



iCourts

iCourts Working Paper Series, No. 197, 2020

IMAGINE Paper No. 4

On the New German Ideology

Conference *EU Constitutional Imagination: Between Ideology and Utopia*

Michael Wilkinson

iCourts – The Danish National Research Foundation's
Centre of Excellence for International Courts

July 2020

Abstract:

Postwar Europe is partly reconstituted by a fear of democratic freedom, and a desire for political and economic stability. Constitutional relations are transformed over time through a mixture of political authoritarianism and economic liberalism. This takes place in a combination of domestic and supranational developments. The transformation also has a utopian dimension, and outlining its utopianism can help identify its ideological character. It is captured by such related terms as ‘post-politics’, ‘post-nationalism’, ‘post-sovereignty’ and ‘the ‘end of history’. These terms all point to the way in which authoritarian liberalism is maintained not only – and perhaps not even predominantly - through coercion and consent but also in the grey area in between, namely through practices and beliefs that suggest politics can be transcended and the medium of law reign supreme. We may call this the new German ideology. It becomes a dominant trope in the European constitutional imagination. Although it is unsettled after Maastricht and enters a critical phase through the financial crisis, the new German ideology remains relatively resilient. It benefits from the support of a critical theory that has lost its moorings, and a political system that is able to incorporate aspects of authoritarian populism, even as the centre ground appears increasingly fragile.

KEYWORDS: European constitutional imagination, authoritarian liberalism, authoritarian populism, post-politics, post-nationalism, critical theory

Michael Wilkinson is Associate Professor in the Department of Law, London School of Economics and Political Science

E-mail: M.Wilkinson@lse.ac.uk

IMAGINE has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 803163).

The iCourts Working Paper Series is funded by the Danish National Research Foundation Grant no. DNRF105.

iCourts - Centre of Excellence for International Courts - focuses on the ever-growing role of international courts, their place in a globalizing legal order, and their impact on politics and society at large. To understand these crucial and contemporary interplays of law, politics, and society, iCourts hosts a set of deeply integrated interdisciplinary research projects on the causes and consequences of the proliferation of international courts.

iCourts opened in March 2012. The centre is funded by a large grant from the Danish National Research Foundation (for the period 2012-18).

On the New German Ideology

Michael A Wilkinson*

1. Introduction

To the multifaceted crises of the European Union, about which much has already been written (the financial crisis, the sovereign debt crisis, the constitutional crises, the refugee crisis, the rule of law crisis) can be added another: a crisis of the European constitutional imagination.¹

There are two aspects to this claim. First, the integrative function of the European constitutional imaginary (always a *constitutionalism-to-come*) no longer has the capacity to fulfill its role.² European constitutionalism can no longer conceal, or credibly promise to bridge, the gap between the European order's claim to legitimacy and its subject's belief in it; the gap, put simply, has become too great if it has not yet reached the moment of rupture. This underscores a crisis of hegemony: the dominant constitutional ideas are in retreat, or worse, they are utilized by those who wish to undermine the European project or the foundational values of the European Union.³

Second, the purpose of this revelation is not merely dis-integrative, but also 'critical-emancipatory', not only to pull the rug from under those who propagate Euro-constitutional ideas, but to note the effect those ideas have had on the material world, in the anticipation that this might lead to a change *in* the material world.

To put the point slightly differently, it is not only that the dominant constitutionalist scholarship neglected the domain of political economy in general and capitalism in particular, with even many of those who made the economic constitution central to their work failing to think beyond a narrow ordoliberal framework, but also that constitutional scholarship must assume a certain responsibility for the impact of that neglect. Constitutional scholarship must

*Associate Professor of Law, LSE. This paper was presented at the University of Copenhagen Conference *EU Constitutional Imagination: Between Ideology And Utopia*. I would like to thank Jan Komarek for the invitation, and the participants for their comments.

¹ On the various crises in Europe and their systemic nature see E. Nanopoulos and F. Vergis (eds) *The Crisis Behind the Crisis: The European Crisis as a Multi-Dimensional Systemic Failure of the EU* (Cambridge University Press, 2019).

² Jan Komarek refers to 'the gap between the claim to authority by the EU and beliefs of its subjects as regards what can possibly justify such authority' (see 'European Constitutional Imaginaries: Utopias, Ideologies and the Other' *IMAGINE Working Paper No. 1 (iCourts Working Paper Series, No. 172)*).

³ See the recent 'Symposium – Crisis and Constitutional Pluralism in the European Union' (2019) 21 *Cambridge Journal of European Legal Studies* (on the uses and abuses of 'constitutional pluralism')

now take seriously the task of revealing the elements of economic domination in European constitutionalism, and indicate how they might be overcome.⁴

In short, theoretical enquiry into European integration must reconnect with a critique of *constitutionalism* and a critique of *capitalism*, as well as consider the link between the two. The purpose of this chapter is to begin that task.

Since the connection between constitutionalism and capitalism has long been interrogated in literature on international relations and critical political economy, it is perhaps surprising that it has received less attention in the scholarship on European integration.⁵ Elsewhere I have attended to this point using the frame of ‘authoritarian liberalism’.⁶ In this paper, I will sketch the ideological accompaniment to authoritarian liberalism, which we may call *the new German ideology*. The purpose of this paper is to offer a brief historicization of this ideology, chart its development, its own crisis and conclude by outlining its stubborn persistence, and even inflection to incorporate elements of authoritarian populism.

2. Authoritarian Liberalism

I have elsewhere attempted to begin the critical task of connecting capitalism and constitutionalism through outlining a particular phenomenon central to European constitutionalism – understood broadly to include domestic and supranational elements -, namely *authoritarian liberalism*.⁷ This captures the combination of politically authoritarian means in the attainment of economically liberal ends. Although dramatized since the Euro-crisis, I have argued that this is a much deeper, more foundational phenomenon, presenting acutely in the interwar period, and characterising the ideal-typical postwar European

⁴ Jan Komarek thus highlights the neglect by orthodox strands of European constitutionalism of ‘the ideological effects of its ideas, in the sense of concealing domination enabled by such kind of constitutionalism, especially in the form of economic power’ (Komarek, above).

