1

Contestation and Integration in Times of Crisis: The Law and the Challenge of Austerity

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What commenced in the United States in summer 2007 with the turmoil surrounding the subprime mortgage market triggered a global financial crisis, which took hold of all areas of the world's economy in the years that followed. The breakdown of credit markets undermined confidence in debt-based growth. The global financial and economic crisis hit the eurozone and its Member States hard. In the less competitive southern countries, where significant parts of the national banking sector became insolvent, Member States found themselves unable to refinance and service their debts on the credit market. The economies of the more competitive Member States were able to absorb most of the shocks. The economic asymmetry of the eurozone both brought about severe consequences for less competitive Member States and structured the power relations that shaped the reaction to the crisis. The so-called 'eurozone crisis' was comprised of a banking crisis, a sovereign debt crisis and a severe economic crisis with grave political repercussions at both European and domestic levels. The seriousness and political impact of this manifold crisis was a crucial test for the stability of the European Economic and Monetary Union. Although the financial markets were ultimately stabilised, the depreciation of the euro turned out to be moderate and the disintegration of the eurozone was ultimately averted, continuing or even deepening European economic integration during this critical period came at a high price.

The primary means of limiting the damage caused by the crisis and upholding the principles of the Pact on Stability and Growth was a 'conditional solidarity approach'[1] in which eurozone Member States unable to refinance their public expenditures and deficits received credits under conditions of strict austerity. During the crisis, austerity became the dominant political paradigm.

[1] Hacker 2015: 133.

Austerity can be defined as 'voluntary deflation',[2] trimming public expenditure, cutting state budgets, decreasing wages and reducing debt in order to stimulate export-led growth. Taken together with the privatisation of state-run companies and the further deregulation of labour markets, this form of crisis management has primarily impinged upon Europe's social promises.[3] Built upon neoclassical economic paradigms and modelled around neoliberal policy prescriptions, the 'new governance of "packs and pacts"'[4] imposed on so-called debtor states has reduced the political leeway for market-correcting policies at the nation-state level. Consequentially, primary crisis instruments such as the Euro-Plus-Pact, the Six-Pack, the European Fiscal Compact or the Two-Pack have radicalised the structural asymmetry between 'negative' and 'positive' integration built into the European polity.[5] These instruments have not only reshaped European economic governance architecture, but also affected the national social systems of debtor states in a profound and unprecedented way. Throughout the crisis, the latter became 'adjustment variables'[6] for the sake of price stability, losing their capacity to cope with the serious rise in unemployment rates, pauperisation and emigration processes through redistributive policies.

Based on the apodictic discourses of 'no alternative' and 'exceptionalism',[7] trust in financial markets was held to be the main objective of crisis management, and austerity the only path to recovery. In turn, crisis management brought on a strengthening of technocratic and executive-biased institutions at the expense of legislative bodies.[8] Not only in crisis-hit countries have democratic politics been constrained by alleged necessities. Technocratic blockage of economic and budgetary issues has not only meant a reduction in the capacity of national social systems to absorb and compensate for need induced by the economic crisis but has also undermined the impact of elections and the idea of meaningful choices as part and parcel of democratic politics; power shifts in democratic elections may not result in alternative government policies.[9] Thus, the eurozone crisis has put the hidden conflict, inherent in democratic capitalism, on the table.[10] Indeed, during the crisis years, the paradigms of economic necessity, urgency, efficiency and reliable risk management openly clashed with the ideas of discretionary choice, majority-based decision-making, and the openness, volatilities and contingencies built into democratic processes of will-formation. In this tense arena, the capitalist end of the spectrum has prevailed as the dominant austerity paradigm, a fact that has created a series of practical and theoretical problems for democratic politics and representation. In turn, governing parties

[2] Blyth 2013: 2.
[3] See Arnaud and Wielgohs 2015.
[4] Arnaud and Wielgohs 2015: 8.
[5] Scharpf 1999: 49–50.
[6] Costamagna 2018: 163–64.
[7] Séville 2017: 271ff; White 2015.
[8] See Scicluna 2014.
[9] See also Schäfer 2013: 1.
[10] Streeck 2013: 262–64.

have struggled to reconcile the growing tension between governmental 'responsibility' towards the markets and democratic 'responsivity' towards citizens.[11] The result was the dealignment of party–voter bonds and a transformation of party systems with voters turning away from long-established parties and giving their vote to new political groupings, which aggregated frustrated demands and in some cases proposed regulatory alternatives to the status quo.[12] It is in this context that the eurozone crisis has turned into a multifaceted crisis, in which financial, economic, social and political aspects all intertwine and become part of a disintegrative 'self-dynamical process'.[13] During the crisis, a solution to one problem – for example, a series of austerity measures adopted to stabilise the credit market – triggered harmful side-effects in other social fields – for example, within the political system, where the policy frustrated voters and undermined the government's bases of support – with the latter spilling back into the original problem – in this case, into the credit market by decreasing political reliability and planning security.

The eurozone crisis did not yield a one-to-one relation between the severity of a financial crisis and the scope of political upheavals and power shifts.[14] But even if there is no empirical evidence for a causal determination, the crisis provided favourable opportunity structures for new political entrepreneurs and their counter-hegemonic political projects. It led to manifold politicisation processes, which challenged not only the measures and decisions themselves (policy), but also the underlying power asymmetries (politics) and the institutional settings struggling to adapt to a much more conflictual and polarised environment (polity). The result was increasingly polarised political spaces, with new salience for and mobilisation around European issues. This holds true at the national as well as the supranational (European) level. As to the latter, the crisis revealed a multiplicity of political conflicts in terms of the distribution of costs and benefits built into a highly interdependent transnational polity. Today, more than ten years after the eruption of the eurozone crisis, a new and perhaps even more devastating economic crisis following the COVID-19 pandemic is lurking. While the full extent and impact of this new crisis cannot yet be estimated, it is already apparent that the transnational conflicts surrounding solidarity in Europe have been fuelled by the COVID-19 pandemic. While strict austerity seems to become less convincing the longer the pandemic lasts, conditionality still seems to be a feature of mutual financial assistance in Europe. Other effects of the eurozone crisis also seem to persist.

