancellor, Gerhard Schröder, inclined towards the 'third-way' discourse of Tony Blair, signalling the decline of the Rhineland model and the embrace of a more Anglo-Saxon-style neoliberal economy.[80] As Gerassimos Moschonas noted, the 'profoundly conservative system' of the EU and the structural and ideological attachment to European integration meant that even prior to the euro crisis, when 12 out of the 15 members were led by centre-left governments, there was no prospect of escape from the straitjacket of economic liberalism.[81] The most 'essential elements in the formation of social democracy's historical identity' were undermined by the EU: the orientation of social democratic appeals to the state, welfare politics, the link with the working class, and the belief in the primacy of politics. Yet the left continued to cling to the belief that there was no alternative.

The 'quiet revolution' of European constitutionalization that had been occurring over several decades of the project of integration did not go entirely politically and socially unchallenged.[82]

[75] R. Dukes, *Labour Constitution: The Enduring Idea of Labour Law* (2014) 143.

[76] Id., p. 150.

[77] As Stefan Bartolini put it, 'in connection with economic activities', the 'new legal universalism' assumed that the role of supranational legal orders was 'to limit regulatory and legislative intervention by the domestic political systems, and bring to an end the historical phase characterised by the close grip of politics on the economy through law': S. Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (2005) 372.

[78] See further G.-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010).

[79] See for example H. Brunkhorst, 'Collective Bonapartism: Democracy in the European Crisis' (2014) 15 *German Law J.* 1177.

[80] On the broader dynamics of institutional change in this period, see W. Streeck and K. Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in *Beyond Continuity: Institutional Change in Advanced Political Economies*, eds W. Streeck and K. Thelen (2005) 1.

[81] G. Moschonas, 'Reformism in a "Conservative" System: The European Union and Social Democratic Identity' in *In Search of Social Democracy: Responses to Crisis and Modernisation*, eds J. Callaghan et al. (2009) 168, at 183.

[82] Krotz and Schild, op. cit., n. 40, p. 175, citing N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (2006).

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The Bolkestein Directive on the liberalization of trade in services had provoked intense debate and even mass protests in various EU countries, including France, Belgium, Denmark, and Sweden. On 21 March 2005, it was estimated that nearly 100,000 people marched in Brussels to protest against the Directive. Critics argued that it would erode many of the member states' regulations governing industry and the environment, and would lead to competition between workers in different parts of Europe, resulting in a general decline in income. The trope of the 'Polish plumber' became famous during the French debate on the Constitutional Treaty, during which social critics depicted the EU as a neoliberal trojan horse, with rules and policies that would lead to social dumping as companies and jobs were relocated to Central and Eastern Europe to benefit from lower costs, less regulated economies, and weaker labour sectors.

It was then that parts of the French left, no longer pacified by Delors' promise, began to openly revolt, protesting against the Constitutional Treaty on the grounds that it represented a further neoliberalization of the economy. The French rejection of the Constitutional Treaty in 2005 (along with the Dutch) highlighted a more general rupture from the Delors consensus, as 'the temptation grew to switch from attempts to upload French (socialist) preferences to the European level towards a defensive stance, protecting the national French model from European-level intrusions'.[83] According to one commentator, 'it was the "*non*" campaign mobilized by the left that was arguably decisive in securing the rejection of the constitution'.[84]

The disconnect between the EU and social democracy accelerated after the cases of *Viking* and *Laval*, when the ECJ put its own juridical weight behind the increasingly market liberal drift, and in more sensitive areas of domestic political economy extended the application of free movement of services and establishment against industrial relations laws and trade unions themselves.[85] The work of Fritz Scharpf was pivotal in emphasizing the structural asymmetry favouring non-political actors over political actors and negative integration over positive integration. He identified integration through law as a significant factor in the neoliberal bias.[86] The EU's economic constitution meant that the economic freedoms not only trampled on sensitive national arrangements and structures of autonomous bargaining, but also did so in areas where the EU itself had no legislative competence and therefore no means to close any regulatory gap.[87]

The ECJ's 'fundamentalist' approach to economic freedom in effect overturned the original de-coupling of national social spheres and supranational market law, with any distortion of competition or obstacle to market access now presumed to be caught by the TFEU prohibitions and subject to proportionality testing.[88] Though building on earlier trends (notably the foundational principles of direct effect and supremacy, as well as mutual recognition), the ECJ's case law became increasingly salient as a matter of political economy, making it a much more conspicuous institution. The counter-movement against top-down liberalization was then predictable, but

[83] Id., p. 173.

[84] O. Parker, *Cosmopolitan Government in Europe: Citizens and Entrepreneurs in Postnational Politics* (2013) 91–92.

