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Some Preliminaries

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# Politicising Europe's Justice Deficit: Some Preliminaries

Michael A. Wilkinson \*

**Abstract:** Normative political theory is divided on whether questions of distributive justice properly extend beyond the state. From a functionalist perspective, however, justice reflects a balance of material forces, subject to the logics of 'market' and 'social' justice, or 'capitalism' and 'democracy'. The justice 'deficit' is the imbalance or disequilibrium in these logics, an imbalance which the constitution of the post-war European state stabilises through their *constraint*. European integration, initially an important feature of this post-war settlement, now increasingly comes to be viewed as a significant threat to it. Whereas market logic and capital have been rapidly supra-nationalised, social-democratic logic has struggled to transcend the state, the EU, in particular, lacking the channels of contestation to legitimise redistribution. This leads to an imbalance in the forces of capitalism and democracy, a justice 'deficit', which destabilises national as well as supranational institutions, but also leads to questions being asked of what Germans owe Greeks, or vice versa. The justice deficit and reaction to it now appear to be threatening core features of state sovereignty. But it also suggests that the logic of the state – and the question: to whom are obligations owed? – must itself be subject to contestation; the dilemma of market and social justice, or capitalism and democracy, must be replaced with a trilemma, of market, social and democratic justice.

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Today owners of financial capital are working with international organisations and debt-ridden national states to insulate once and for all the economic economy from the moral economy of traditional social obligations and modern citizenship rights – and with greater prospect of success than ever in the four decades since the 1970’s. As democratic states are being turned into collection agencies on behalf of a new global haute finance, market justice is about to prevail over social justice, for a long if not an indefinite period of time. In the process those who have placed their confidence as citizens in capitalist democracy must concede precedence to those who have as investors placed their money on it.

[Wolfgang Streeck, ‘How to Study Contemporary Capitalism’ (2012) 53 *European Journal of Sociology* 15-16.]

## INTRODUCTION

Europe is awash with deficits. In addition to the various economic deficits engulfing the Eurozone (and elsewhere), the EU has been said to suffer a democratic deficit, a political deficit and a social deficit, each of which predates the financial and subsequent sovereign debt crises beginning in 2007.<sup>1</sup> None of this is new to the seasoned observer of the EU. Only now, however, is discussion turning to its ‘justice deficit’. Not merely pointing to the aggregate of these other deficits, accusation of a justice deficit suggests something more fundamentally rotten at the heart of the project. Justice, after all, is the sovereign virtue.<sup>2</sup>

Even if it is curious that the measurement of this virtue is now expressed in the language of economics – a justice ‘deficit’ – the very measure of the EU in terms of its justice, or rather, *injustice* – which is where the accusation points – suggests that a threshold has been crossed. After all, dominant strands in the analytical tradition of normative political theory have not infrequently resisted or outright rejected its applicability to domains beyond the nation-state – including the nascent EU polity – due to the absence there of the relevant political community.<sup>3</sup> Other commentators continue to *justify* the political, democratic and

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<sup>1</sup> On the democratic deficit, see S. Hix and A. Follesdal, ‘Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533; on the political deficit, see R. Dehousse, ‘Constitutional Reform in the EC’ in Hayward (ed.) *The Crisis of Representation in Europe* (Abingdon, Frank Cass, 1995); on the social deficit, see C. Joerges and F. Roedel ‘Informal Politics, Formalised Law and the Social Deficit of the European Union’ (2009) 1 *European Law Journal* 1-19.

<sup>2</sup> Analysis of Europe’s justice deficit could proceed by investigating the treatment of refugees and asylum seekers, allegations of complicity in torture and processes of extraordinary rendition, collusion in wars and occupation of dubious legality, mass surveillance programs and other threats to civil liberties. None of this will be dealt with here.