As one of the major consequences of the eurozone crisis, European governance witnessed unprecedented politicisation.[15] While European integration

[11] Mair 2013: 141.
[12] Hutter et al 2016.
[13] See Bach 2014.
[14] See Panizza 2014: 4.
[15] See generally De Witte and Zürn 2012.

has largely been sheathed by 'permissive consensus' in the twentieth century, the eurozone crisis dismantled its underlying conflictive dimension and further boosted 'constraining dissensus', to complete Liesbeth Hooghe and Gary Marks's conceptual pair.[16] The relative sobriety of European integration was suddenly permeated by the political logic of antagonism and conflict. At least in some countries, the functional spillover rooted in interdependence and mutual vulnerability was hit by 'political spillbacks'.[17] European issues became a pivotal point of reference in the construction of political identities. They deepened the antagonistic rift between cosmopolitanism and ethnocommunitarism that has evolved as the primary fault-line of political spaces and party systems all over Europe.[18] It is yet to be seen how the increasing politicisation of European integration will play out in the upcoming economic crisis following the COVID-19 pandemic. In any event, insights into how the European public and political systems dealt with strongly technocratic, austerity-based crisis management during the eurozone crisis provide valuable information for the next crisis. This volume seeks to take stock of the new modes and the intensity of the judicial and political contestation of austerity during the eurozone crisis and ventures a preliminary forecast of what this can mean for the upcoming challenges of European integration in the post-pandemic era.

RESISTANCE TO AUSTERITY: THE VARIETIES OF CONTESTATION

During the eurozone crisis, party politics became an important forum for challenging dominant crisis management, as we have just seen. However, it was certainly not the only such forum. Austerity provoked multiple forms of contestation. The struggle against austerity included traditional activism strategies, such as human rights, but also new forms of collective action and collaborative resistance. It involved diverse actors using institutional as well as extra-institutional channels for contestation. Austerity policies were challenged by oppositional parties, trade unions, grass-roots activists, newly emerging protest movements, academics, intellectuals, experts, artists, the mass media and lawyers.

Some of these actors reject austerity altogether. For these critics, austerity is an inefficient or even counterproductive means of overcoming the economic crisis.[19] It sets in motion a downward spiral of economic decay, international tax competition, emigration, falling tax revenues and weakening social systems, and brings the social dimension of Europe to a 'dead end'.[20] Others have criticised the political means by which austerity has been pushed through

[16] Hooghe and Marks 2009.
[17] Vilpišauskas 2013.
[18] See especially Hutter et al 2016; Zürn and de Wilde 2016.
[19] See Blyth 2013.
[20] Lechevalier and Wielgohs 2015.

and have highlighted that crisis management has set a course for further technocratisation,[21] bypassing deliberation in parliaments and public spheres. They claim that the politics of austerity aggravates 'authoritarian'[22] tendencies toward 'collective bonapartism',[23] that it disproportionately prioritises market demand and undermines the bases of democratic politics.[24] Another group of actors contests particular austerity measures, such as payment and pension cuts, labour law reforms and privatisation. Rather than the overall logic of austerity politics, their interventions target the harmful consequences of concrete measures for vulnerable groups, such as children,[25] unemployed people[26] or disabled and chronically sick persons.[27]

Contesting austerity does not only vary according to the engaged actors and the scope of critique (general or concrete) but also regarding the sites and channels of contestation. Austerity has met resistance in courtrooms, in parliaments, in the streets, in mass media, at 'green tables', in collective bargaining systems as well as in intellectual discourse and academic conferences. Some of the channels that proved successful in the past, such as collective bargaining systems and parliamentary politics, have faced new constraints. Nevertheless, other, sometimes less explored, channels have taken centre stage. These channels of contestation are even more crucial since they allow for the articulation and handling of collective discontent. They absorb the individual experience of need. They proceduralise, symbolise and even temporarily transcend the conflictual nature of modern societies, countervailing their detrimental and anomic tendencies.

Each of these channels implies a certain mode of contestation. Whereas contestation before a court, for example, is necessarily bound by the language of law and based on the reinterpretative application of legal norms and the creation of doctrinal concepts and theories, parliamentary contestation is less constrained, though still following certain formal rules, as well as informal conventions and traditions. The same holds true for general strikes, demonstrations or acts of civil disobedience, which can be regarded as forms of political contestation that also follow certain normative structures. Even violent riots not only express political discontent, but at times follow normative structures. All of these channels vary as to their impact on political outcomes; while parliaments, courts and bargaining systems have a direct effect, mass strikes and intellectual discursive interventions only influence politics indirectly through mobilisation.

[21] See especially Scicluna 2014.
[22] Wilkinson 2013; Somek 2015.
[23] Brunkhorst 2014a.
[24] Streeck 2013.
[25] See Cantillon et al 2017.
[26] Focusing the developments of the Portuguese labour market, see Lopes and Ferreira do Amaral 2017.
[27] With a focus on Greece, see Sakellariou and Rotarou 2017.

These differentiations are merely analytical. Austerity politics and the struggle against it consist of the interplay of different institutional, social and political actors, representing and bundling grievances related to the crisis and the austerity paradigm. The picture gets more complicated, since perceptions and interpretations of the crisis and its causes are part of the conflicts themselves. In critical situations, we are confronted not only with various actors, scopes and (institutional and extra-institutional) channels of contestation but also with 'competing crises narratives', which 'shape perceptions of causality, responsibility, and interest', attribute blame through moralisation and promote certain 'strategies of economic recovery'[28] – at the expense of alternative narratives, their culprits and possible solutions.