⁵ In international political economy, see e.g. Stephen Gill and Claire Cutler, *New Constitutionalism and World Order* (Cambridge University Press, 2014).

⁶ See Michael A Wilkinson, ‘Authoritarian Liberalism: On the Common Critique of Ordoliberalism and Neoliberalism’ (2019) 45:7-8 *Critical Sociology* 1023 – 1034; ‘Authoritarian Liberalism as Authoritarian Constitutionalism’ in G. Frankenberg and H. Alviar (eds) *Authoritarian Constitutionalism* (2019, Edward Elgar); ‘Authoritarian Liberalism: The Conjunction Behind the Crisis’ in E. Nanopoulos and F. Vergis *The Crisis Behind the Crisis: The European Crisis as a Multi-dimensional Systemic Failure of the EU* (Cambridge University Press, 2019); ‘Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?’ (2015) *European Law Journal* 313; ‘The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union’ (2013) *German Law Journal*.

⁷ Ibid.

constitutional state and state-system, in which the project of European integration comes to play a key part.⁸

The expression ‘authoritarian liberalism’ captures a complex configuration of power, authority and ideology. It expresses a distrust of popular sovereignty, constituent power and democracy, paradigmatically in postwar reconstruction in West Germany, but extending elsewhere in Europe, and beyond.⁹ It is a placeholder for various aspects of European postwar reconstruction, cemented at Maastricht, which function to repress sovereignty, understood not merely in the sense of inter-state relations, but also as democratic constituent power and specifically democratic control over the economy. It reflects a fear that the people may undermine the liberal economy, through, for example, democratizing the workplace, pursuing irrational, inflationary programs of a socialist type or undermining a transnational market logic.¹⁰ In its ordoliberal variant, it reflects the desire for a strong state and institutional apparatus to contain the excesses of unfettered capitalism as well as unfettered democracy. Its best known expression is perhaps the TINA narrative (‘There is No Alternative’), initially associated with Margaret Thatcher’s neoliberal policies and now identified both with the political economy of austerity more generally and with the project of integration itself.¹¹

The phenomenon of authoritarian liberalism is rooted in a fear of democratic freedom, and in a desire for political and economic stability. But it also has a utopian dimension, and it is in outlining its utopianism that we can think through to its ideological nature. This is captured by such related terms as ‘post-politics’, ‘postnationalism’, ‘post-sovereignty’ and of course, the ‘end of history’.¹² These terms all point to the way in which authoritarian liberalism is maintained not only – and perhaps not even predominantly – through coercion and consent but also in the grey area in between, namely through a belief that politics can be transcended and the medium of law reign supreme. This becomes a dominant trope in the European constitutional imagination. We may call this *the new German ideology*.

⁸ See e.g. Michael A Wilkinson, ‘The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies in Dowlle and Wilkinson (eds.) *Constitutionalism Beyond Liberalism* (Cambridge University Press, 2017).

⁹ See Kanishka Jayasuriya, ‘Globalisation, Sovereignty and the Rule of Law: From Political to Economic Constitutionalism’ (2001) 8 *Constellations*: 442.

¹⁰ See e.g. W Bonefeld, ‘Authoritarian Liberalism: From Schmitt via Ordoliberalism to the Euro’ (2017) 43 *Critical Sociology* 747.

¹¹ See Mark Blyth, *Austerity: History of a Dangerous Idea* (Oxford University Press, 2013).

¹² These terms become particularly prominent following the end of the Cold War, and associated with the work of Chantal Mouffe, Jürgen Habermas, Neil MacCormick and Francis Fukuyama. Despite significant differences (and ‘family quarrels’), they all suggest in different ways the transcendence of political antagonism. In studies on European integration, post-sovereignty became a central thematic after Neil MacCormick’s article, ‘Beyond the Sovereign State’, published in the *Modern Law Review*, in 1993, following his Chorley Lecture. For critical analysis, see M Wilkinson, ‘Beyond the Post-Sovereign State: On the Past, Present and Future of Constitutional Pluralism’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 6 – 23.

3. The New German Ideology

In the new German ideology, democracy is no longer as a promise, or an emancipatory project, but a threat to be contained, a risk to be managed, an obstacle to be overcome. Associated initially with the mislabeled concept of 'militant democracy',¹³ mislabeled because it means the opposite of what that label suggests, the new German ideology means that democracy must be tamed and moderated, proactively and institutionally. Expressions of the collective will are to be limited, restricted to a narrow range of options within the political centre-ground, hedged in by a constitution and a constitutional culture that permits little variation. It is more appositely named 'liberal democracy', 'democracy with qualifiers' or 'constrained democracy'.¹⁴

The new German ideology has now reached a critical juncture. Popular sovereignty and non-liberal political alternatives have returned, at least rhetorically, even if frequently dismissed by liberal opinion as merely 'populist'.¹⁵ The political centre struggles to hold, parties of the centre-left in particular having been 'Pasokified' across the continent, after the collapse of the established socialist party in Greece.¹⁶ Brand new Left parties pop up, and old parties inflect in a populist direction, although with little success.¹⁷ Parties of the centre-right are now becoming 'Fideszified', coopting the anti-immigration and cultural rhetoric of the populist Right and harnessing Eurosceptic opinion but without any plan to leave the EU. The European project itself appears fragile, with a major country having left for the first time in a process long considered 'irreversible'. And yet, no serious alternative appears to be on the horizon.

The purpose of the remainder of this paper is to sketch the constitutional and ideological trajectory of this constitutional formation by outlining its historical development as well as its recent critical phase, when it has come under sustained pressure. The condition for this can be traced back to the Maastricht Treaty and even further. At its root is a particular diagnosis of the interwar breakdown of liberalism. And it is there we must begin.