[85] Case C-341/05 *Laval* v. *Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line* [2007] ECR I-10779. See C. Joerges and F. Rodl, 'Informal Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law J*. 1.

[86] F. Scharpf, 'The Double Asymmetry of European Integration: Or Why the EU Cannot Be a Social Market Economy' (2010) 8 *Socio-Economic Rev*. 211.

[87] Id.

[88] M. Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' (2014) 15 *Theoretical Inquiries in Law* 229.

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while the social deficit and the structural drift of the EU revealed by these cases were noted by labour lawyers, sociologists, and private lawyers, they had relatively little impact on the constitutional scholarship.

Where concessions were made by political elites to some of the counter-movements against European economic integration, these were largely symbolic, as with the removal of 'free competition' from the preamble of the TFEU, and its repackaging at Lisbon by jettisoning the flag and anthem (but without any substantial repatriation of sovereign powers). The warning signs should have been obvious. The declared goal of the Laeken Declaration (drafted by a group of 'wise men') had been to bring the EU's institutions 'closer to its citizens', but it turned out that many of them did not much like what they saw. In the only country that held a referendum on Lisbon, the TFEU was rejected, with the Irish made to vote again after concessions offered in a legally binding declaration. Political sovereignty had returned, but it had few systemic avenues to channel its energies; though the constitutional disconnect had been decades in the making, it was dramatically deepened and widened after Maastricht.

4 | THE CONSTITUTIONAL DISCONNECT

The project of European integration had become increasingly intertwined with an academic discourse of post-sovereignty just as sovereignty was concretely returning in both judicial and political domains. As we have examined, this was in part a reaction against Europe's third-way consensualism and its political economy of neoliberalism. The narrowing of constitutional positions, the structural democratic deficit, and the neoliberal drift of integration were part of a passive authoritarian liberal framework that had been established over the post-war decades. After Maastricht, this process continued; it was scaled up through the EMU and widened with the collapse of the Soviet Union. However, it then began to exist much more uncomfortably alongside renewed if often marginalized sovereignty claims made through formal and informal channels. This combination revealed a profound constitutional disconnect, reflected in (1) the hollowing out of Western democracy and the accelerated decline of traditional partisan politics, and (2) the widening of a de-politicized neoliberal ideology in the process of the enlargement of the EU.

4.1 | The deepening of the democratic disconnect

The relationship between Europeanism and authoritarian liberalism was not contingent; on the contrary, it was structural and ideological. It was also becoming institutionally entrenched. As Simon Hix and Andreas Follesdal demonstrated in their classic article on the democratic deficit published in 2006, despite the growing law-making powers of the European Parliament, the process of integration entrenched a centre-right bias in the law because of the constitutional primacy of market making, the proliferation of veto points, and the second-order character of European Parliamentary elections.[89] European integration, as others persuasively argued, functioned through the bypassing of domestic representative politics and the empowerment of increasingly unaccountable elites.[90]

[89] S. Hix and A. Follesdal, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravscik' (2006) 44 *J. of Common Market Studies* 533.

[90] C. Bickerton, *European Integration: From Nation-States to Member States* (2012).

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Consensus politics and technocratic competence were often exposed as a thin veneer. The EU's own institutions, insulated from public view, became more conspicuous after Maastricht, and as they did so they were beset by corruption scandals of the kind that had affected the member states, the Jacques Santer era culminating in the dramatic mass resignation of the entire Commission in March 1999 after the publication of a report of a Committee of Independent Experts on charges of fraud, mismanagement, and nepotism. This episode seriously weakened the Commission's authority.[91] With regard to the European Parliament, even the modest attempts to remedy the democratic deficit by increasing its formal law-making powers were stymied by the legislative culture of secrecy and expert management, with negotiations taking place through so-called 'trialogues' between the Parliament, the Council, and the Commission, which facilitated bureaucratic decision making behind closed doors.[92] Despite the Parliament acquiring more law-making powers, turnout for its elections continued to fall, dropping below 50 per cent in June 1999 and reflecting low levels of support for the EU as recorded in the Eurobarometer surveys in 2000 and 2001.[93] The various negative referenda[94] were only the most obvious sign of trouble beneath the constitutional surface.