<sup>3</sup> See e.g. T. Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy and Public Affairs* 113.

social deficits beyond the state or to deny them normative significance in the first place.<sup>4</sup>

The purpose here is not to engage directly in debates over the correct theory of the reach and scope of justice claims, over the respective merits of libertarianism and egalitarianism or over the precise limits of the polity within which one may properly speak of justice or injustice. It is rather to consider the way that European integration is altering – whether by exposing, concealing or constraining – the *politics* of justice; in particular, the way integration is destabilising the national frame but not (yet) offering up an alternative platform for subjecting transnational justice claims to democratic contestation.

There is a reason for taking an explanatory rather than a normative approach. Whatever normative theory of social justice we happen to endorse (including its wholesale rejection),<sup>5</sup> the distribution of individual, collective and common goods will in practice, in any really existing society, be determined, at least in part, by political and social struggles for equality. This means not only over the economists' 'scarce resources' but also over public goods such as education and health and non-material goods such as solidarity, recognition and representation.<sup>6</sup> Since in democratic society ideological superiority will – in theory at least – always be up for grabs, arguments of principle in favour of or against redistribution, recognition and representation will merely be another factor in the fight over and for such goods.

Wolfgang Streeck has recently modelled struggles over distribution on the tension or 'dynamic disequilibrium' between capitalism and democracy, where they are understood not as organised competitions for the accumulation of money or votes but as representing two *principles* or *logics* of resource allocation – market justice and social justice. This enables us to conceptualise a justice deficit as the result of an imbalance in these two logics. And, in Streeck's account, imbalance will tend towards crisis, provoking a reaction of sorts to remedy the imbalance or at least prevent it from becoming critical for the society (section 1).<sup>7</sup>

But in what context is this relationship played out? The contest between market and social justice does not occur in a vacuum. Historically, it is the state that sets the framework for the negotiation and recalibration of the relationship between market and social justice, through institutional and ideological, coercive as well as consensual means (section 2).

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<sup>4</sup> See e.g. J. Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 *Journal of Common Market Studies* 903.

<sup>5</sup> On the rejection of patterned theories of justice, see R. Nozick, *Anarchy, State, Utopia* (New York, Basic Books, 1974).

<sup>6</sup> Only in part because in practice levels of inequality will depend not only on the basic structure of the state, and its reception to political and social struggles, but also on what has been called the principle of community, the extent to which questions of distributive justice arise for persons in their daily lives. See e.g. G. Cohen, 'Back to Socialist Basics' (1994) *New Left Review* 3.

<sup>7</sup> See W. Streeck, 'Taking Capitalism Seriously: Towards an Intuitionist Approach to Contemporary Political Economy' (2011) 9 *Socio-Economic Review* 137; W. Streeck, 'How to Study Contemporary Capitalism?' (2012) 53 *European Journal of Sociology* 1; W. Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *New Left Review* 5; W. Streeck, 'Markets and Peoples' (2012) 73 *New Left Review* 63.

In recent historical perspective, the political constitution of the post-war state has been conceived as aiming to prevent or forestall crisis by *constraining* the logics of democracy and of capitalism.<sup>8</sup> On this account, the process of European integration is a significant feature of the post-war settlement – designed to prevent majoritarian democratic excesses but without surrendering the state’s ability to constrain the logic of capitalism (section 3).<sup>9</sup>

But European integration is now exposing the fragility and dysfunctionality of this settlement. With the apparent boundlessness of markets and extension of market logic, but with democracy struggling to transcend state borders, the structural asymmetry in Europe is now proving *destructive*, not only of the supranational constitution but also of national constitutional settlements. We can conceptualise the EU’s ‘justice deficit’ as representing this imbalance in favour of capitalism and market justice, where, in the absence of a European democratic or social movement, any rebalancing is to come from the executive power of the member states, or rather from certain among them (section 4).

And yet, whatever the prospects of supra- or trans- national democracy, Europe’s justice deficit is de-politicised with market logic presented in naturalistic terms, making it appear necessary and inevitable, an expression of inescapable pressures to modernise and gain competitiveness. It will be argued that pre-requisite to dealing with the justice deficit is its politicisation. But this may come at a high cost in terms of the stability and unity of the project of integration, and is (therefore) unlikely to come from the top-down, from the political and economic elites who have driven the project since its inception (section 5).