¹³ Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I', *The American Political Science Review*, vol. 31, issue 3, 1937, p. 417 and 'Autocracy versus Democracy in Contemporary Europe Part 1', *The American Political Science Review*, vol. 29, No.4, 1935, p. 571.

¹⁴ See Jan Werner Müller, *Contesting Democracy* (Princeton University Press, 2012).

¹⁵ The literature on populism is already enormous. On the relation between populism and constitutionalism see Jan-Werner Müller, 'Populism and Constitutionalism' in *Oxford Handbook of Populism* ed. C. Rovira Kaltwasser, P. Taggart, P. Ochia Espejo & P. Ostiguy (Oxford: Oxford University Press, 2017) 590-606.

¹⁶ Chris Bickerton, 'The Collapse of Europe's Mainstream Centre Left' *New Statesman*, 1May 2018.

¹⁷ See Anton Jager, 'We Bet the House on Left Populism – and Lost' *Jacobin Magazine*, 25th November 2019.

4. Interwar: Carl Schmitt and the roots of authoritarian liberalism

The new German ideology is in an important sense *reactionary*. It is a reaction to the dynamic of popular sovereignty, democracy and class consciousness unleashed in the interwar period, when universal suffrage and working class movements begin to threaten the bourgeoisie state and state-system – not only by revolutionary but also through evolutionary means, from within the constitutional order, notably in the Weimar Republic.¹⁸

Ironically, given his frequent depiction as the epitome of an anti-liberal, the figure that stands at the root of postwar liberal reaction is none other than Carl Schmitt. In the interwar period, Schmitt's main fear was that democracy might overturn the Weimar constitution 'from the Left', through movements towards social emancipation and economic democracy.¹⁹ With others who supported economic liberalism, he turned towards authoritarian rule as a means to defend the constitution and the bourgeoisie order it represented, even if this meant ushering in increasingly conservative and reactionary cliques. This liberal authoritarian turn reaches a climax in late Weimar, when from 1930 its Parliament is suspended and a series of centrist and conservative Presidential Cabinets rule by dictat and decree, imposing harsh austerity in order to defend the interests of the ruling class and big business. According to historians of the period, it was these antidemocratic and embittered ruling cliques that effectively laid the conditions for the Nazis to seize power in January 1933.²⁰

¹⁸ Franz Neumann 'On the preconditions and Legal Concept of an Economic Constitution' in Tribe, Keith (ed.) *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (trans. Tanner, L. & Tribe, K.) ([1931] 1987 London: Allen and Unwin) pp. 44-66. Neumann's own trajectory is complex, varied, and cannot be fully evaluated here. For discussion, see Claus Offe, 'The Problem of Social Power in Franz L. Neumann's Thought' (2003) 10(2) *Constellations* 211-227.

¹⁹ Before his turn towards National Socialism in 1933-1934 Schmitt was an 'implacable conservative opponent of the enemies of the Weimar state', especially those on the Left. See Keith Tribe, *Strategies of Economic Order: German Economic Discourse 1750 – 1950* (Cambridge University Press, 1995) 175. See also Benjamin Schupman, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (OUP, 2017) 180: 'Schmitt repeatedly argued that the Weimar Constitution contains a political decision to be a bourgeoisie *Rechtstaat*, which was above all oriented by its commitment to individual liberty.' Schupman cites Ingeborg Maus' analysis, that 'Schmitt was motivated above all by a desire to protect bourgeoisie property rights against the threat of socialism' *ibid*, although he himself suggests that protection of property rights was only a 'peripheral concern' for Schmitt, above 36. See also Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff, University of Wales Press, 1998). According to Cristi, making the distinction between liberalism and democracy enabled Schmitt's rapprochement with liberalism as early as 1923 – it allowed him 'to identify what he feared most: the increased pace of the democratic revolution' (p 17).

²⁰ See e.g. Ian Kershaw (ed.) *Weimar: Why did German Democracy Fail?* (Wiedenfeld and Nicholson, London, 1990); Eberhard Kolb, *The Weimar Republic* 2nd ed. (Routledge, 2005) 116 – 135.

Just before the Nazi seizure of power, German social democrat and constitutional theorist Hermann Heller identified this formation for what it was, a combination of political authoritarianism and the ideology of economic liberalism, in defence of the capitalist interests underwriting it. With this pejorative label 'authoritarian liberalism', Heller was targeting not only the cabinets but also the intellectual figure standing behind them, namely Carl Schmitt.²¹ For Schmitt, before he turned to the Nazi party, the key enemy were those who were trying to democratize the economy, as made clear in his address to the *Langnamverein* in 1932, 'Strong State, Sound Economy'.²²

Liberalism, for Heller, was not, however, only at fault in this conjunctural moment or only in its economic variety; it was more deeply defective. Its rationalism, legalism and individualism elided the key question of sovereignty and rendered it powerless to respond to the pressing political and social needs of the day.²³ Although, in Heller's view, Schmitt correctly diagnosed liberalism's intellectual deficiencies, Schmitt did not have any political solution, offering an overly personalized and ultimately dictatorial account of sovereignty and – paradoxically given his anti-liberal reputation - remaining tied to liberalism's ideological separation of the political from the economic.²⁴ Instead, what needed to be recovered and defended was a resolutely political conception of sovereignty that might restore a sense of the collective will, as understood by Hegel, and Rousseau before him. The problem, as Rousseau and Hegel had also understood, was that this could not be constructed democratically in conditions of deep inequality and class division. What Heller had identified, without being entirely explicit or lucid about, was the contradiction between democracy and capitalism.²⁵

5. The 'original sin' of postwar constitutional imagination

The dominant narrative of the interwar breakdown constructed in the postwar constitutional imaginary would be a failure of democracy, a story of decay caused by political excess. Unconstrained democracy, so the story goes, leads to extremes that will eventually destroy democracy. In reaction to this narrative of democratic suicide or of the 'tyranny of the majority', the cure is said to be less rather than more politicisation.²⁶

²¹ Hermann Heller, 'Autoritärer Liberalismus', *Die Neue Rundschau* 44 (1933): 289-298, (H. Heller (trans S. Paulson), 'Authoritarian Liberalism?' *European Law Journal* 21 (2015): 295-301.