The democratic deficit was in fact far deeper than any analysis of the EU's law-making processes (formal and informal) or its popularity index would reveal. To the extent that all European economies had become 'semi-sovereign', with the *demos* subject 'to a set of constraints and persuasions that lie outside [its] own direct control', the scope of partisan politics had been severely limited, affecting the capacity of parties to act as representative agents of popular or class interests.[95] As Peter Mair argued, the accelerated decline of traditional partisan politics and the transformation of the role of domestic political parties, away from representative agencies and towards 'public office holders', were intimately connected with a process of integration that was emptying politics of content. If parties could no longer make a difference, it 'would then hardly be surprising to find that ordinary voters might also have despaired of a partisan intent'.[96] Nor was it surprising that the post-Maastricht period coincided with a decline in party membership, 'reinforcing the sense of erosion in the position of the party on the ground'.[97]

A significant aspect of this narrowing of political possibilities was down to the more general decline or blurring of traditional identities within civil society, which was decades in the making, leading to the 'erosion of traditional boundaries based on class and religion', 'changing patterns of social stratification', and 'a greater emphasis on individualistic or particularistic identities'.[98] As

[91] G. Majone, 'The Limits of Collective Action and Collective Leadership' in *The End of the Eurocrats' Dream: Adjusting to European Diversity*, eds D. Chalmers et al. (2016) 218, at 230–231.

[92] A. E. Stie, *Democratic Decision-Making in the EU: Technocracy in Disguise* (2013); C. Reh et al., 'The Informal Politics of Legislation: Explaining Secluded Decision Making in the European Union' (2013) 46 *Comparative Political Studies* 1112.

[93] Archived Eurobarometer reports are available at <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/index#p=1&instruments=STANDARD>.

[94] These were the Danish referendum on the Maastricht Treaty, the Irish referenda on the Nice Treaty and the Lisbon Treaty, and the French and Dutch referenda on the Constitutional Treaty.

[95] Mair, op. cit., n. 62, p. 46. See also F. Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe Differs from the United States' in *The Federal Vision: Legitimacy and Levels of Governance in the United States and European Union*, eds K. Nicolaïdis and R. Howse (2001) 355.

[96] Mair, id., p. 47.

[97] Id., p. 46.

[98] Id., p. 50.

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an economic consumer rather than a political citizen, the individual had little need for political representation; existential meaning conveyed by lifestyle choices required only an enhanced personal freedom. This was increasingly regulated through provisions on non-discrimination across various domains, where EU law and policy played a particularly prominent role.[99] Unlike traditional social policy, anti-discrimination law was not about creating solidarity among the members of a collective, but focused on eliminating arbitrary factors that might affect individual life choices.[100]

The erosion of traditional class identities and political representation was reinforced by a turn of the liberal left towards a politics of multiculturalism and cultural pluralism. With the left embracing a moralistic discourse of inclusion, social solidarity was abandoned, and recognition substituted for issues of power and redistribution.[101] This too was a continuation of earlier trends: the abandonment of class struggle and Marxism by social democracy in the early Cold War period, the philosophical legacy of '68, the new social movements of the 1970s, and the de-radicalization of major Communist parties in continental Europe followed by their collapse with the end of the Cold War. In fact, these trends had been identified as early as the 1950s, notably by Otto Kirchheimer in his surveys of the German and French post-war political scenes, when he diagnosed de-politicization and apathy under the rubric of the 'catch-all party' and its professionalization of politics.[102]

However, the new millennium also saw an acceleration of these trends, amounting to a qualitative state–society transformation, signalling not only a dis-embedding of political parties from class but also their re-embedding in the state, as they moved away from civil society and became part of the state apparatus and a new establishment culture. From that position, established parties could obtain income, office, and access to state-regulated media – a combined strategy to increase their public profile and privileges.[103] A mutual dependency between state and party then developed, connected to organizational and technological changes, with national media increasingly becoming the preferred form of communication with the electorate.[104] This even gave rise to a new ideal type: a form of representative government where the electorate appears, 'above all, as an *audience* which responds to the terms that have been presented on the political stage', heralding, in Bernard Manin's view, rule by media expert.[105]

Tracing this trajectory back to the 1970s and changes to the global economy associated with the era commonly described as 'neoliberal', Mair noted that the project of European integration could only act as an accelerant of this decline, with the opacity of European law making and the Europeanization of policy making further narrowing the scope for class politics. In Mair's own

[99] A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (2011).

[100] Id.

[101] A. Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law J*. 711. See more generally N. Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 *New Left Rev*. 68.

[102] A. Krouwel, 'Otto Kirchheimer and the Catch-All Party' (2003) 26 *West European Politics* 23.

[103] Mair, op. cit., n. 62, pp. 53–54.

[104] These phenomena were identified by theorists of radical democracy such as Chantal Mouffe and Ernesto Laclau, who advocated a left populism as a means to fill the void, thereby widening the gulf between this new left to Marxism and class struggle: C. Mouffe and E. Laclau, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (1985).