I will suggest in the concluding section (6), drawing on the recent work of Nancy Fraser, that ‘the state’ – understood as the framing of relevant boundaries – must itself be politicised, subject to contestation and struggles of recognition and representation. The challenge, it is argued, is to substitute Streeck’s dilemma for a trilemma, of market justice, social justice and democratic justice. The purpose of this paper is not to proffer institutional responses to this trilemma, nor even to specify its social and political conditions; it is to explore some preliminaries for a fuller understanding of the politics of Europe’s justice deficit.

## 1. CONCEPTUALISING A JUSTICE DEFICIT

A justice deficit can be explained functionally as the result of an imbalance between the logic and forces of capitalism on the one hand and those of

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<sup>8</sup> I draw here on the work of Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (Yale University Press, 2011).

<sup>9</sup> Chris Bickerton’s argument that the post-war logic fundamentally changes in the neo-liberal period beginning in the 1970’s will also be drawn upon, see C. Bickerton, *European Integration: From Nation-States to Member States* (Oxford, OUP, 2012).

democracy on the other. A *social* justice deficit would then exist where the former gains an upper hand over the latter. A compelling account of this imbalance – or ‘dynamic disequilibrium’ – between democracy and capitalism has recently been presented by Wolfgang Streeck.<sup>10</sup> He argues that the relationship between capitalism and democracy will tend towards a critical imbalance as capital tends to dominate, and to such an extent that democracy itself will be threatened, as revealed most dramatically in Europe since the recent financial crises.

In Streeck’s account, capitalism and democracy, or ‘markets’ and ‘peoples’ represent rivaling constituencies, with contrasting ‘logics of action’, which we can label as ‘market justice’ and ‘social justice’ respectively.<sup>11</sup> In terms of societal values, these suggest two different principles of resource allocation: one operating according to marginal productivity, and merit on a ‘free play of market forces’ and the other based on social need, and ‘certified by the collective choices of democratic politics’.<sup>12</sup> This reflects a clash in the respective ethical demands of the two major forces in the modern democratic capitalist state, rather than merely a functional clash of interests between money and votes. If the market imposes a marginal ethics (by advancing the prospect and expectation of rational egoism and competitive accumulation without limits), democratic society promises a maximal ethics (by holding out the prospect of and need for solidarity, collaboration and concern for human well-being).<sup>13</sup>

By rejecting the standard contrast between an amoral market system and moral obligations of solidarity, persons and political communities are in this account instead torn between obligations on either side of the justice balance, obligations that although distinct are not incommensurable. On the one hand, market imperatives present individuals and communities with the duty to adopt and adjust to economic change, to accumulate wealth, to be entrepreneurial in spirit, competitive, and, above all, efficient. On the other hand, democracy calls forth solidarity, the collective obligation to protect weaker individuals from the fallout of capitalist excesses and to prevent or attenuate the ‘creative destruction’ that is central to liberal progress or ‘modernisation’; debate then occurs ‘over the moral limits, if any, to the pursuit of economic advantage’<sup>14</sup> where that pursuit and its limits are themselves understood as normative forces.

The paradox is that the market ethos of a capitalist political economy is, for reasons of systemic survival, parasitic upon the moral obligations imposed by social democratic norms.<sup>15</sup> By tempering and correcting capitalist excess, these prevent disequilibrium from turning into outright societal collapse.

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<sup>10</sup> See note 7 above.

<sup>11</sup> A. Schäfer and W. Streeck ‘Introduction’ in A. Schäfer and W. Streeck (eds.), *Politics in the Age of Austerity* (Cambridge, Polity, 2013) 19.

<sup>12</sup> Streeck, ‘Crisis of Democratic Capitalism’, note 7 above, 7.

<sup>13</sup> Streeck, ‘Taking Capitalism Seriously’, note 7 above, 137.

<sup>14</sup> Streeck, ‘How to Study Contemporary Capitalism?’, note 7 above, 23.