²² See Carl Schmitt, 'Strong State, Sound Economy', reprinted in Renato Cristi, above.

²³ See Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (Oxford University Press, 2019 [1926]).

²⁴ *Ibid.*

²⁵ See further Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London, Verso, 2014).

²⁶ See Müller, above.

With the implication that the decline and destruction of Weimar accelerates through an excess rather than a privation of democracy, it leads to a great forgetting; the proximate condition of Weimar's collapse was the uniting of liberals and conservatives ('tolerated' by the Social Democrats) to support an authoritarian regime in the early 1930's in an attempt to maintain the liberal economic order and in the process forestalling any move towards democratic socialism. What would be forgotten was Heller's late but poignant lesson: democracy is repressed by those seeking to defend vested interests, and this, in the first instance, will be the ruling elites, in other words, a tyranny of the minority.²⁷

The new German ideology is constructed out of narratives of democratic decay, as well as related myths, such as unfettered mass democracy leading directly to fascist dictatorship, ignoring the presidential emergency rule in circumstances of political violence and social turbulence;²⁸ or hyperinflation leading directly to political collapse, ignoring the economic impacts of deflation caused by the great depression.²⁹ It also has a deeper cultural dimension; fear of democracy affect, and infects the social imaginary: this reflects not only an elite that distrusts the people but a people that distrusts itself, evading political responsibility and ultimately the capacity for self-government.³⁰

The constitutional character of this ideology is appositely captured by the sentiment, 'We are afraid of the People'.³¹ In its dominant ordoliberal version, this signals a fear that the people will make irrational decisions about the economic order or about the money supply. The purpose of this postwar liberal formation is thus less to consolidate democracy than to restore and maintain a liberal economic order, to make markets safe from democracy.³²

Popular sovereignty is politically and materially suppressed through the substitution of democratic constituent power with individual economic freedom — a freedom to participate

²⁷ This reflects a change in Heller's view, compared to 1928, when he believed the threat to democracy came from the working class (see 'Political Democracy and Social Homogeneity', in B Schlink and A Jacobson (eds) *Weimar: A Jurisprudence of Crisis* (Berkeley, University of California Press, 2000) 265.

²⁸ See recently e.g. J. H. H. Weiler, 'The European Circumstance and the Politics of Meaning: Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4)' (2020) 21 *German Law Journal* 96 – 99 ('Hitler and Mussolini were hugely popular at their time and came to power democratically').

²⁹ On the significance of the myth of hyperinflation for the construction of the independent central bank in the postwar era, see Hjalte Lokdam, 'Banking on Sovereignty: A Genealogy of the European Central Bank's Independence' thesis submitted to the European Institute of the London School of Economics for the degree of Doctor of Philosophy, London, December 2019.

³⁰ Cf. Erich Fromm, *Fear of Freedom* (Abingdon, Routledge, 2001, first published: Routledge & Kegan Paul, 1941).

³¹ See Christoph Möllers, 'We are (afraid of) the people': Constituent Power in German Constitutional Discourse in Loughlin and Walker (eds.) *The Paradox of Constituent Power* (OUP, 2007).

³² See Quinn Slobodian, *Globalists: The End of Empire and Birth of Neoliberalism* (Cambridge, Mass: Harvard University Press, 2018).

in the market — as the legitimating device for the whole constitutional order. The democratic power to constitute anew is ultimately lost, swallowed up into the authority of the constitution itself, ironically, in the West German case, not even in the form a proper constitution, but a ‘basic law’.³³ The normative foundation represented by this document would be protected by specialist constitutional interpreters and constitutional courts, as well sustained by a culture of loyalty to the constitution, or a ‘constitutional patriotism’, which operated as a substitute for ‘the traumatized national self-esteem of West Germans.’³⁴

Postwar Europe is characterized by this new form of authoritarianism, more subtle than the authoritarian rule of charismatic leaders or presidential states of emergency, but no less depoliticising in form. It is frequently conceptualised as part of a later neoliberal transition to a ‘post-political’ or ‘post-democratic’ world, dominated by a managerial and technocratic politics of deliberation.³⁵ It is given intellectual credibility through the turn of critical theory away from class struggle and political economy and towards rational consensus and cosmopolitan constitutionalism.³⁶ Sovereignty itself becomes *unpopular*.³⁷ Although this is exacerbated and deepened through the decades of neoliberalism as the social contract between labour and capital is breached, and it accelerates through the recent Euro-crisis phase as the social contract is ripped up, a soft authoritarian liberalism underwrites the constitutional dynamic in Europe right from the start of postwar reconstruction.

The arc of the long trajectory of postwar reconstitution traces a gradual escape from politics and from political freedom. It is a trajectory that is institutionalized and zealously guarded in the domestic and international corridors of Commissions and Constitutional Courts, Central Banks and Committees, and upscaled through regional and international institutions, prominently through the project of European integration. This project begins at Paris and Rome, deepens at Maastricht and is pursued in a more disciplinary fashion through the Euro-crisis phase. It involves domestic institutional and supranational bodies, formal institutions such as the European Central Bank, and ‘formally informal’ powers such as the Eurogroup.

6. European integration: authoritarian liberalism writ large

³³ For a discussion on how this impacts the lack of constituent moment in the debates around German reunification, see Simone Chambers, ‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ (2004) 11 *Constellations* 153–173.

³⁴ Ulrich Preuss, ‘Political Order and Democracy: Carl Schmitt and his Influence’ in C. Mouffe (ed.) *The Challenge of Carl Schmitt* (London, Verso, 1999).

³⁵ See e.g. Chantal Mouffe, ‘Deliberative Democracy or Agonistic Pluralism’ (1999) 66:3 *Social Research* 745 – 758. Mouffe is critical of the deliberative turn but also rejects the antagonism and materialism of class struggle as the domain of a left politics.

³⁶ See e.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, 1997) and recently *The Crisis of the European Union: A Response* (London, Polity Press, 2013).