Contestation of austerity varies. There is not one unitary counter-hegemonic struggle against austerity but a series of contestatory attempts sustained by politically heterogeneous actors. Yet, beyond their heterogeneity, the conflicts flaring up around the austerity regime show that the political strategy aimed at concealing the contingency of policy decision with the rhetoric of 'no alternative' ultimately fails beyond a certain point. It can be hegemonic, but it cannot fully transcend the conflictual nature of a pluralist society. At the same time, these conflicts are likely to end in disintegration and social anomie if powerful channels for contestation are lacking.

CONTESTATION AND INTEGRATION THROUGH LAW

This crisis-driven and conflict-prone environment brings law into a very specific position. For the proponents of austerity, law is an important means to enforce austerity and to adapt to a crisis-prone environment which demands planning security and calls for urgent action. The constitutionalisation of budgetary constraints imposed on Member States of the European Monetary Union is a rather particular case in point.[29] It aims to judicialise and thus reduce the leeway for future social and fiscal policies. It therefore comes as no surprise that budgetary constraints recently came under severe pressure in light of the devastating economic effects of the COVID-19 pandemic.[30] It is precisely because of the pandemic that the Spanish Parliament decided to set aside the budgetary constraints introduced during the eurozone crisis.[31] Yet, most crisis measures

[28] Panizza 2014: 7.

[29] For an overview of the constitutionalisation of the so-called golden rule, see Adams et al 2016.

[30] Goldman (2020: 1072) even argues that there is a new paradigm of 'integrative liberalism' emerging in the eurozone.

[31] On 20 October 2020, with 208 votes in favour, 138 abstentions and only one vote against, the Spanish Parliament gave permission to exceed ceilings of structural deficit and public debt volume. Art 135(4) of the Spanish Constitution empowers the Parliament to take this decision by absolute majority 'in the event of natural catastrophes, economic recession or situations of extraordinary emergency which are beyond the State's control and considerably harm the State's financial situation or its economic or social sustainability'.

are enacted in budgetary laws through regular parliamentary legislation – even if the latter follows the recommendations of international regimes without sufficient democratic legitimacy. For challengers of austerity, by contrast, law is an important means of contestation. During the crisis, opponents submitted austerity legislation to judicial bodies, arguing that the contested measure exceeded legality, violated fundamental rights and thereby had to be rejected.

Thus, labour, administrative and constitutional courts were frequently addressed to assess the legal validity of austerity policies particularly concerning minorities and vulnerable groups. These courts found themselves confronted by the increasing tension between adaptation and continuity. On the one hand, law must adapt to a crisis in which political decision-making bodies find themselves under extreme pressure to stave off the worst effects. On the other hand, law must uphold rights protection and preserve the principles of the constitutional order. The demands of increased flexibility and urgency as features of crisis politics must be reconciled with constitutional normativity and reliable legal protection. Crises point to the fact that the conflictual nature of the issue at stake is not transcended and resolved by the political process as embedded in parliamentary legislation, but rather translated into legal language by judicial contestation. Any reconciliation of crisis-induced demands for action with legal normativity is a precarious balancing act between the diverging logics of adaptation and maintenance.

In times of crisis, contestation does not necessarily stop with specific measures of crisis management. When institutions face serious critique and contestation because of their decision-making, politicisation spills over from the conflictual issue itself into the 'conflict frame',[32] ie from the policy level to the polity level. Conflicts regarding conflict frames, however, have a significant, destructive capacity as they can potentially question the normative basis of the polity. The crucial question, therefore, seems to be whether eurozone-crisis-induced conflicts could be channelled to tame their destructive capacity and eventually bring about its integrative potential. After a brief theoretical introduction to the idea of integration through constitution, the concrete institutional requirements and the practice of political and judicial actors during the eurozone crisis will be discussed in the following sections. These insights will also indicate institutional requirements for dealing with solidarity conflicts induced by the COVID-19 pandemic in the future.

Integration Through Constitution: The Balancing Act between Perceptible Limits and Interpretative Openness

Theoretical approaches to conflict teach us that social conflicts have the potential for destructive and disintegrative effects, while also allowing for the

[32] For the differentiation of conflicts and conflict frame and their interplay, see Fehmel 2014.

integration of communities.[33] Conflicts not only prove to be cohesive for the respective parties on each side of the conflict. They may also contribute to larger societal integration, provided that the mechanisms of conflict resolution allow for the (re)articulation of a normative framework on the basis of which similar conflicts in the future may be resolved.[34] Law, as the primary infrastructure for both conflict resolution and normative orientation in modern societies, seems to be a natural candidate to channel deep social conflicts in a way that brings about their integrative potential and reduces their destructive tendencies to a minimum.

This holds particularly true for constitutional law as constitutions aim to provide reliable normative orientation for political actors, guiding and limiting political action not only in times of seeming consensus, but also in times of crisis and open conflict. Constitutions serve as 'normative scripts'[35] that inform democratic will-formation in the future and recall the normative ambition of the constitution at the moment of its foundation.[36] The core challenge for constitutions in times of fundamental crises is to ensure both reliable normative continuity and sufficient flexibility to adapt normative concepts to new crisis-driven societal demands.[37] On the one hand, constitutions need to set perceptible limits in order to continue to be a relevant normative framework, but, on the other hand, major societal crises inevitably require adaptation of the meaning of constitutional norms to avoid their becoming museum pieces. It is through this tension between continuity and renovation that constitutions may bring about the integrative effects of major societal conflicts.