[105] B. Manin, *The Principles of Representative Government* (1997) 220. This is one of three ideal types that Manin identified, alongside parliamentarism and party democracy. Extraordinarily, he considered the channels of public communication in an audience democracy to be 'politically neutral, that is, non-partisan': id., p. 228, emphasis added.

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words, European integration would blur the differences among parties within the mainstream to 'almost non-existence'. Moreover, as integration contributed to severing its link to the working class, the EU would also be a mechanism for social democracy, which had become more firmly pro-European, 'to connect better with the salaried and educated middle strata of the population'.[106] European integration would thus reinforce the left's turn towards cultural liberalism and transnationalism and away from class politics.

What was new after Maastricht was that the transformation in constitutional culture and political society could no longer produce an equilibrium. On the contrary, a disequilibrium or contradiction appeared, between the decline of the representative role of parties and their increased set of governmental powers. Like Alexis de Tocqueville's nobles, the status of political parties had increased while their popular relevance had eroded.[107] This process was reinforced by the enhanced power and legitimacy of the state's and the EU's bureaucratic apparatus (such as courts, regulatory agencies, and independent commissions),[108] reaffirming 'people's belief in the existence of an undifferentiated political *casta* that rules in unrepresentative ways'.[109] It was thus in the Maastricht era that the seeds were planted for the rise of what would more recently be termed 'populism'.

The French '*petit oui*' in the Maastricht referendum should have signalled the depth of the social cleavage. As early as 1990, French political philosopher Marcel Gauchet had captured this phenomenon with the metaphor of a 'wall' emerging between the elites and the people – 'between an official, respectable France, which prides itself on its noble feelings, and a country of the marginalized', the 'ignoble', bitter from the denial even that it exists.[110] It was out of this 'social fracture', as well as the collapse of the French Communist Party, that the Front National's popularity grew, and it only increased as the state retreated further away from the discourse of sovereignty and materially transferred more sovereign powers to the EU. While the left (or at least its intellectual class) put its faith in a future European integration as a corrective to this process, the right presented Europe as a scapegoat for the democratic deficit.[111]

4.2 | The widening of the democratic disconnect

The post-Maastricht acceleration of legalistic and technocratic constitution making, detached from democratic politics, was particularly marked in the 'new democracies' of Central and Eastern Europe. Not only were there no grand re-founding moments to mark the momentous changes inaugurated by the process of enlargement, but the idea of the *demos* was also almost entirely missing. In the words of one commentator, the project of European constitutionalism in the

[106] Mair, op. cit., n. 62, p. 47.

[107] Id., p. 55.

[108] R. S. Katz and P. Mair, 'Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party' (1995) 1 *Party Politics* 5.

[109] C. Bickerton et al., 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 *J. of Common Market Studies* 703, at 710.

[110] M. Gauchet, 'Les mauvaises surprises d'une oublieé: la lutte des classes' (1990) 60 *Le Débat* 257, at 257, author's translation.

[111] On the revival of nationalisms in connection with integration, see J. Heartfield, 'European Union: A Process without a Subject' in *Politics without Sovereignty: A Critique of Contemporary International Relations*, eds C. J. Bickerton et al. (2006) 131.

new millennium was resulting in 'an overall depoliticized and essentialist view of democratic politics', one that denied 'any role of the larger demos and civil society'.[112]

The *deepening* of market liberal ideology and its democratic disconnect in the Maastricht era was thus reinforced through its *widening* as the EU extended eastwards. Despite the rhetorical re-founding of the EU on the values of respect for democracy and the rule of law (among others listed in Article 2 of the Treaty on the European Union (TEU)), these were not integral to the process of integration . The economic transformation that was demanded was, by contrast, conspicuous and its effects were extreme – compared by commentators to natural or man-made disasters in terms of the enormity of the social dislocation.[113] Accession had prompted a swift and brutal transition to market economies for many of the former Soviet Bloc countries, involving a version of neoliberal 'shock therapy'.[114] In the context of third-way neoliberal consensus, accession itself – framed as 'catching up' with the West – meant adopting an even stricter form of the market liberalism that had come to dominate the constitutional imagination in Western Europe. It was one that was tightly bound up with a political economy of neoliberal financialization that was generally in the ascendancy.[115]

While significant energy went into making the new members 'market conform', little was expended on ensuring that they were 'democracy enhanced'. On the contrary, the 'low-intensity form of democracy' that had become dominant in the West was assumed as the norm.[116] Democratic transition was presented as a technical challenge, which 'de-politicised the meaning of democracy', detaching it 'from politics, from history, from society and from economics'.[117] As David Kennedy noted at the time, the new member states, unlike the old, had to 'undertake a long march not only through austerity but through formalism'.[118] The type of market liberalism imposed was a fantasy version of strict deregulated laissez-faire economics that had been long discarded in the practice of most Western European states in favour of softer technocratic versions of market making.