³⁷ See Alexander Somek and Michael A Wilkinson, ‘Unpopular Sovereignty’ (2020) *Modern Law Review*.

The process of European integration reflects the new German ideology writ large, locking in liberal economic constraints through its constitutionalisation of the single market, protecting undistorted competition and free movement of the factors of production. Market logic is depoliticised, naturalised, and presented as without any alternative. This is a domestic as much as a supranational phenomenon – both layers are intertwined in the construction of the EU ‘Member State’.³⁸

Constitutionalisation of the market freedoms has an uneven but acute deregulatory impact over time; through the constitutional dynamic generated by judge-made law, and national judicial acquiescence, social democratic commitments at the national level are undermined and there is no compensation at the supranational level due to the difficulty of establishing political consensus.³⁹ In practice, clashes between social goals and economic rights and duties are frequently resolved in favour of the latter.⁴⁰ Despite the promise of Delors, there is no upscaling of social Europe, but only a weakening and erosion of industrial relations and labour power.⁴¹

After Maastricht, which lays the ground for Economic and Monetary Union, European integration becomes increasingly material to the suppression of political democratic alternatives, removing a key lever of power from the sovereign member states through the establishment of the single currency. With its authoritarian character heightened through the recent decade-long Euro-crisis, a political philosophy of ‘no alternatives’ emerges.⁴² Elections fail to offer any possibility of meaningful change and domestic referenda are ignored. If postwar democracy begins in constraint, it ends in capitulation - to the markets, the European Treaties, or the ideology of Europeanism.

The new German ideology comes to dominate the whole European constitutional imagination, even in places where the myth of democratic decay resonates less or not at all. There are different national stories to be told, according to distinct varieties of constitutionalism and historical paths. But in each case there is a domestication of the German ideology both in terms of the constitutional imaginary and the political economy of ordo and neoliberalism

³⁸ Chris Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press, 2012)

³⁹ Fritz Scharpf, ‘The asymmetry of European Integration, or, why the EU cannot be a social market economy’ (2010) 8 *Socio-Economic Review* 211 – 250.

⁴⁰ Ibid.

⁴¹ See Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014).

⁴² For an argument that ‘downturn austerity’ is better understood as an ideological prescription rather than a legal obligation within the European constitutional framework, see C. Kaupa, ‘Has Downturn Austerity Really Been Constitutionalised in Europe? On the Ideological Dimension of Such a Claim’ (2017) 44:1 *Journal of Law and Society* 32 – 55

that is integrated into the EU's micro and macro-economic constitution.⁴³ The fear of popular sovereignty and democracy assumes a hegemonic status.

The hegemony of the German ideology is a complex phenomenon, involving material inter-state asymmetries of power, the transformation of traditional state-society relations and the erosion of social solidarity and dominance of liberal individualism. It functions through a mixture of coercion and consent and the grey area in between.⁴⁴ The hegemony of the new German ideology is in part – but only in part - a feature of Germany's regional coercive power.

7. Ideology and hegemony

In contrast to the early 1930's, Germany now inhabits a position of relative strength rather than weakness, imposing itself as a creditor nation rather than finding itself in the position of debtor. The impact of the reunification of Germany and the increasing strength of German capital on the asymmetrical relations of inter-state power, and in particular, on an imbalance in the Franco-German relationship is well documented.⁴⁵ The significance of growing German strength in shaping monetary cooperation is undeniable.

Within the Eurozone, the ordo-liberal emphasis on price stability, competitiveness, and fiscal discipline would be entrenched at Maastricht as well as protected against discretionary ECB programmes by domestic institutions such as the German Constitutional Court.⁴⁶ The Treaty, domestic institutions, and the balance of class power in favour of the interests capital all act as constraints on the exercise of a 'benign hegemony' along post-Keynesian lines, or along the lines of debt mutualization or forgiveness.⁴⁷

Germany's own export-led regime would increase its competitiveness after the introduction of the Euro not by increasing productivity but by wage restraint, a feature of its own authoritarian liberal policies. These would be pursued by a 'third-way' social democratic

⁴³ Tuori, Kaarlo and Tuori, Klaus, *The Eurocrisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2012). EU membership is not, of course, necessary to adopt the neoliberal path but it is, perhaps, sufficient.

⁴⁴ As Perry Anderson puts it, tracing the fortunes of the term from ancient Greece to the present, the persistence of the term hegemony is due to its combining of 'cultural authority' and 'coercive power' and 'the range of possible ways it can do so' (*The H-Word: The Peripeteia of Hegemony* (London, Verso, 2017)).

⁴⁵ See Ulrich Krotz and Joachim Schild, *Shaping Europe: France, Germany and Embedded Bilateralism from the Elysée Treaty to Twenty-First Century Politics* (Oxford University Press, 2013).

⁴⁶ Although the German Court backed down, it effectively obtained rhetorical guarantees that the triggering of the OMT programme would be attached to conditionality. See Michael A Wilkinson, 'The Euro is irreversible... Or is it?' (2015) *German Law Journal*.

⁴⁷ See Andreas Bieler, Jamie Jordan and Adam David Morton, 'EU Aggregate Demand As a Way out of Crisis? Engaging the Post-Keynesian Critique' (2019) 57:4 *Journal of Common Market Studies* 805 – 822.

government under the auspices of agenda 2010 and the Hartz reforms.⁴⁸ The benefits would not only accrue to German capital but to 'neo-mercantilist German bloc'.⁴⁹

Due to the economic interconnectedness of export-led and debt-led growth, the ordoliberal regime then comes into tension with democracy in *other* parts of the Eurozone, particularly when the state with the largest economy makes a trade surplus a '*de facto* reason of state'.⁵⁰ Germany could not 'coherently' insist that all other states have a macro-economic policy 'that looks like its own', it has been noted, 'because such a result is definitionally impossible'.⁵¹ The harder, more coercive constraints of Eurozone membership became particularly evident in crisis conditions, austerity imposed in return for credit and 'internal devaluation' the only way for debtor states to regain competitiveness. It is here that the 'iron cage' of ordoliberalism is at its most oppressive.⁵²