Theories on conflict-prone constitutionalism argue that constitutions may integrate individuals and social groups into political communities because they symbolise a shared normative vision and aspirations.[38] This representation is symbolic in that the normative authority of a constitution is not self-evident, but rather produced through communicative means. Constitutions become an instrument of normative orientation because social and political actors identify it with historically contingent normative meaning and aspirations. However, in modern, pluralistic societies consensus about the normative conception of a constitution, and the meaning of the aspirations expressed through it, is quite illusionary. Integration through constitution should not be misunderstood as the constitution attesting to a pre-existing homogenous collective,[39] nor can a consensual understanding of the constitution be expected to develop through deliberation. Rather, constitutional discourses are continuously conflictual as to

[33] Simmel 1992: 683–84.
[34] Weber 1922: 398. On the productive potential of conflicts, see also Fehmel 2014: 134.
[35] Brito Vieira and Carreira da Silva 2013: 898.
[36] Vorländer 2002: 19, 21.
[37] Contiades and Fotiadou (2017: 207) talk about resilient constitutions in this respect.
[38] Vorländer 2002: 18.
[39] Integrative approaches based on the idea of homogeneity can be found in Smend 1994: 136ff; Hesse 1990: nos 4, 6, 17. For criticism of such approaches, see Frankenberg 2002: 48–49.

the constitutional self-perception of a political community.[40] Their integrative effect does not result from a homogeneous perception of the meaning of constitutional norms, but from the conflictual practice of making the constitution meaningful for political action in each historical moment.

A constitution may integrate individuals and social groups into a political community through communicative practice in which they – or at least the majority – accept and refer to it as the relevant normative framework, thereby constituting the political community and ultimately themselves as its members. Although they may interpret concrete constitutional norms in different or even divergent ways, and may attribute irreconcilable meanings to the same constitutional principles, they nonetheless refer to the same document and thereby implicitly or explicitly accept it as the dominant normative framework of the political community.[41] Hence, a constitution can mean something different to different political actors, individuals and social groups. In this sense, a constitution is indiscriminate towards the various visions of the collective self-perception. Such an understanding fits well with Claude Lefort's idea of the empty place of power in modern democracies.[42] The constitution itself symbolises this empty place because its concrete meaning will never be fully fixed. Quite to the contrary, it remains open to reinterpretation and to differing, even diverging, meanings that are given to its provisions.

It is through its interpretative openness and its indiscriminate stance towards diverging interpretations that a constitution may serve as an integrative conflict frame. For it is only the equidistance of the constitution to the various interpretations and interpreters[43] that allows individuals to recognise each other as free and equal members of the political community.[44] As all political actors refer to the same constitutional document, even if they argue in favour of a divergent meaning, they not only accept the constitution as the relevant conflict frame, but also perceive themselves as part of one political community constituted under that foundational document. Only then does the constitution symbolise the political community in its intrinsic plurality. From this perspective, integration through constitution is always the result of constitutional practice and does not follow from the normativity of the constitution alone.

Of course, one may critically ask whether such an approach based on law and constitutional thinking is not too accepting of the idea of coherence or even rationality and thereby overlooks the inevitably irrational and conflictual potential of politics. If this were the case, integrative constitutional thinking would very likely produce new conflicts. The crucial point of integration through constitution as conceptualised here, however, is that each interpretation

[40] Vorländer 2002: 23.
[41] Brodocz 2002: 106.
[42] Lefort 2007: 560–61.
[43] Häberle 1979.
[44] Frankenberg 2002: 55, 60.

of a constitution is prima facie equally valid. There is no such thing as an irrational constitutional argument. Of course, courts themselves are constrained by the intersubjective acceptability of their arguments among their peers, just as academics must respect methodological standards. Likewise, the letter of a constitution sets certain limits even if the dominant meaning of core concepts undergoes significant changes over time. These constraints, therefore, do not impede the presentation of different meanings of a constitution in public and political discourse.

Against this theoretical backdrop, a constitution needs to fulfil two functions in times of crisis in order to enable the integrative potential of social conflicts. First, it needs to set meaningful limits and give perceptible guidance on how to react to a major societal crisis to be relevant to crisis discourse. Second, the constitution needs to be open to diverging interpretations of its provisions to avoid the impression that it takes sides or aims to block democratic will-formation. Any authoritative interpretation and application of a constitution – for instance, by a court – needs to take this into account. Judicial interpretation of the constitution can only provisionally set its meaning, as it may again be contested and reinterpreted in the future. Moreover, we must bear in mind that openness and indiscrimination are not features that a constitution, in and of itself, can possess. Rather, both elements are the result of a constitutional practice that involves all political and judicial actors. As they interpret the constitution in multiple, potentially diverging ways, they themselves expand the meaning of constitutional provisions.[45]

Institutional Conditions and Practice During the Eurozone Crisis: Courts as a Default Option for Contestation

For constitutions to perform an integrative function, some structural preconditions need to be met. First, a multiplicity of institutional and non-institutional interpreters should exist. Second, institutional fora for contesting and updating the meaning of the constitution should be as inclusive as possible. In light of these requirements, democratically elected parliaments lend themselves as the core forum for controversially debating crisis management and continuously updating constitutional meaning. One of their central features is the relatively indiscriminate inclusiveness towards all political actors, inasmuch as they organise themselves in a party.

However, as we have seen, parliamentary debate during the eurozone crisis was constrained in many ways. Decision-making power during the crisis shifted from parliaments to governments and technocratic bodies.[46] Certainly, in

[45] Brodocz 2002: 106.

[46] Ragone 2015: 537; Dawson and de Witte 2013: 817, 830ff; Curtin 2014: 1, 7ff; Menéndez 2014: 127, 132–33; Rodi 2015: 737, 740ff.

parliamentary democracies, parliaments are typically dominated by the governing majority. But, during the eurozone crisis, this general feature was exacerbated by the fact that members of parliaments from all political camps were themselves drawn into a 'rescue discourse' that prioritised swift decision-making, with the aim of regaining the trust of 'the markets', over the debate of potential alternatives to what executive actors had proposed.[47] These constraints often prevented an open-ended debate about how to react to the crisis.