The predominance of market making rather than democracy building in what was termed 'the return to Europe' was exacerbated by the absence of solid social foundations for democracy, after the decimation of civil society through the years of Soviet rule.[119] Constructing a vibrant civil society was never part of the package of membership of the EU; on the contrary, membership was part of a package of a 'constrained democracy'. In a significant way, the neglect in attending to the

[112] P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (2014) 5.

[113] S. Islam and M. Mandelbaum (eds), *Making Markets: Economic Transformations in Eastern Europe and the Post-Soviet States* (1993).

[114] J. Komárek, 'Waiting for the Existential Revolution in Europe' (2014) 12 *International J. of Constitutional Law* 190, at 193.

[115] Ivan Berend described a 'blind neoliberal belief in self-regulating markets and the withdrawal of state regulations', which had 'helped prosperity in the short-run, and gave a huge spurt to globalization'. I. T. Berend, 'A Restructured Economy: From the Oil Crisis to the Financial Crisis, 1973–2009' in *The Oxford Handbook of Postwar European History*, ed. D. Stone (2012) 406, at 417.

[116] S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2003) 70.

[117] Id., p. 73.

[118] D. Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 *Harvard International Law J*. 373, at 381.

[119] Dorothee Bohle and Béla Greskovits note that East Central European democracies had a 'hollow core' at their inception: D. Bohle and B. Greskovits, *Capitalist Diversity on Europe's Periphery* (2012). See also J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2006).

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construction of active democracy was therefore not a departure from but entirely in keeping with the post-war European trajectory of passive authoritarian liberalism.[120]

As the new member states had no experience of liberal democracy as a political way of life, it was expected to be imposed from above, 'without democrats'. What emerged was another 'there is no alternative' (TINA) narrative, something 'disturbingly familiar' to countries of the former Soviet Bloc; they were again, as one commentator put it, 'simple marionettes in a historical process that [took] place independently of their will and drag[ged] them with it to a better future'.[121] There would be 'revolutionary changes in the political and constitutional system' but without a 'revolution as such', the 'roundtable' rather than the constituent assembly functioning as the totem after 1989.[122] Thus, 'in Poland, Hungary, Bulgaria, and the German Democratic Republic', it was 'legal' and 'constitutional' revolutions that were sought, with the notion of 'civil society' acting as a substitute for the revolutionary constituent power.[123]

Just as in Western Europe, constituent power was a problem to be subdued rather a potential to be harnessed. Furthermore, as in the West, the failure of social democratic politics to remain embedded in working-class communities and the domination of policy making by liberal-technocratic elites were critical for the later rise of populist parties.[124] In Hungary, for example, which had been subjected to harsh and imposed austerity after the onset of the global financial crisis (though led from outside the EU institutions, notably by the International Monetary Fund),[125] the political party Fidesz was the major beneficiary of the 'disintegration of the culturally and ideologically integrated socialist working class'.[126] The mandate that it received in the 2010 elections was used 'to engineer a new class compromise between the political class, the national bourgeoisie and transnational corporations', which had become hugely significant in terms of direct investment and integration of production networks.[127]

As a matter of constitutional culture, accession to the EU was presented as a 'return to Europe' or the 'reunification of Europe' following the 'rectifying revolution' heralded by the fall of the Soviet Union.[128] This promised the restoration of cultural unity with the West,[129] the new members' rejection of the Soviet Union conforming so closely to the Christian democratic myth of post-war European reconstruction that aspects of the fascist experience shared with Germany in the inter-war years 'could even be commemorated in the name of anti-Communism'.[130]

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[120] See further Wilkinson, op. cit., n. 2.

[121] Komárek, op. cit., n. 114, p. 195.

[122] G. A. Tóth, 'Hungary's Constitutional Transformation from a Central-European Comparative Perspective' in *Norms, Interests and Values: Conflict and Consent in the Constitutional Basic Order*, ed. H. Glaser (2015) 129, at 132. Hungary was unique in failing to adopt an entirely new constitution after the fall of Communism, the 1989 constitution codifying the previous constitution of 1949.

[123] A. Arato, 'Dilemmas Arising from the Power to Create Constitutions in Eastern Europe' (1992) 14 *Cardozo Law Rev*. 661.

[124] G. Scheiring and K. Szombati, 'From Neoliberal Disembedding to Authoritarian Re-Embedding: The Making of Illiberal Hegemony in Hungary' (2020) 35 *International Sociology* 721.

[125] C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' (2015) EUI Department of Law Research Paper No. 2015/34.