Critique of German-led Euro-crisis management was not restricted to scholars associated with the tradition of critical theory. According to Giandomenico Majone, receivership was too mild a term for the suspension of normal democratic process that countries in the periphery were reduced to; 'occupation' by the Troika was more appropriate, suggesting 'the consequences of military defeat'.⁵³

Geo-economic hegemony also extends beyond the imposition of conditionality as a prerequisite for financial aid in the periphery, reflecting a broader feature of capitalist imperialism in an age where the acquisition of territory is no longer considered necessary to exert economic control over another state.⁵⁴ Today, as Claus Offe puts it, 'one can have

⁴⁸ See e.g. Bob Jessop, 'Variegated Capitalism, das Modell Deutschland, and the Eurozone Crisis' (2014) *Journal of Contemporary European Studies*, 22:3, 248-260.

⁴⁹ *Ibid.*

⁵⁰ Helen Thompson, 'Austerity as Ideology: The Bait and Switch of the Banking Crisis' (2013) *Comparative European Politics* 729 – 736 (according to Thompson, 'The euro-zone simply cannot endure in a way that is compatible with democratic politics if the state with the largest economy and most fiscal credibility makes a trade surplus a *de facto* reason of state', 730).

⁵¹ *Ibid.* See also Wolfgang Munchau, 'The Wacky Economics of Germany's Parallel Universe' November 16th 2014, *Financial Times* ('the ordo-liberal word view is asymmetric. Current account surpluses are considered more acceptable than deficits. Since the rules are based on national law, ordo-liberals do not care about their impact on the rest of the world. When they adopted the Euro, the rest of the world suddenly did start to matter.)

⁵² Magnus Ryder, 'Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro area Crisis and its Management' (2015) 22:2 *Journal of European Public Policy* 275 – 294.

⁵³ Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis* (Cambridge University Press, 2014) 200.

⁵⁴ According to Hans Kundnani, Germany enjoys 'geo-economic semi-hegemony' (see *The Paradox of German Power* (London, Hurst & Co, 2016) 107). See further Simon Bulmer and William Paterson, *Germany and the European Union: Europe's Reluctant Hegemon* (Red Globe Press, 2019)

perfectly peaceful relations with a particular country and still literally own it—simply by appropriating its economy through a permanent trade surplus and by destroying its sovereignty by depriving the country (in an ad hoc fashion of rescue conditionality, if not through European law) of its budgetary and other legislative autonomy.⁵⁵

And yet, Germany is not able to exercise anything approaching a full geo-political hegemony, not only due to its own lack of military and financial resources, but due to the absence of any consent (either domestically or outside of Germany) for its adoption of a leadership role.⁵⁶ It does not assume the role of ‘hegemonic stabilizer’; on the contrary, insistence on rigid ordoliberal medicine has created political instability. To the extent Germany exercises a form of hegemony it is through a consent of the other states to, and perhaps their fetishisation of, the European Union.⁵⁷

There is thus an obvious, perhaps trivial, sense in which the new German ideology is consensual – membership of the European Union is voluntary, and, since Lisbon, exit from the EU has been formalized within the Treaty itself, through Article 50 TEU. If the lack of exit options from the single currency (short of triggering article 50) is notable, voluntarism remains a formally accurate description of membership of the Eurozone.

A simple collective voluntarism, however, discounts the political and material conditions in which membership of the Eurozone is embedded, the erosion of sovereignty it reflects as well as the ideological attachment to the EU.⁵⁸ If the constraints of Membership are properly understood as external constraints they are not ‘imposed from without’; they are the means through which the domestic governing class rules over its own people.⁵⁹ This is part cause and consequence of the ‘hollowing out of democracy’ and the disconnect or ‘void’ between rulers and ruled associated with the work of Peter Mair.⁶⁰

8. A crisis of the new German Ideology? The ascendance of authoritarian populism

By the time of German reunification and the Maastricht Treaty, the new German ideology becomes unsettled even in its own backyard, with sovereignty claims resurfacing after a hiatus of 50 years and nationalisms rising. This presented a series of irritants to the postwar

⁵⁵ Claus Offe, ‘Europe Entrapped’ (2013) 19:5 *European Law Journal* 595-611.

⁵⁶ See Majone above.

⁵⁷ This is the expression used by Costas Lapavistas at the LSE event, ‘Marx at 201’ (recording can be downloaded here: <http://www.lse.ac.uk/Events/2019/03/20190327t1830vSZT/Marx-at-201>)

⁵⁸ See Martin Loughlin, ‘The Erosion of Sovereignty’ (2017) *Netherlands Journal of Legal Philosophy* 57 – 81.

⁵⁹ Chris Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press, 2012).

⁶⁰ Peter Mair, *Ruling the Void: The Hollowing Out of Western Democracy* (Verso, 2013); Christopher Bickerton, ‘Beyond the European void? Reflections on Peter Mair's legacy’ (2018) 24 *European Law Journal* 268-280.

constitutional order, which, however, remained largely inconsequential, or only marginally consequential, whether the German Constitutional Court's rhetorical flourishes or the *Front Nationale's* capitalization of the growing social fracture represented by the *Petit Oui* in the Maastricht referendum.⁶¹

Over the last decade, these irritants emerge into a full-blown crisis, as the German Court's rulings become more assertive, and the far Right grows in power and authority, not only in Central and Eastern Europe but in the core of Europe. Sovereignty claims multiply and intensify, no longer constrained, but distorted in their disconnect from any democratic base.

Matching the centrifugal force of assertions of 'sovereignty from below' is the centripetal force of a 'sovereignty-to-come' from Europe above; not one rooted in democracy or social movements, but imposed by a European Central Bank, a putative European Army, spearheaded by a shiny new brand of executive authoritarian liberals, led by the 'centrist King' Emmanuel Macron.⁶²

The new German ideology struggles to maintain its grip over the constitutional imagination; its integrative function has weakened and the 'extreme centre' struggles to hold.⁶³ It no longer has the capacity to close the gap between the European order's claim to legitimacy and its subjects' belief in it, generating the very symptoms it was meant to suppress, as Right-wing political extremism resurfaces, inter-state domination returns, and international solidarity is foreclosed.