Given the general and crisis-induced constraints of parliamentary will-formation, many political actors both from inside and outside parliament turned to courts to contest the result of executive and legislative decision-making either against the standard of ordinary legislation or, more prominently, against constitutional standards. In light of the theoretical assumptions in the previous section, the first question, as to the integrative potential of ensuing constitutional disputes, is how inclusive these judicial channels have been, procedurally speaking, in enabling political actors to make social and political conflicts visible at the constitutional level. Second, in order to contribute to the integrative function of constitutions, courts need to show enough respect for the open-endedness of parliamentary will-formation and maintain the constitution itself open to diverging interpretations in the future. This implies reflecting on current political measures in light of the constitution as well as on constitutional meaning in light of present challenges. Finally, in order to ensure that judicial discourse regarding the updating of constitutional meaning is not encapsulated in the courtroom, political actors – such as parties and non-governmental organisations – need to engage in constitutional discourse and take judicial decisions up in political discourse outside the courtroom. The idea of this volume is to shed light on how far constitutional orders in Europe, on both the national and the supranational level, have succeeded in channelling the major societal conflicts that emerged during the eurozone crisis.

TOWARDS A COMPREHENSIVE ANALYTICAL FRAMEWORK FOR CONTESTATION IN TIMES OF AUSTERITY

To assess the integrative potential of constitutional orders during the eurozone crisis, this volume takes stock of the variety of judicial and political contestations of crisis-induced austerity and assesses their impact on constitutional orders, thereby seeking to add specific knowledge regarding the ability of our core normative frameworks to limit executive crisis management and to provide orientation as to a way out of the crisis. By focusing explicitly on different modes of contestation, it also aims to better understand the agency of the variety of actors and the dynamics of contestation. The goal of this volume is, thus, to complement existing sociolegal scholarship on the eurozone crisis, which,

[47] Ragone 2015: 546; Puntscher-Riekmann and Wydra 2013: 565, 579.

coming from either a legal[48] or social science[49] background, has explored the phenomenon of austerity in broader, non-European contexts[50] and has sought to understand the structural shifts in power yielded by the dominant approaches to crisis management.[51]

Against this backdrop, this volume covers a plethora of different modes of contestation and pursues an understanding of how they relate to one another. It thereby transcends both the traditional social science focus on social movements[52] and the traditional legal focus on courts. Moreover, it puts contestation and confliction at the centre of analytical interest and seeks to understand how the interaction of different practices of contesting austerity has impacted the unique institutional and political setting of the European Union. Our research interest, however, is both more specific and more general than existing literature on the eurozone crisis. It is more specific in that we restrict ourselves to the analysis of distributional conflicts resulting from austerity measures, and more general in that we consider the close interdependence between national and supranational governmental structures and focus not only on judicial reactions, but also on social movements and the interplay of different institutional, social and political actors.

Conceptual Approaches to Politicisation and Depoliticisation During the Eurozone Crisis

The conceptual framework of integration through constitution as developed in this introductory chapter calls for deeper consideration of the inherent confliction of modern societies both on a theoretical as well as an institutional level. The contributions in Part I of this volume therefore deal with the complex relationship of contestation, politicisation and democracy from a theoretical, but empirically informed, perspective. These chapters show that even our analytical tools are often already shaped by hegemonic theoretical perceptions of conflicts and the possibility to tame them using liberal institutions.

In his contribution, Martin Nonhoff demonstrates how important it is to reflect upon the theoretical underpinnings of democratic institutions and to become aware of blind spots. In his view, the dominant liberal understanding of democratic institutions blinds us to contestation that questions the constituted order itself. The spillover effects from societal conflicts to conflicts regarding the conflict frame are thereby theoretically excluded and appear as an anomaly.

[48] Nolan 2014; Adams, Fabbrini and Larouche 2016; Schmidt, Esplugues and Arenas García 2016; Beukers, de Witte and Kilpatrick 2017.
[49] Worth 2013; Baines and McBride 2015; Bassel and Emejulu 2017; Fishwick and Conolly 2018.
[50] Kessler-Harris and Vaudagna 2018.
[51] Lechevalier and Wielgohs 2015; Schäfer and Streeck 2013.
[52] Della Porta and Matoni 2014; Della Porta 2015; Ancelovici, Dufour and Nez 2016.

Nonhoff suggests applying radical democracy approaches that take concrete political practice more seriously and on a more theoretical level allow to better grasp political protest in times of crises of representation.

Understanding the impact of increasing contestation during the eurozone crisis is, however, not only a matter of the theoretical foundations of our political orders, but also of their institutional order. The European Union has long been built on an institutional setting that seeks to avoid open conflict between Member States, instead looking to reach consensus. This has fundamentally changed during the eurozone crisis, as Miguel Azpitarte argues in his chapter. As political conflicts regarding austerity have been largely framed as conflicts between austere and spendthrift Member States, all of the sudden open conflict between 'rich' and 'poor', 'northern' and 'southern' Member States has taken centre stage. While core institutional principles, such as technical independence and national and supranational democracy, could be formally upheld, no institutional responses truly allow for an alternative to austerity. Rather, discourse surrounding alternatives has only recently begun to emerge in light of measures taken to mitigate the economic effects of the COVID-19 pandemic, as Azpitarte convincingly shows.

The long-term impact of eurozone crisis management on the responsiveness of the EU political system to severe contestation of hegemonic policies only becomes visible when analysing the new mode of governance applied during the crisis. The contribution of Nicole Scicluna affirms that EU institutions have actively sought to depoliticise crisis management by framing it as a technocratic or legalistic measure. They have, thereby, replaced the traditional technique of 'integration through law' with a new mode of 'integration through crisis' that leaves hardly any room to (re)politicise hegemonic austerity policy and significantly damages EU legitimacy.

