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**Europe in Hard Times. A Conversation with
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The past few years have been a lot more challenging for the European Union because of the obstacles it had to face, which created quite a few worries. The British Referendum, which decided the exit of Great Britain from the European Union, and the incessant landings of refugees along the coasts of the Mediterranean Sea, along with the lasting economic crisis, seem to have given vent to a debate, polarizing the attention of many scholars about the future of the Union.

The economic crisis seems to have weakened the effectiveness of European democracies, enough to look at new reflections about the rights of the citizens, especially of the poor and economically marginalized ones. However, the economic side is not the only one the scholars are concerned about; also, the geopolitical aspect implies different problems and questions that are not merely conceptual. The Brexit vote in the UK seems to have strengthened a tendency towards the disintegration of the European Union. Furthermore, the economic rescue of those countries risking default included new regulations and management techniques that limited the political and economic discretionary power of the single states. The logic of solidarity expressed in the national Constitutions seems to have been sacrificed in favour of the free market, the preservation and the expansion of what had turned into the main priority of supranational lawmaking. In such a context, the dissatisfaction and the fears of the forgotten and the excluded are growing deeper.

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That being said – and here I combine several questions which have been raised – some aspect must be analysed further, and this is what I am about to do with the help of two distinguished professors, Dieter Grimm and Michael Wilkinson.

DIETER GRIMM**

1. It is appropriate to raise a preliminary question. If we ask what kind of legal system the United Nations is, nobody would hesitate to answer that it is an International Organization, as well no one would doubt that France is a State. However, uncertainties arise when the same question is referred to the European Union. Why is it so difficult to define it?

The EU is a unique and unprecedented institution. It differs from other international organizations in that it has a much denser organization, including all branches of government, and a much higher number of public powers. In addition, these powers are exercised permanently, not only on special occasions, and the legal acts of the EU are directly binding in the member states and supersede national law. The EU differs from a state in that it is not sovereign. Sovereignty means self-determination of a political entity with regard to its existence, its purpose, its legal foundation. The EU is not self-determined but hetero-determined. It owes its existence to an agreement by the member states, which can be revoked, and the member states determine its legal foundation by way of concluding a treaty under international law.

2. It seems that the monetary and fiscal system developed in Maastricht has been unprepared to face the economic crisis.

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It was assumed that each state would fulfil its own economic commitments, with no possibility, for the other States and the Union, to take on the debts of a state in crisis. How much has the existence of the Euro, a single currency without a state, influenced the growth of the national public debt?

When the Monetary Union was founded in 1992, it was a common understanding among economists that a monetary union of states of very different economic strength could function only if either economic policy was communalized as well or the strong states were willing to pay for the debts of the weaker states. Politicians ignored this warning. The financial crisis showed that the economic experts were right. The Monetary Union deprives the states of a number of fiscal instruments such as revaluation or devaluation of the currency. This contributed to the crisis.

3. Regarding the introduction of the Fiscal Compact, the crystallization of the *golden rule* of balanced budget, in the individual national systems, has evidently given preference to a specific economic theory: a neoliberal approach, which seems to have relegated politics to a second place in favour of technical or technocratic solutions, forbidding the implementation of interventionist policies by the states. How could one then reconcile the current institutional European framework with the democratic social state?

In my view, it is extremely difficult. The main problem is what I call the over-constitutionalisation of the EU, which, in turn, is a consequence of the two ground-breaking judgments of the ECJ of 1963 and 1964. The over-constitutionalisation has a de-politicizing and

democracy-weakening effect (“The more constitution, the less democracy” - see my book “The constitution of European Democracy”, OUP 2017). The solution would be to downgrade all provisions in the Treaties, which are not of a constitutional nature, to European secondary law and thus re-open them for decision-making in the democratic instead of the judicial process.

4. After the crisis of 2009-2010, the Union adopted an emergency legislation that goes far beyond the letter of the Treaties. We are confronted with macro-economic criteria – not always agreed-upon – imposed by the fear of a crisis. Governments prefer to act in association with other executives rather than dealing with fundamental questions through parliamentary debate. How could we guarantee European democracies from such a development that centers around decisions taken by executives?