Authoritarian liberalism has incubated the conditions for the emergence of forms of *authoritarian populism*, having hollowed out democracy in the drive to create the conditions for markets and capital to expand. If the leading proponents of European constitutionalism imagined their ideas would 'rule the world',⁶⁴ in reality they ruled only a void. There should be no surprise when this void is then filled with the rhetoric of national identity and anti-immigration, a predictable counter-movement after a period of enforced liberal constitutionalisation, marketisation and rigid adherence to austerity.⁶⁵ The 'self-serving

⁶¹ Karlsruhe, before the rise of the AfD, was described as serving as the 'missing channel for Germans to voice their Euroscepticism' (Klaus Garditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) *German Law Journal* 189).

⁶² See A Chaudhary, 'In the Court of the Centrist King: Emmanuel Macron and Authoritarian Liberalism' in *The Public Eye*, Winter 2018, accessible here: <https://www.politicalresearch.org/2017/11/28/in-the-court-of-the-centrist-king-emmanuel-macron-and-authoritarian-liberalism>

⁶³ See Michael Wilkinson, 'The Brexit Referendum and the Crisis of Extreme Centrism' (2016) *German Law Journal*.

⁶⁴ J Dunoff and J Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009).

⁶⁵ On the interwar counter-movement, see K Polanyi (2001, first published 1944) *The Great Transformation, The Political and Economic Origins of Our Time*, Boston: Beacon 250-265.

illusions of austerity', Helen Thompson noted in 2013, 'would be bound to elicit strong social and political reaction, and risk letting loose the kind of political passions that were so destructive during the inter-war years.'⁶⁶

The case of Hungary illustrates the Polanyian 'counter-movement in one character', Orban's liberal pro-Europeanism in the context of accelerated transition to a market economy in the early 1990's shifting into an illiberal reactionary nationalism, or 'authoritarian populism', defending a Christian Europe, in an strange inflection of the founding fathers of European integration as well as some of its more recent high priests.⁶⁷

Contrary to how it is often presented, authoritarian populism is not in opposition to, but a symptom of the liberal order, purporting but failing to fill in the political void that this order has created and maintained in its own authoritarian fashion. The relationship between authoritarian populism and authoritarian liberalism is therefore less one of antagonism than of mutual dependence, even combining its own complementary political forms into new hybrids such as 'technopopulism'.⁶⁸

There also appeared to be an asymmetrical response to the various 'morbid symptoms' that emerged from the financial crisis, even if they were germinating since at least the Maastricht era. This is a curious aspect to the liberal hegemony, a disturbing echo of the interwar period.⁶⁹ Where liberal economic commitments were threatened by popular sovereignty from the Left, as they were (briefly) with the election of the anti-austerity Syriza in Greece, however democratically motivated and rationally justified, the punishment would be severe, and the consequences devastating. Where they are threatened from the Right, as in Hungary and Poland, however authoritarian and illiberal their form, the European states and EU state-system appeared impotent and ineffective, unable to respond or lacking the power or authority to do so. On the contrary, the European Union starts to shape itself in their own image, emulating populist strategies to define and defend a European 'way of life'.⁷⁰

9. The stubborn attachment of critical theory to the EU

⁶⁶ Helen Thompson, 'Austerity as Ideology: The Bait and Switch of the Banking Crisis' (2013) *Comparative European Politics* 729 - 736, at 730.

⁶⁷ J H H Weiler, *Un Europa Cristiana: un Saggio Esplorativo* (2003)

⁶⁸ See Christopher Bickerton & Carlo Invernizzi Accetti (2017) 'Populism and technocracy: opposites or complements?', *Critical Review of International Social and Political Philosophy*, 20:2

⁶⁹ See Schupmann, above, 36 (Schmitt's fear of the radical left in Weimar 'kept him looking in the wrong direction as the Nazis consolidated their power').

⁷⁰ As with Von Der Leyen's attempt (see <https://www.politico.eu/article/von-der-leyen-on-european-way-of-life-we-cant-let-others-take-away-our-language/>)

An extraordinary feature of the postwar settlement is that it has locked much of the 'Left' into unconditional if not uncritical support for remaining in the EU, from social democrats to Euro-communists, and Frankfurt School theorists to Italian Marxists. It is not only that the lure of postnationalism was so intellectually dominant. It is also the case that heretics would be ostracised, dismissed as nationalist, backward-looking, nostalgic or worse.⁷¹

The Habermasian promise of a European-constitutionalism-to-come not only reflected an ethical distaste for nationalism but a turn away from any concrete analysis of domestic or international political economy. If Habermas's turn to discourse, his 'talking cure', had long neglected the colonization of the public sphere by power and money,⁷² it would now be law that would substitute as the medium of integration, somehow compensating for a deracinated politics. The process of juridification, instead of a corruption of the lifeworld, was 'not only a rationalising but also a civilising force'.⁷³ If Habermas maintained the rhetoric of constituent power, albeit in an entirely de-materialised fashion, other constitutional scholars who followed suit discarded it entirely, identifying Constitutionalism with a free-floating 'cosmopolitan framework' of liberal principles.⁷⁴

By refusing serious opposition to the EU, the Left would be caught between accepting that however neoliberal in character, the default to European integration is atavistic nationalism, and buying into a [scalarist](#) eschatology which promises the benefits of a pan-European utopia if only patience is maintained.⁷⁵ Paralysed between lesser evilism ('the EU is not perfect but the alternatives are even worse') and the luxury of intellectual optimism ('the EU is not perfect but it can be reformed'), concrete political struggles for democratic socialism are avoided, postponed until a pan-European social democracy emerges in some unspecified but distant future. Europe had become the 'empty signifier' that will save all.⁷⁶

That this position would dominate in the UK even after a democratic vote to leave the EU was a sign of how deep its sentiment ran, disposing any simple voluntaristic account of

⁷¹ See e.g. Jürgen Habermas, *The Lure of Technocracy* (Cambridge, Polity Press, 2015). For a particularly egregious example, see Adam Tooze's silly insinuation of Wolfgang Streeck's work as anti-semitic, 'A General Logic of Crisis' (2017) *London Review of Books*. For an overview and 'application' of the Streeck-Habermas debate in the context of Syriza's fate, see Milos Sumonja, 'The Habermas-Streeck debate revisited: Syriza and the illusions of the left-Europeanism' (2019) 43:3 *Capital & Class* 427 – 458.