<sup>15</sup> Id. But, Streeck notes, ‘only in a functionalist worldview’ is the success of efforts at taming capitalist excesses actually ‘guaranteed’, note 7 above, 156.

There is therefore an interdependence rather than straightforward conflict between the two principles of resource allocation. But this is not a happy or stable relationship. As Streeck concludes, capitalism not only necessitates a continual demand for moral and social support in order for the system to stay afloat, but it is also always undermining that very same support because of its own internal logic. Because of this pathological tendency, capitalism is an inherently ‘self-destructive social formation’.<sup>16</sup> Democratic capitalism is then conceivable ‘as a political economy in permanent disequilibrium’, pushed forward inexorably by continuous innovation on the part of capital and ‘pervasive political conflict over the relationship between social and economic justice’. Disequilibrium will periodically lead to crisis, not least because of the inability of capital to think beyond its own short-term interests; even the environmental conditions of our survival are reducible to a mere ‘externality’.

With this relationship in view, capitalism is systematically reconfigured, because profits and losses – as well as resultant gulfs in socio-economic equality among persons – are exposed as non-naturalistic, ‘the outcome of a struggle between conflicting concepts of and claims to justice [...]’ rather than between an irrational moral code and an amoral but rational objective economic law.<sup>17</sup> Rational and public choice philosophy then appear in a new light; rather than purely scientific, positivistic theories that remain above the political fray, they can be seen as performative and ideological, imposing a dominant market logic and narrow view of rationality on neighbouring disciplines and occluding alternative values. Self-interest is the only proper mode of rationality, and, eventually, ‘greed is good’. This subordination of discourses of legitimacy to a particular economic rationality is achieved through ‘naturalising’ the logic of the market. The technocratic dictates of economics then come to speak ‘with the pathos of natural law’, controlling and even colonising the political debates over justice and inequality.<sup>18</sup> Economics is the method; the aim is the transformation of the soul.<sup>19</sup>

## 2. HISTORICISING A JUSTICE DEFICIT: THE ROLE OF THE STATE

Although recent political philosophy in the social contract tradition investigates justice primarily as a normative question, seeking for a resolution or reflective

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<sup>16</sup> Streeck, ‘How to Study Contemporary Capitalism?’, note 7 above, 25.

<sup>17</sup> Streeck, ‘How to Study Contemporary Capitalism?’, note 7 above, 16.

<sup>18</sup> G. Teubner, *Constitutional Fragments* (Oxford, OUP, 2012) 32-34. For Teubner, the neo-natural law conception of economic rationality is nothing less than ‘grotesque’ because it substitutes causal explanation for normative legitimacy, bypasses political debate, and overlooks the potential instability of a constitution based on science that has to resolve controversies which cannot be scientifically resolved.

<sup>19</sup> To misquote Margaret Thatcher.

equilibrium, Streeck's analysis exposes it as an irresolvable, practical, political problem. This becomes even more apparent when attention is given to the unit within which the question of justice is properly raised, which is frequently, but often implicitly, assumed to be a state.<sup>20</sup> And the standard reason given, if one is given at all, is that only within the state does the requisite unity of coercion and community exist, generating and sustaining the capacity to provide for basic collective goods.<sup>21</sup> Although in some apparent degree of tension with each other, coercion and community are presented as complementary rather than in competition.

Both are paradigmatic attributes of statehood. First, the capacity to dominate, the monopoly on legitimate violence, which in the Weberian tradition is the defining feature of the modern state and in liberal political theory key to understanding why its authority requires normative justification, is, at least formally, an exclusively sovereign power. To this must be added, second, the sense of being part of a collective endeavour or 'community of fate', necessary for sustaining a functioning public sphere and legitimising any non-trivial redistribution of benefits and burdens. This too is elusive once we move beyond the state's borders.