The measures were taken in the intergovernmental method, not the community method. Hence, they operate outside the parliamentary powers, more precisely outside the powers of the European Parliament (the national parliaments have a say if the national constitutions involve them, like in Germany). If the crisis management were communalized the decisions would be subject to the process prescribed by the Treaties. However, one should not overestimate the effect since the European democracy is quite weak, in particular the societal substructure of a vibrant democracy is missing and the European elections are not truly europeanized.

5. If we had to identify a European constitutional moment, as we have sometimes lived it at a national level, we might

say that this never took place at a supranational level. Nevertheless, this conclusion might be too simple. Indeed, there are several theories about European constitutionalism that say we already have a European constitution. But how could this come to existence without a *constituent* process?

A constitutional moment may contribute to a constitution's acceptance and legitimacy. But it is not indispensable. The EU does not have a constitution. Its legal foundations are treaties concluded under international law. They fulfill a number of functions that constitutions fulfill in states. But there is no European constituent power that could produce a European constitution in the full sense. The foundational power for the EU lies in the hands of the member states (see answer 1). This means at the same time that transforming the Treaties into a constitution would require a transfer of the "constituent power" from the member states to the EU itself, and this, in turn, would mean to transform the EU into a state. The question is not whether this is possible or not, but whether it is desirable or not.

6. It has been more than 20 years since the Treaty of Maastricht was signed. It introduced a type of citizenship somehow at variance with the classic and stable conception of the institution. In principle, European citizenship conferred to all citizens of member states freedom of movement and residence throughout European territory. But, the recent economic crisis depleted the content of such supranational citizenship. Would it then be appropriate to rethink the relationship between citizenship and European integration?

I don't see a need to give up the European citizenship. What may be reconsidered is the entitlements that are combined with citizenship. Citizenship is not an all or nothing-concept.

7. We might perhaps take into consideration solving the lack of democratic participation of the *European citizens*. Recently, growing support has been in favour of a political debate that proposes a return to a full national sovereignty, somehow rejecting the model of the *ever-closer union*. Would reformation of the Treaties then be necessary?

Returning to full national sovereignty would mean dissolving the EU. However, one can retain the EU in its present form and nevertheless give up or modify the aim of an ever closer union. This would allow for more diversity within the EU and a lowering of the *acquis communautaire*. Whether or not this would require Treaty amendments depends on the concrete means. Some modifications might be obtained by a different interpretation of the Treaties, Others might require Treaty revisions.

MICHAEL WILKINSON***

1. It is appropriate to raise a preliminary question. If we ask what kind of legal system the United Nations is, nobody would hesitate to answer that it is an International Organization, as well no one would doubt that France is a State. However, uncertainties arise when the same question is referred to the European Union. Why is it so difficult to define it?

Definitions are problematic in any domain of the social sciences, and often obscure more than they reveal. To say that France is undoubtedly a state does not tell us much about what it is. Even if we were to define it, what kind of definition of the state tells us anything true and interesting about the state as it is evolving today as compared with the state of the industrial revolution, or the American state of the current moment, as opposed to the Italian state or the Egyptian state? To misquote Nietzsche, things with a history defy definition. States have a history (as does the modern European state), but this is to say they also have a geography, a politics, a legal order and so on. And the EU certainly is a historical entity, and, in view of a longer arc of political modernity, a very new one and one that is rapidly changing. That is not to say the EU is without precedent in every respect, and there is interesting work, for example, on the political form of the federation, which is revealing about the nature of the beast¹. Another particularly fruitful approach has been to view the Union not as an autonomous or

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¹ E.g. O. BEAUD, *Théorie de la Fédération*, PUF, Paris, 2007.

sui generis entity but as internal to the state and integral to the process of state transformation².