[126] Scheiring and Szombati, op. cit., n. 124, p. 726.

[127] Id., p. 727.

[128] J. Habermas, 'What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left' (1990) 1 *New Left Rev*. 183.

[129] For discussion, see J. Přibáň, *Legal Symbolism: On Law, Time and European Identity* (2007).

[130] J. Mark, *The Unfinished Revolution: Making Sense of the Communist Past in Central-Eastern Europe* (2010) 94–95.

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What was new after Maastricht and the reunification of Germany was that authoritarian liberalism now had a geopolitical dimension, with the emergence of a clear centre-and-periphery dynamic in the process of integration and even the prospect of a regional semi-hegemon, at least as a matter of economic power.[131] As one commentator put it, enlargement was a means to 'assert political and economic control over the unstable and impoverished eastern part of the continent … It was about conquering, reforming, and regulating new emerging markets … through the skilful use of EU membership conditionality.'[132] The term 'conditionality', of course, acquired a specific significance in the context of the later euro crisis, when it came to be associated with the austerity attached to financial assistance in negotiation with the 'Troika', particularly in Greece after the election of Syriza on an anti-austerity platform. For the new member states, the manner of reform required of Greece would have been clear from their experience of accession itself. Radical state transformation had been demanded in the domain of political economy; this meant a process of economic liberalization in a harsher imitation of the experience of countries in the West, which was then used to punish a left-wing Greek government that dared to contest it.

5 | FILLING THE VOID?

In the decade after Maastricht, the 'permissive consensus' around the process of integration began to fray, Europe itself becoming juridically, politically, and socially contested to a degree that outstripped anything in the foundational period. The GCC's rulings reflected the growing turbulence beneath the formal constitutional surface. Nevertheless, though sounding some rhetorical warning shots against further integration, they ultimately legitimized its ground rules of political economy and did nothing to counter the material transformation of the EMU. Despite the considerable attention given to the juridical disputes between Luxembourg and Karlsruhe, the underlying material dynamic of the constitutional order escaped serious interrogation by constitutional scholars. Furthermore, these disputes also functioned to deflect attention from real domestic political pressures, with Karlsruhe serving 'as a missing channel for Germans to voice their Euroscepticism'.[133] Elsewhere in the EU (and eventually in Germany too), Euroscepticism had its more direct political channels of expression, notably in France, which served as the political avant-garde of the populist movements that were so prominently discussed in more recent years, when the focus turned to political authoritarianism in Hungary and Poland.

Constitutional theory was so detached from its moorings that it had not perceived them shifting in the sand. Neither the French '*petit oui*' in 1992 nor even the abandonment of the Constitutional Treaty did much to dent the constitutional enthusiasm in the academy.[134] Nor did the increasingly neoliberal cast of its political economy sound the alarm, even for scholars who self-identified as social democratic. MacCormick's declared political goal, for example, was to pursue a soft version of social democracy, firmly rejecting any 'purely market-economical view of the good society'.[135]

[131] Kundnani, op. cit., n. 46.

[132] Zielonka, op. cit., n. 119, pp. 44–45.

[133] K. Garditz, 'Beyond Symbolism: Towards a Constitutional *Actio Popularis* in EU Affairs? A Commentary on the *OMT* Decision of the Federal Constitutional Court' (2014) 15 *German Law J*. 183, at 189.

[134] See for example H. van Gunsteren, 'The Birth of the European Citizen Out of the Dutch No Vote' (2005) 1 *European Constitutional Law Rev*. 406.

[135] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) 174–175.

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As a matter of political philosophy, he explicitly attacked voluntaristic liberalism of the social contract variety in favour of contextual individualism associated with the communitarian tradition.[136] Yet in *Questioning Sovereignty*, despite its focus on the EU, one looks in vain for any discussion of the consequences of market integration for society, or the likely impact of the single currency on macroeconomic policy choices. Habermas, though he did frequently lament the democratic deficiencies of the EU and showed a serious concern for its market liberal bias, could not see anything other than post-nationalism on the horizon, and critiqued opposing positions as nostalgic at best and regressive at worst.[137]

The position of left-liberal intellectuals such as MacCormick and Habermas reflected a more profound cultural shift, with European left-oriented parties in general turning away from radical politics and working-class representation, and viewing the EU as the only possible ground for a socialist alternative. This was sometimes advanced on a pragmatic and reluctant basis and sometimes on more idealistic grounds; it covered positions from strong reformism to weak reformism and 'uncritical pro-integrationism'.[138] There was simply no question of taking exit from the EU seriously; withdrawal was effectively off the table. The fact that nothing remotely resembling a pan-European socialist alternative was emerging did not appear to counter the belief that constitutional scaling-up was the only theoretically correct position; only the EU could act as a bulwark to global capitalism.[139] The scalarist escatology so dominant in liberal constitutional theorizing was reinforced by the sentiment that anything short of European constitutional patriotism betrayed a recidivist ethnonationalism.[140] This complete democratic disconnect of social democracy meant that the return of sovereignty claims were channelled into right-wing anti-systemic forms, but these often had no real need or desire to effect a rupture from the status quo.