The practice of depoliticisation and politicisation not only affects institutional architecture and decision-making processes, but also the construction of collective identities insomuch as the latter result from the ambivalent interplay of politicisation and depoliticisation. In particular, public media has played a crucial role here by conveying a certain understanding of transnational interdependence and solidarity in the eurozone, while, at the same time, depoliticising European governance by undermining the legitimacy of dissensus and contestation, as the chapter by Marius Hildebrand illustrates in an empirical analysis of articles taken from the leading German magazine *Focus* at the peak of the eurozone crisis. Such framing of austerity conflicts may lead to the creation of 'politicised non-citizens'[53] circumventing the discretionary character of democratic politics. At the height of the eurozone crisis, such a framing helped to push through harsh austerity measures by way of conditionalities.

[53] Greven 1999: 205.

Contestation of Austerity in Courts

As the eurozone crisis continued, austerity measures were increasingly contested using judicial means. Given the ambivalent role of the law both as a means to entrench austerity measures and as a means to contest them, the outcome and the impact of judicial review of austerity measures is of particular interest for assessing the integrative potential of constitutions in Europe. As the contributions in Part II of this volume show, analysis of supreme or constitutional courts reveals a wide variety of reactions to the contestation of crisis measures during the eurozone crisis, both amongst each other and over time. Sometimes, courts proved rather flexible in that they accepted a new constitutional meaning as proposed by the executive;[54] in other decisions, emergency-driven flexibility was combined with a reticent stance towards the contestation of crisis measures (the Portuguese Constitutional Court in the first cases on austerity,[55] the Greek Council of State in its first decision on the Memoranda of Understanding,[56] the Spanish Constitutional Court throughout the crisis[57]). In particular, the Court of Justice of the European Union (CJEU) was reluctant to accept cases challenging austerity measures, applying its procedural law in a rather restrictive way, initially closing the door to contestation of austerity measures at the European level as many of these cases were decided upon in unconventional legal settings.

This restrictive interpretation, however, was by no means determined by the Treaties or earlier case law, as Carlos Aymerich observes in his chapter. Rather, the CJEU could have made use of a more lenient approach to its admissibility criteria. The longer the crisis lasted, the more willing the CJEU became to accept cases contesting austerity measures, though not fully exhausting the possibilities for substantial review that the Treaties offer, as Aymerich argues. The CJEU not only missed the opportunity to strengthen its jurisprudence on social rights, but also to develop a constitutional framework that puts equality and solidarity on equal footing. Ana Bobić, therefore, proposes a new conceptual understanding of solidarity in the European Union that would mitigate the unequal opportunities of EU citizens to judicially contest austerity measures. The development of CJEU's case law during the eurozone crisis fits well with the development before national courts.

Over the course of the crisis, courts generally became more inclined to update and refine the established meaning of constitutional standards so as to both set meaningful limits to austerity and to provide orientation for future crisis management and a way 'back to normality' (the Greek Council of State and the Portuguese Constitutional Court both in the second period of their austerity jurisprudence[58]). In these constellations particularly, courts have frequently been accused of being activist and of encroaching upon the competences of legislative bodies.

[54] See CJEU, Case C-370/12 *Pringle v Ireland* [2012] ECR I-13.
[55] See the contribution by Violante in this volume.
[56] See the contributions by Lampropoulou and Kaidatzis in this volume.
[57] See the contribution by Ponce in this volume.
[58] See the contributions by Violante, Lampropoulou and Kaidatzis in this volume.

While this line of jurisprudence can arguably be necessary to regain constitutional orientation and help political actors – both in the executive and the legislative branches – to emancipate themselves from emergency logic and the 'no alternative'[59] rhetoric, it surely comes at the expense of epistemological difficulties and structural limits. Measures in reaction to a crisis entail prognostic elements and their assessment often requires economic knowledge that judges do not necessarily possess. At the same time, such decisions (eg budgetary decisions, monetary policy) are genuinely political in that they are based on ideological or theoretical assumptions and preferences that typically distinguish political from judicial decision-making. Hence, courts assessing austerity measures necessarily assume the risk of taking sides or supplanting political preferences and assessments with their own. While these risks are by no means a unique feature of austerity case law, but rather general challenges to constitutional adjudication, they may easily result in the politicisation of courts themselves, as a number of contributions in this volume vividly illustrate.

In Greece, the Council of State became heavily involved in political reasoning during the crisis, as Elisavet Lampropoulou points out in her contribution. Moreover, as Akritas Kaidatzis argues later in this volume, the Council of State invaded the sphere of the legislator, effectively taking sides under the pretext of preserving vested rights. Whereas the Greek Council of State was often attacked for being too activist, the Spanish Constitutional Court was accused of not developing enough constitutional guidelines during the crisis. In particular, the relevance of social rights, which feature prominently in the letter of the Spanish Constitution, has been continuously downplayed by said court, as Juli Ponce argues in his chapter. This has reinforced the politicisation of the court once more. If court decisions are no longer seen as impartial, but rather as one-sided or detrimental to the separation of power, this can easily lead to contestation of the authority and legitimacy of courts.[60]

While taking the struggle over austerity measures to courts is a useful strategy to bring the constitution back into play and to initiate collective awareness as to the fundamental impact of crisis management on the general normative aspirations of the political community, it is not an equally effective tool to remedy the harm done to the claimants, even less so to the most vulnerable groups of society.[61] Similarly, it would be too much of a stretch empirically to assume that crisis jurisprudence has fundamentally altered the politically dominant preference for austerity as the main remedy. After all, the content of most Memoranda of Understanding has remained unchanged with regard to substance. A case in point is how 'the institutions' – the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), formerly

[59] See, on these aspects, Séville 2017: 271ff; White 2015.