So rather than trying to define the EU, we should be trying to understand it, conceptualise it, and historicise it. This will require a different approach depending on what we are seeking to explain: its legal system, its political form, its authority, its material contradictions, the reasons for its dynamic, its crises and so on. Now, we also have to try to get an overview of it, which is capable of taking in more than one of these instances at the same time. Looking only at its legal system, for example, without considering its structure of political authority, will be partial, and likely misleading. This much should be easily understood. But more is required if we are to get to grips with what I would call its materiality or its material constitution: this demands inquiry into the relation between its form and its substance, including the inequalities of power (both within and between states), its institutional capacity, competing political objectives, and so on. So, the approach I take to try to understand the EU is grounded in constitutional theory³. This is partly because of my disciplinary background. But it also seems a productive line of enquiry because it is capable of integrating legal, political, and economic phenomena (understood broadly as our material social relations) as well as concepts with a critical bite such as power and domination and a normative edge such as sovereignty, democracy, and legality. This of course is an ambitious endeavour but it seems essential if we are to get close to understanding European integration in a meaningful way.

² E.g. C. BICKERTON, *European Integration: From Nation State to Member State*, OUP, Oxford, 2012.

³ For the building blocks, see M. GOLDONI and M.A. WILKINSON, *The Material Constitution*, in *Modern Law Review*, 2018, forthcoming.

2. It seems that the monetary and fiscal system developed in Maastricht has been unprepared to face the economic crisis. It was assumed that each state would fulfil its own economic commitments, with no possibility, for the other States and the Union, to take on the debts of a state in crisis. How much has the existence of the Euro, a single currency without a state, influenced the growth of the national public debt?

It is necessary to unpack this question a little. First, we can unsettle your assumptions. If correct, how do we explain the convergence in sovereign bond yields in the period preceding the financial crisis? It is hard to imagine this convergence reflected sound economic fundamentals across the euro area. The notion of the ‘irreversibility of the euro’ and the connection of the currency with the existential success or failure of the project of integration (‘if the Euro fails, Europe fails’) suggests that if push came to shove, there would be some kind of mutuality. This assumption, or the political complacency of the post-Maastricht era, may well have underpinned a system which facilitated the massive flow of money from the North to the South in the decade before the crisis.

Now, no doubt the Euro influenced the growth of national public as well as private debt throughout this period. But much of our understanding of the politics of this is speculative. More illustrative is what happened after, once the magnitude of the crisis and the absence of the political will necessary to tackle it became apparent. Although legally the Treaty prohibited so-called bailouts, and this made rescue problematic, it is in the response to the crisis that we can better understand the nature of the beast. Since there can no longer be any illusions about this (transforming a banking crisis into a sovereign debt crisis - the ‘greatest bait and switch in history’, as Mark Blyth

aply named it),⁴ and about the predominantly German political-economic interests and ideas undergirding it, what seems to be holding back any sort of progress is the lack of capacity or political imagination to leave the Euro area (aside from the, far from trivial, legal-technical difficulties). It is in this sense that the existence of the Euro proves to be a burden.

3. Regarding the introduction of the Fiscal Compact, the crystallization of the *golden rule* of balanced budget, in the individual national systems, has evidently given preference to a specific economic theory: a neoliberal approach, which seems to have relegated politics to a second place in favour of technical or technocratic solutions, forbidding the implementation of interventionist policies by the states. How could one then reconcile the current institutional European framework with the democratic social state?

In order to understand the current institutional framework, we have to consider not only the legal rulebook but also the ideology, social relations, material interests and geo-political dynamics underlying it. In short, there is no way to reconcile the current institutional framework with the democratic social state. I would go further and say even the pre-crisis and pre-Maastricht frameworks cut against it. So, the current trajectory represents a deepening rather than departure from the basic thrust of the postwar European settlement, which is far from democratic or social. This is a long and complex argument⁵. But

⁴ M. BLYTH, *Austerity: The History of a Dangerous Idea*, OUP, Oxford, 2013.