Where was a critical theory that took political constitutionalism in Europe seriously? There was no lack of critique of the EU's ordoliberal and neoliberal features, or of its technocratic mindset.[141] German ordoliberals, as Hauke Brunkhorst put it, had taken the chance 'to realise their old dream of a mere *technical constitution without government and legislator*'.[142] Drawing on the work of Marti Koskenniemi, Brunkhorst juxtaposed a Kantian-Marxian revolutionary constitutionalism that presented an internal relation between law and democracy, based on 'autonomy, egalitarian self-determination, representative government, and universal rights', with a managerial mindset that saw the structural coupling of law and economics, based on 'the rule of law, judicial

[136] Id., pp. 162–163.

[137] For discussion, see for example W. Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2013) 21 *Constellations* 213.

[138] R. Dunphy, *Contesting Capitalism? Left Parties and European Integration* (2004) 3–6.

[139] J. Habermas, 'Does Europe Need a Constitution?' (2001) 11 *New Left Rev*. 5.

[140] For a more nuanced assessment of the 'no demos thesis', identifying a variety of positions on a spectrum, see L. Cederman, 'Nationalism and Bounded Integration: What It Would Take to Construct a European Demos' (2001) 7 *European J. of International Relations* 139.

[141] See for example Brunkhorst, op. cit., n. 79, p. 1188: 'If we look back from today, the beheading of the legislative power that once produced the French Revolution, exactly represented the overlapping consensus between (otherwise very different) German-Austrian Ordoliberals from the Freiburg-school and the later Neoliberals from the Chicago-school of economics. In the words of Ernst-Joachim Mestmäcker, the leading legal theorist of the Freiburg-school, "The most important powers in economic concerns should be reserved for the judiciary, and taken away from legislation and government".'

[142] Id., emphasis in original.

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review, [and] possessive individualism'.[143] The managerial mindset worked using 'the technical language of courts, committees, [and] conferences' and was put into effect by agencies that aimed at stabilizing political power.[144] In Brunkhorst's vivid formulation, 'managerial government –from Lenin to Angela Merkel – is government for or against the people'. In this technocratic mode, the Kantian and Marxist rhetoric of changing the world 'is displaced by negotiation, diplomacy, compromise, new public management, and the noiseless implementation of "structural reform"'.[145]

Nevertheless, though critical theorists such as Brunkhorst attempted to offer a new and integrated analysis, combining systems theory with a more radical critique than Habermas, and directing it to democratic and social problems of late modernity, they remained unable to grasp the problem of political sovereignty and the erosion of the *demos*. Implicit was the suggestion that democratic deficit could be overcome merely by better adaptation, learning, and cognition, even if Brunkhorst insisted on normative as well as cognitive openness. The assumption remained that the democratic deficit of the EU was merely a blip on an otherwise evolutionary-progressive path – one that, following Habermas' lead, could only see European and global constitutionalism on the horizon:

Habermas rightly has called this a civilization of state power by overcoming state-sovereignty and individualizing popular sovereignty. Thus, there is not only existing justice of the national state at stake once it comes to a transfer of sovereign rights from the national state to the European Union. There is also the already existing justice of the European Union at stake once it comes to a return of powers of the Union to the national state. There is not only a requirement of solidarity between national states and their different demoi but also a requirement of solidarity between the individual European citizens as bearers of European rights. This could be called the European cosmopolitan moment.[146]

As the euro crisis unfolded, Brunkhorst changed direction in an important respect, criticizing Europe's 'façade democracy' and recognizing that technocratic instrumentalism was fomenting a 'legitimation crisis'.[147] However, he still concluded, improbably, that 'the European Union has a democratic constitution' that is a realization of 'the same modern republicanism that was introduced in the realm of public law by the famous declarations of the 18th century'; despite all of the evidence to the contrary, he continued to maintain that the ordoliberal vision of economists and judges as philosopher-kings with its institutionalized distrust of democracy could be changed democratically, 'from within' the present system of European public law.[148] Even at the height of criticizing the EU's legitimacy and seeing its technocratic domination as a form of authoritarian liberalism, Brunkhorst viewed incremental reform of the trialogue procedure as potentially resolving the contradictions of democratic capitalism.[149] There is, he concluded, no alternative to a higher transnational level of democratic reintegration.