[60] On the cases of Spain and Greece, see again the contributions by Ponce, Lampropoulou and Kaidatzis in this volume.

[61] See, on this aspect in particular, the contribution by Kaidatzis in this volume.

known as 'the troika' – were ignored in the CJEU decision in *AGET-Iraklis*,[62] in which a centralised system of protection against redundancies was allowed under certain circumstances. 'The institutions' nevertheless insisted upon abandoning the Greek system of protection against redundancies altogether.[63] At the very least, however, court decisions setting limits and giving criteria for constitutional crisis management have led to greater sensitivity to social issues and the consequences of austerity policies.[64]

In the best-case scenario, court intervention in economic crises leads to a rearticulation and enforcement of boundaries set by the constitution and may help to re-establish the primacy of political will-formation over technocratic governance. In this sense, judicial contestation helps by strengthening the constitutional mindset that stresses meaningful normative limitations and aspirations against the prevailing managerial mindset of (ad hoc) problem solving.[65] To some extent, one can argue that the Portuguese Tribunal Constitucional contributed to the strengthening of such a constitutional mindset. Like its Spanish and Greek counterparts, the Portuguese Constitutional Court was confronted with a heated political debate following its stricter scrutiny of austerity measures in the second period of its crisis jurisprudence. Teresa Violante demonstrates in her contribution how the court took advantage of the politicisation of its role to strengthen its institutional power due, in particular, to the fact that a strong left-wing political coalition built a new constitutional narrative on the basis of the court's jurisprudence.

This illustrates that, if we want to better understand how constitutional contestation enables integration, we must stop thinking about judicial crisis reaction in isolation. Rather, we need to acknowledge that to unleash the integrative potential of social conflicts, constitutional jurisprudence should be used, interpreted and reappropriated by all players – not only by austerity crisis managers, but also by political actors involved in its contestation. The case of the Portuguese Constitutional Court is a good example of how a court needs to be heard in order to place the constitution centre stage in the normative struggle of crisis management. Nevertheless, it is also crucial to assess the ability of societal actors to contest austerity measures by other means.

Trade Unions and Social Movements as Agents of Contestation

As austerity policies also included significant liberalisation in the labour market, the role of trade unions becomes pivotal. Although unions were once a powerful

[62] Case C-201/15 *AGET-Iraklis* [2016] ECR I-972.

[63] On this problem already before the CJEU-decision was taken, see Antonaki 2017: 1513, 1533–34; Markakis 2017: 724, 735–36.

[64] Evidence for an increased sensibility on the European level in this respect is the proclamation of the European Pillar of Social Rights. On the potential impact of the EPSR, see the optimistic account of Garben 2018: 210, 212ff.

[65] On this distinction, see Koskenniemi 2006: 9, 31.

opponent to liberal market rules and a strong mobilising force, their relevance and impact has diminished throughout the continent over the last few decades. Part III of this volume traces this development well into the eurozone crisis and gives a panoramic view on the variety of forms and fora for contestation of austerity-induced labour law.

Trade unions' declining strength and waning ability to mobilise has been particularly visible in the United Kingdom. As K D Ewing demonstrates in his contribution, British trade unions have lost their status as powerful political agents due to the dominance of the austerity paradigm and the competitiveness-centred approach to the crisis. This has ultimately led to their transformation into 'service institutions' that provide services to their members rather than engaging in political struggle. Severe legal obstacles put in place during the eurozone crisis have prevented UK trade unions from taking a more significant political role. Their increasingly defensive position is not unique to the United Kingdom, but can also be observed, for instance, in Portugal and Spain.

Nevertheless, the eurozone crisis also provided new windows of opportunity for trade unions to regain influence and build new coalitions. If opposition against austerity measures gains sufficient ground in public opinion and if trade unions open themselves up to cooperation with other social movements, they may use moments of crisis for recovery, as Hermes Costa argues in his analysis of the performance of two leading Portuguese trade unions during the eurozone crisis. By joining with other social movements, trade unions in Portugal have successfully managed to regain agency. This, however, becomes increasingly difficult if governments take on criticism and withdraw the harshest measures, though still keeping with the general spirit of the austerity policy.

Trade unions may also use conflicts between levels of government to regain regulatory power or mitigate the effects of austerity policies. The case of Spanish trade unions illustrates this well. The decentralisation of bargaining to the company level over the last few years has weakened the position of trade unions in Spain significantly. However, these policies have been met with resistance at the regional government level (in particular in Catalonia and the Basque Country). As Julia López López and Sergio Canalda Criado argue in their chapter, trade unions have been able to exploit this institutional conflict between governmental levels to countervail the increasing decentralisation and regain agency at the regional level. Contestation of austerity can therefore lead to the building of new coalitions and the mitigation of the most severe institutional consequences of the liberalisation of industrial relations. Whether this actually helps to successfully contest the liberalisation of labour markets is, however, a different matter. Here, the Spanish case is rather disappointing as the increasing flexibilisation and precarisation has not been meet with significant opposition either at the political level or among the judiciary. Moreover, despite strong international labour law commitments, the Spanish Constitutional Court has barely applied these international labour standards in practice, thus confirming most austerity-driven measures in the field of labour law, as Consuelo Chacartegui and Xabier Arzoz show in their chapter.