⁵ I make the argument here: M.A. WILKINSON, *Authoritarian Liberalism: The Conjecture Behind the Crisis*, in E. NANOPOULOS and F. VERGIS (eds.) *The Crisis*

let's take your association of neoliberalism with the substitution of technocracy for politics. In fact, this long predates the period that we think of as 'neoliberal'. It is a staple of ordoliberal thought that originates in the interwar period and of the practice of political elites in the immediate postwar period, particularly in the movement of Christian Democracy⁶. This is well documented, particularly in the domain of constitution-making by lawyer-experts in the early years of the European Economic Community. It is true that during the so-called *trentes glorieuses*, technocracy was compatible with the continued existence of social democratic policies. But I think that it is a mistake to view this as the achievement of a democratic social state. It was the product of a managed capitalism that still feared democracy enough to compromise with labour. Now, it is true that this series of compromises begins to unravel in the neoliberal period, and is ripped up in the Euro-crisis phase. This is only partly related to the project of integration. In the current moment, however, the European Union looms larger in terms of its ideological hegemony and the geopolitical and economic power it represents. But when Jean-Claude Juncker scandalised some by saying there could be no democratic vote against the Treaty he was only reiterating a longstanding orthodoxy of the European Union.

4. After the crisis of 2009-2010, the Union adopted an emergency legislation that goes far beyond the letter of the Treaties. We are confronted with macro-economic criteria – not always agreed-upon – imposed by the fear of a crisis.

Beyond the Crisis: The European Crisis as a Multi-Dimensional Systemic Failure of the EU, Cambridge University Press, Cambridge, forthcoming.

⁶ See e.g. JAN-WERNER MÜLLER, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, Yale University Press, New Haven and London, 2011.

Governments prefer to act in association with other executives rather than dealing with fundamental questions through parliamentary debate. How could we guarantee European democracies from such a development that centers around decisions taken by executives?

It seems to be a mistake, again, to focus only on the formal crisis response and avoid deeper analysis of the dynamics of integration. Regarding the reinforcement of executive power, this phenomenon was a significant part of the story long before the crisis began. It was certainly present in the abundant post-Maastricht literature on the 'democratic deficit'. The new inter-governmentalism that your question implicitly refers to has been detailed by Bickerton and others to capture a mutation in form across the last few decades⁷. And if we consider the flip-side of executive dominance, which is the decline or erosion of parliamentarism in Europe, we have to go back even further, at least to the discussion of legitimation crisis in the 1960's and 70's, to understand its causes (related to the point above about the postwar turn to technocracy and expertise and other strategies of depoliticisation). To reverse this process, and empower European democracies (not necessarily parliaments - and there is obviously an important distinction here) is not an easy thing to do. It would first require a widespread sense that something can be done democratically, that there is some alternative to the neoliberal status quo, and a sense of how it can be achieved. Since I argue that the status quo is more entrenched than meets the eye, I suspect only a deep and radical change in the constitutional imagination would be able to meet

⁷ See e.g. C. BICKERTON, D. HODSON, U. PUTTER, *New intergovernmentalism in the Post-Maastricht Era*, in *JCMS*, vol. 53, n. 4/2015, 703 – 722.

the challenge – but of course we cannot assume any rupture would be in a progressive direction.

5. If we had to identify a European constitutional moment, as we have sometimes lived it at a national level, we might say that this never took place at a supranational level. Nevertheless, this conclusion might be too simple. Indeed, there are several theories about European constitutionalism that say we already have a European constitution. But how could this come to existence without a *constituent* process?

This question raises the issue of the constituent power, which is a thorny one. It would be entirely coherent to argue that since, formally, constituent power is the power to make a constitution, this is exercised by elites, whether constitutional courts, executive branches of government, or parliamentary representatives. To paraphrase Hermann Heller, the prince as well as the people can exercise the constituent power, and it can reflect a progressive as much as a reactionary change. So, in the EU one might say that there is a constitution – there are constitutional doctrines developed by the European Court of Justice, in conjunction with domestic constitutional courts, without a democratic constituent process (‘constitutionalism without a constitution’, as Weiler once remarked)⁸. There has, in other words, been a legal process. But it is important to remember that the so-called ‘European constitution’ (in fact a constitutional treaty), which failed in popular referenda in France and

⁸ See J.H.H. WEILER, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999.

the Netherlands, was, at the time, considered a Treaty masquerading as a Constitution because there was not a European-wide referendum, even though it was the closest we have come to witnessing a democratic constituent process.