[143] Id., p. 1178.

[144] Id.

[145] Id.

[146] Id., p. 1191.

[147] H. Brunkhorst, 'Democracy under Siege of Authoritarian Liberalism: Remarks on the Crisis of National and Transnational Republicanism in Europe' (2017) 8 *Global Policy* 44.

[148] Id., p. 47.

[149] Id., p. 52.

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6 | CONCLUSION

What the examination of the post-Maastricht era offered here suggests is not merely a structural democratic deficit but an increasing material and ideological disconnect. The trap was understood by some at the time, as the example of the French political scene shows: 'voter demobilization, on the one hand – evident in the increasing levels of abstentionism in French elections – and voter extremism – evident not only in the referendum on the Constitutional Treaty but also in the 2002 presidential election'.[150] However, apparently, it could not be sprung, or at least not by the left, which could only see post-sovereignty on the horizon. Instead, the void was concretely filled by right-wing movements that harnessed Euroscepticism but without any plan to exit the EU, able to pursue their political agendas from within, in contrast to the anti-austerity platforms of the left.

The increasing disconnect between the project and the people simultaneously reinforced the power of elites *and* made the whole edifice more fragile, lacking in both de jure and de facto authority. Though freestanding in theoretical orientation, in practice European constitutionalization did not bypass the governments of the member states, but empowered them in their role as EU executives, and at the same time immunized them from mechanisms of domestic accountability.[151] As Martin Loughlin noted, the process of constitutionalization beyond the state, as a 'freestanding process of rationalist constitutional design' operating without the fiction of authorization by 'the people', suggested a deeply 'authoritarian constitutionalism'.[152]

Political sovereignty, in other words, had been neither transcended nor reasserted; it had been *eroded*.[153] This only became more obvious with the unfolding of the Greek crisis after the election of Syriza on an anti-austerity but pro-European platform in January 2015. However, the process of erosion had started much earlier. In establishing the (incomplete) constitutional structure of the EMU, opening the door to differentiated integration, and anticipating the enlargement of the EU to the east, Maastricht marked a change in the material and ideological balance of power; re-unification reinstated the 'German question', and the end of any genuine alternative to capitalism unleashed a neoliberal ideological hegemony, with not only centrists but also erstwhile critical theorists abandoning any emancipatory projects. Habermas took the lead in this capitulation, declaring that since 1989 'it has become impossible to break out of the universe of capitalism; the only remaining option is to civilize and tame the capitalist dynamic from within'.[154] Was this the same Habermas who later declared the Brexit referendum the victory of populism over capitalism?[155]

The long process of post-war de-politicization reached its apogee at the turn of the millennium in domestic contexts of a third-way politics that offered little alternative to the neoliberal paradigm, and in many cases deepened it. European integration reinforced the edifice of authoritarian liberalism through its institutional procedures of consensual law making, constitutionalization of the Treaty provisions, and entrenched and extended commitments to market

[150] V. A. Schmidt, 'Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization' (2007) 14 *J. of European Public Policy* 992, at 996–997.

[151] Bickerton, op. cit., n. 90.

[152] M. Loughlin, 'In Defence of *Staatslehre*' (2010) 48 *Der Staat* 1, at 26.

[153] M. Loughlin, 'Erosion of Sovereignty' (2016) 45 *Netherlands J. of Legal Philosophy* 57.

[154] Habermas, op. cit., n. 35, p. 106.

[155] T. Assheuer, 'The Players Resign – Core Europe to the Rescue: A Conversation with Jürgen Habermas about Brexit and the EU Crisis' *Die Zeit*, 12 July 2016, at <https://www.zeit.de/kultur/2016-07/juergen-habermas-brexit-eu-crises-english>.

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liberalism and technocratic authority. In the absence of any robust supranational democratization, it left member states with 'policies without politics on the EU level and politics without policies at the national'.[156]

Without channels to contest the direction of European politics, the only option was to contest Europe itself. Yet, due to the profound grip of European integration on post-war cultural memory as well as on dominant material interests and identity, there was limited willingness to channel this dissent, particularly on the left. The permissive consensus of the founding period, which had given way to a 'constraining dissensus' after Maastricht, then fuelled 'a destructive dissensus' as the divide grew 'between integrationist leaders and a skeptical public'.[157] Developments through the euro crisis cast doubt on the very sustainability of the EU. However, the manner in which Europe was reconstituted in the Maastricht era had not only laid the grounds for this conjuncture; in repressing the theory and practice of political sovereignty, it had also established the conditions for the irresolution of the crisis.

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