⁷² Deborah Cook, 'The Talking Cure' (2001) *New Left Review*.

⁷³ *The Crisis of the European Union*, above, at 8.

⁷⁴ Matthias Kumm, 'How Does European Union Law Fit into the World of Public Law' in J. Neyer and A. Weiner (eds) *Political Theory of the European Union* (Oxford: Oxford University Press, 2010) 125. Cf. Alexander Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20:2 *European Law Journal* 142 – 163.

⁷⁵ Cedric Durand and Fredric Lordon, 'Internationalism Beyond Scalarism: Democratic Politics and the Political Economy of European Integration' (2017).

⁷⁶ Perry Anderson, 'Situationism a l'envers' (2019) *New Left Review* (a review of Tooze's work).

membership. If the Brexit referendum signaled the visible 'tip of an iceberg', representing the deeper and wider disconnect between the political class and the citizen across the European Union that has grown in proportion since Maastricht, it seems largely to be the Right to have grasped that it is within and over the state that concrete political struggles can still most credibly be fought.

Conservative and Right-wing forces, having little need of rupture from the European Union to pursue a nationalist market-liberal agenda – whether in Hungary or Poland, or Italy – remain and prosper *inside* the Union, largely unperturbed by the constraints of its bureaucratic apparatus and yet reaping the electoral rewards of Euroscepticism. They have been able to capitalize on the discontent with neoliberalism and European integration that should have presented a clear opportunity for the Left.

With the tables turned, the Left is frequently propping up an establishment in decline; defending a system in crisis, an order in disarray. Even where it has not been entirely eviscerated, 'Pasokified' after its turn to the centre ground, it is largely devoid of ideas, clinging to the German ideology because of its own fear of alternatives. In imagining that the only alternative to a neoliberal EU is right-wing nationalism, it misses that far from alternatives, neoliberalism and nationalist populism is precisely the combination emerging in and through the EU.

The UK has offered a prime example of the failure of even a supposedly radical Left leadership to grasp the opportunity offered by Brexit. The UK is an outlier in certain respects, outside the tight constraints of the single currency, without the same constitutional imaginary of Europe or trajectory of authoritarian liberalism. It is an irony that the UK's homegrown domestic neoliberal project of the 1980's (itself characterised as an 'authoritarian populism'),⁷⁷ had such a significant impact on the course of European integration through the market liberalization agenda of the Single European Act.⁷⁸ But if more generally the UK's looser cultural, constitutional and material ties also meant that entertaining the possibility of leaving was a more feasible political route, the obstacles it presented remained significant.

Britain's vote to leave the European Union was a wasted opportunity for the Left to reconnect with a democratic socialist project and the material struggle for equality and political freedom.⁷⁹ That struggle was interrupted in the interwar period, and constrained by the postwar resettlement, in a so-called 'golden age' when soft authoritarianism was masked by

⁷⁷ See Stuart Hall 'Popular-Democratic versus Authoritarian Populism', in Alan Hunt, ed., *Marxism and Democracy* (London 1980); Stuart Hall, 'Authoritarian Populism: A Reply' (1985) *New Left Review*.

⁷⁸ According to Lord Cockfield, '[t]he gradual limitation of national sovereignty is part of a slow and painful forward march of humanity' *The Guardian* (11 November 1988), cited by A Milward, *The European Rescue of the Nation State* (Routledge, 1994) (Cockfield, 'father of the single market', European Commissioner from 1985 – 1988 was the author of the White Paper on 'The Completion of the Internal Market').

⁷⁹ In regard to Brexit, see Michael Wilkinson, 'The Failure of the Left to Grasp Brexit' *LSE Brexit Blog* 12 December 2019.

economic growth. It was then decimated by decades of neoliberalism, and finally dealt a near-fatal blow through the Euro-crisis period.

The rupture signaled by Brexit offered a broader occasion to consider a break with this trajectory, to advance a project that combined popular sovereignty with social radicalism, unambiguously internationalist and anti-capitalist in nature. Failure to connect with the dynamic energies created by movements of popular sovereignty, radical democracy, and class politics vacated the ground of Euroscepticism to the Right, which has ultimately prospered electorally from the conjuncture, even without breaking from it, following the pattern in much of the rest of the Continent. If the political centre has not held, the constitutional ideology, governing arrangements and political economy that have accompanied it largely remain in place. Their fragility, however, is apparent.

Author(s): Michael Wilkinson
Title: On the New German Ideology
iCourts Working Paper, No. 197, 2020

Publication date: 14/July/2020

URL: <http://jura.ku.dk/icourts/working-papers/>

© Author
iCourts Working Paper Series
ISSN: 2246-4891

Michael Wilkinson is Associate Professor in the Department of Law, London School of Economics and Political Science
E-mail: M.Wilkinson@lse.ac.uk

The iCourts Online Working Paper Series publishes pre-print manuscripts on international courts, their role in a globalising legal order, and their impact on politics and society and takes an explicit interdisciplinary perspective.

Papers are available at <http://jura.ku.dk/icourts/>

iCourts
- The Danish National Research Foundation's Centre of Excellence for International Courts
The Faculty of Law
University of Copenhagen
Karen Blixens Plads 16
2300 Copenhagen S
E-mail: icourts@jur.ku.dk
Tel. +45 35 32 26 26