It could also be argued that there has been another ‘constitutional moment’ (in Bruce Ackerman’s sense), an informal process of change, whereby the basic norms and forms of integration have been altered, or mutated, into something qualitatively different as a result the Euro-crisis measures. I used to think that was the case but am increasingly coming to the view that the crisis response represents a doubling down on the pre-existing trajectory (which I call ‘authoritarian liberalism’) rather than a departure from it⁹. Increasingly, I suspect that a democratic constituent moment is more likely to occur in the manner of a rupture against the EU, as was nearly the case in Greece in 2015, and was clearly the case with the Brexit vote in 2016. Although this is still fluid and could lead in different directions, it is notable since Brexit that the UK is one of the few countries in Europe to have avoided the ‘Pasokification’ (annihilation) of its traditional Centre Left party, Jeremy Corbyn’s Labour bucking the trend with roughly 40% of the electorate and becoming the largest political party in Western Europe (coinciding with the evisceration of the Right-wing Eurosceptic UKIP). There are, to be sure, particular features of the UK’s constitutional landscape that contribute to this opening, other than Brexit alone. But, more generally, domestic democratic renewal is more likely than the up-scaling of the democratic constituent power urged, for example, by DiEM, in a manner far removed from local political and social movements. It is, finally, worth noting that constitutional change in a manner that is inconsistent with liberal democratic norms may be

⁹ See M. WILKINSON, above.

already under way in parts of Central and Eastern Europe, but without any formal rupture with the EU. Indeed, the fact that Viktor Orban, for example, doesn't want to leave the EU – and despite the contradictions with the values in Article 2 TEU in some way offers a new version of the Christian Europe of the founding period - makes it all the more problematic for the European Union to deal with.

6. It has been more than 20 years since the Treaty of Maastricht was signed. It introduced a type of citizenship somehow at variance with the classic and stable conception of the institution. In principle, European citizenship conferred to all citizens of member states freedom of movement and residence throughout European territory. But, the recent economic crisis depleted the content of such supranational citizenship. Would it then be appropriate to rethink the relationship between citizenship and European integration?

European citizenship has always been a weak form of citizenship in comparison to its domestic counterpart. It is derivative and supplementary as regards its political and legal status. The European Court of Justice, in a series of cases following Maastricht, substantially bolstered its effect, extending the principle of non-discrimination in order to guarantee European citizens rights beyond formal free movement of workers. At its high point, the Court declared it as destined to be the 'fundamental status' of citizens and gave it legal bite

even in the absence of cross-border movement¹⁰. And yet, although not without practical impact in particular cases, this was largely a rhetorical move and it has never been backed up with a parallel political or social movement. It remains economic, aspirational, and individualistic. There was also concern early on that it would erode principles of social justice by destabilising domestic welfare settlements, which could only be properly legitimate at the national level, because only there could one even claim the existence of the requisite political community. And the court in recent years has stood back from its earlier, more aggressive jurisprudence. The dilemma is that Europe has become increasingly politically salient without any corresponding channels of political contestation, other than the essentially negative or second order one at the national level. As others have pointed out, since it is difficult to contest the policy direction of the EU, the outlet of protest is to contest its very existence. On the other hand, this leads to lacuna of its own - the inability of EU citizens to vote in general elections and domestic referenda was highlighted in the Brexit referendum, where some three million affected citizens were deprived of the right to vote.

Looking at the broader picture, it is clear that the economic crisis has, first and foremost, depleted the material content of national citizenship. European-driven austerity has pushed a neoliberal agenda that has had a severe impact on welfare, public goods, and levels of inequality. Although it is true that in the UK, for example, this agenda was adopted through domestic politics, largely outside of EU pressure, those countries in the Eurozone face far greater constraints. But this,

¹⁰ For discussion, see e.g. A.J. MENENDEZ, *European Citizenship After Martina Sala and Baumbast: Has European Law Become More Humane but Less Social*, Arena Working Paper, n. 11/2009.

paradoxically, makes it more difficult to leave. And of particular current concern for the future of the EU is the increasing turn towards the election of Eurosceptic parties of the Right, obtaining governmental power in Hungary and Poland and now possibly in the core of Europe, in Italy, but unlike the UK, with the apparent intention to remain.

In terms of the project of European citizenship, this, for now, can only be described as a failure, a case of disconnect between political elites and the material reality of lived political experience. What should be reimagined is how to achieve what Greek philosopher Cornelius Castoriadis called ‘effective autonomy’ – this will involve a multitude of political strategies, local, national, and international, based on a corresponding understanding of where effective power lies¹¹.