Gaps and Exclusion in Contesting Austerity

Although the filing of lawsuits and the protest of austerity measures by trade unions and social movements have proven to be suitable tools for raising awareness about political alternatives to austerity and for reinforcing constitutional standards as guidelines as to how to overcome a crisis situation, they hardly ever cover all societal groups. Quite to the contrary, access to constitutional and supreme courts is frequently limited either to specific institutional actors or by de facto social and economic barriers, as the contributions in Part IV of this volume show. Akritas Kaidatzis argues that, in Greece, it has essentially been the middle class who has addressed the courts and succeeded in reverting austerity measures, such as pension cuts. This, however, has had detrimental effects on the very poorest segments of society because using financial resources to undo pension cuts means that fewer resources are available for the fight against extreme poverty. This not only fuels new conflicts between social groups, but also significantly curtails the legislator's power to take preference-oriented decisions as to who should be protected most during a severe economic crisis. Contestation through judicial review therefore carries its own risks and may, under certain conditions, aggravate the disintegrative potential of social conflicts rather than tame it.

Contestation through trade union activism and social movements may also have its drawbacks. Trade unions by definition only represent organised workers, and while social movements are theoretically more inclusive, representation requires a social group to have gained prior public attention. The dominant modes of contestation during the eurozone crisis, however, have created a series of unintended gaps and side-effects and have left behind a number of social groups who have not managed to build a strong lobby. The contribution of Nuria Pumar demonstrates how gender inequalities in professional training schemes have aggravated the unfortunate situation of so-called NEETs (people 'neither in education nor in employment or training') in Spain. As gender has hardly been a dominant category in contestation against austerity, these specific gender-driven disadvantages have largely remained out of sight. Only recent regulatory developments at the EU level promise further integration of this topic in political discourse.

Likewise, the position of young people has been rather neglected during the eurozone crisis. While the elderly clearly have a strong lobby, as Pau Marí-Klose and Francisco Javier Moreno-Fuentes argue in their chapter, children and, in particular, young people do not. The coverage of several welfare policies targeted at children and young people have been drastically cut during the eurozone crisis. Adding to the dominant narrative of 'deservingness' that has largely focused the elderly or – if at all – small children, youth have become the most defenceless group in terms of resistance to austerity. This case illustrates how contestation against austerity has not only left some societal groups behind, but also how austerity measures, in some policy areas, have achieved the status of de

facto uncontestable dogma due to either strong societal stereotypes or hegemonic narratives of deservingness and responsibility-sharing.

CONCLUSION

As we have seen, societal crises and the pressure of alleged necessities in emergency situations challenge the normativity of constitutions as stable frameworks of orientation. Although constitutions may, on the one hand, provide a powerful tool for channelling major societal conflicts, they may also become politicised and questioned themselves if they either prove ineffective in setting limits to executive crisis management or are perceived as taking sides. A crucial condition for a constitution to play an integrative role and allow for updating of its normative ambitions in a crisis is that it remain open and indiscriminate towards contradicting interpretations and that it provide inclusive interpretative avenues. Therefore, refreshing and sometimes readjusting constitutional meaning in major societal crises cannot be limited to judicial contestation. Rather, it is only the interplay between judicial contestation and political forms of contestation that render a constitution meaningful for societal reflection as to normative guidance in crisis management. Not only do judicial interpretations need to be taken up in political discourse, political forms of contestation also need to frame their claims as expressions of the constitutional framework in order to make the constitution the core reference point for the self-perception of a political community during a crisis.

These theoretical underpinnings help to better grasp the plethora of forms that the contestation of austerity measures took during the eurozone crisis and to assess their consequences for domestic and European constitutional law. At the same time, the results of the inquiries regarding the eurozone crisis also provide us with the necessary knowledge to better understand the constitutional dynamic lying ahead. The recent COVID-19 pandemic shockingly revealed the devastating consequences of a decade of austerity politics, particularly in the healthcare sector. Moreover, measures taken to fight the disease are likely to bring about a new and even more disastrous economic crisis in the European Union. Already the immediate crisis management by the European Commission and initial discussions regarding a European recovery fund have spurred debate as to transnational solidarity in Europe. Transnational solidarity here signifies that it is not only the modes of solidarity that we are dealing with, but that the shape of solidarity regimes within Member States is inextricably linked to the modes of solidarity between the states.[66] Both forms of solidarity can no longer be shaped and developed independently, thereby increasingly producing conflicts between societal groups that cut across the boundaries of the national welfare state.

[66] On the relevance of solidarity also in the reasoning of courts, see Bobić in this volume.

With transnational solidarity conflicts flaring up again, different policy preferences regarding the appropriate answer to major economic shocks have once more shown their divisive potential by splitting the European Union, yet again, into 'southern' and 'northern' blocks. The contributions in this volume demonstrate that genuine political decision-making and responsibility are clearly needed to provide regulatory answers that enjoy not only full democratic legitimacy, but also allow for maximum inclusiveness. Experience from the eurozone crisis, however, also reveals that increasing technocratisation and depoliticisation of crisis management are now deeply entrenched in EU governance and are, to some extent, even the result of the inertia and unwillingness of EU political institutions. It is, therefore, crucial that both the European Parliament and national parliaments take their task seriously.

Judicial review is likely to remain an important instrument for contestation given the enduring technocratisation of crisis governance. It seems, however, that constitutional and supreme courts throughout Europe have become more aware of their role. For future conflicts, it will be important that they remain procedurally inclusive, provide meaningful and perceptible limits to political crisis management and pay more attention to keeping the constitutional text open to divergent interpretations. As the contributions in this volume show, much will depend on how political and social actors outside public institutions, such as trade unions and social movements, interact with political decision-makers and deal with court decisions. After all, not only does the narrative of a crisis significantly shape the remedies, but the narrative of contestation also matters. It determines not only who – ie which social group – takes the spotlight, but also how the outcome of judicial or political intervention is interpreted. Building powerful narratives can, therefore, be a key tool for mutually reinforcing different modes of contestation and for establishing or renewing an alternative normative framework in which answers to contemporary challenges may be found. In this sense, we hope that insights as to the varying forms of contestation and their respective constitutional consequences, gained through great effort during the eurozone crisis, will also inform and support our ability to channel the perhaps even more brutal conflicts of the future.

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