7. We might perhaps take into consideration solving the lack of democratic participation of the *European citizens*. Recently, growing support has been in favour of a political debate that proposes a return to a full national sovereignty, somehow rejecting the model of the *ever-closer union*. Would reformation of the Treaties then be necessary?

‘Ever closer union’ has always been an ambiguous albeit powerful, evocative and symbolic motto. It did of course feature in the UK’s attempt to renegotiate with the EU in advance of the Brexit referendum, but I doubt that it plays much of a substantive role in the material trajectory of the Union as currently configured. Reform of the Treaties would certainly be required to deal with many of the political-

¹¹ See C. CASTORIADIS, *The Castoriadis Reader*. Trans. and Ed. D.A. CURTIS, Blackwell Publishing, New York, 1997.

economic problems facing the Union as a whole. But it is also important to be realistic about the chances of meaningful Treaty reform in a union of 28 (or 27) Member States, few of which has an agenda of pursuing a domestic democratic socialist project, let alone a pan-European one! Even Portugal, which supposedly bucks the trend, has done so with a government supported by a left bloc and a Communist Party that made clear, unlike Syriza, its willingness to rupture from the Euro regime¹². It is not hard to see why progressive reform of the Treaty is unlikely, and it should be clear that it is also not in everyone's interests, so as to be clear that this isn't just about getting the right kind of technocrat or more effective management in place, but will involve political and social struggle.

Which brings us to alternative options¹³. We shouldn't shy away from talking about national sovereignty, lest this ground is ceded entirely to Right-wing or centrist versions of nationalism - which it effectively has been, the Left too wary of its connotations, as if its problematic history could be resolved by pretending it didn't exist, instead of trying to underscore the democratic narrative intertwined with it. So-called 'Lexit' (Left-wing exit from the European Union) must become a much more serious strategy across the European Left. But it must be made clear that it is fundamentally about restoring democracy and tackling inequality, about class and anti-capitalist struggle, not nationalism or immigration per se (to simplify a complex relation, we can say that democracy is bottom-up empowerment, whereas nationalism is an

¹² See C. PRINCIPE, *Anti-Austerity and the Politics of Toleration in Portugal: A Way for the Radical Left to Develop a Transformative Project?*, in *Rosa-Luxembourg-Stiftung*, December 2017 (<https://www.rosalux.de/en/publication/id/38188/anti-austerity-and-the-politics-of-toleration-in-portugal/>).

¹³ See e.g. TH. FAZI AND B. MITCHELL, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World*, Pluto Press, London, 2017.

elite-driven project, making palatable the inequality that capitalism generates). And the point is not to be seduced by simplistic narratives of ‘taking back control’, as if, all of a sudden, the material constraints of a regional and global system of political economy would be lifted by leaving the EU. But if it must be made clear that the ‘Lexit’ option would face serious difficulties, so will the current path of stumbling through, if that hasn’t already been cut off by a resurgent Right, retaining the essential political economy of neoliberalism albeit with a illiberal ideological inflection with regard to national identity in general and immigration in particular¹⁴.

Some eight years ago, French philosopher Etienne Balibar described Europe as a ‘dead political project’¹⁵. Since then it has continued in an apparently Zombie-like state, neither moving forward, nor unravelling. But on closer examination we can begin to see the outline of what might properly be described as a hegemonic federation, a regional variant of authoritarian liberalism, which is monstrous enough, and is creating a variety of still more morbid symptoms.

¹⁴ For example, the turn to ‘authoritarian populism’ in Eastern Europe has been described as an inflection of, rather than rupture from, neoliberalism. See G. DALE and A. FABRY, *Neoliberalism in Eastern Europe and the Former Soviet Union*, in D. CAHILL, M. COOPER, M. KONINGS and D. PIMROSE (eds), *The Sage Handbook of Neoliberalism*, Sage Publications, Thousand Oaks (United States), 2018.

¹⁵ E. BALIBAR, *Europe: Final Crisis? Some Theses*, in *Theory and Event*, 13, n. 2/2010.