Only by combining these features in a contiguous manner, when a state not merely coerces but does so 'in our name' or for our collective benefit, are obligations to remedy injustice and duties of redistribution incurred, above the minimum moral duties of humanitarian intervention that might exist outside the state. We ought to be concerned with equality because, and when, we can and do value the reciprocity that it entails. The unity of coercion and community is therefore central to the modern state's capacity to negotiate the tension between capitalism and democracy, market and social justice. Since beyond the state there is no (or at most – as in the case of the EU – only relatively ineffective) political apparatus that unites coercion and community, there can be no egalitarian duties of redistribution.<sup>22</sup>

But from a political perspective, this tension is not resolved in an original position or final determination of where the balance of justice rests; rather the state provides a more or less stable framework within which the ceaseless competition and interaction of interests and ideas might be negotiated relatively peacefully.<sup>23</sup> In practice the state manages the tension between capitalism and

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<sup>20</sup> In Rawls's later work, exploring the international basic order, the relevant unit is explicitly a 'people'; see J. Rawls, *Law of Peoples* (Cambridge MA, Harvard University Press, 1999).

<sup>21</sup> In Nagel's 'political conception' it is coercion and co-authorship that combine as the relevant characteristics giving rise to obligations of justice within a state, against the cosmopolitan account, see note 3 above. Nagel's position is not of course unchallenged, see e.g. A. Julius, 'Nagel's Atlas' (2006) *Philosophy and Public Affairs* 176 - 192. And there are those in the Rawlsian tradition who have argued for a more cosmopolitan or global basic structure.

<sup>22</sup> We may, however, have moral duties to create such authoritative institutions (and mechanisms of redistribution) in the first place.

<sup>23</sup> I do not claim that the state is merely a neutral arbiter between these forces; it is undoubtedly more complex than that. Beyond some suggestive comments, this will not be the place to go into detail into the history and concept of the state and its role in the balance of justice.



democracy in order to contain or forestall any crisis that might result from the imbalance in their relationship.

From this perspective, coercion and community are also instrumental to the maintenance of stability *in spite of*, and even to legitimise existing and continuing, *inequality*. The idea of a community of fate, binding rulers and ruled, not only facilitates redistribution but also softens, if not eradicates, class conflict. It pacifies struggles over justice by appealing to a sense of communal identity, which is not merely left to grow spontaneously or organically, even if it could be nurtured in that way. This is periodically revived as a political project – however insincerely – with communitarian mottos such as that currently in vogue, ‘we are all in it together’, and ironically by those who only recently urged that ‘there is no such thing as society’. From a functional perspective, recall, resources of solidarity are a necessary complement to a market economy, to maintain or re-establish order either by rebalancing the justice disequilibrium or encouraging the population to tolerate, accept or at least acquiesce in the inequalities that the market permits, and even depends upon. In the absence of such resources of solidarity, politics will require more coercive mechanisms.

There is, to be sure, nothing new in the perception that the tense and even antagonistic relationship between market and social justice, capitalism and democracy, has a significant political dimension. In an earlier period, Karl Polanyi argued that the destruction caused by the dis-embedding of the market in a liberal capitalist society would lead to a reaction, or ‘second movement’, of re-embedding through social policies and the re-regulation of markets.<sup>24</sup> It is not only that as a matter of proper sociological understanding, the economy is embedded in society rather than the other way round; it is also that politically, since democracy poses a threat to the logic and interests of capital, the ruling class will attempt to curtail the economic goals of the majority, and by political and even constitutional means if necessary.<sup>25</sup> The perception that capitalism and the individualist ethos of classical liberalism pose a serious threat to the robust ‘public’ on which democracy itself depends, as John Dewey argued in a different historical and political context, has a similarly vintage pedigree. Dewey of course thought that democracy must permeate all of society, becoming industrial and not merely civil and political; in order to allay the corrupting effects of capitalism and the inequalities it results in, a vibrant public is essential.<sup>26</sup>

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<sup>24</sup> K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, 2001).

<sup>25</sup> ‘Inside and outside England, from Macaulay to Mises, from Spencer to Sumner,’ wrote Karl Polanyi in *The Great Transformation*, first published in 1944, ‘there was not a militant liberal who did not express his conviction that popular democracy was a danger to capitalism’. Ibid 234.

<sup>26</sup> See e.g. J. Dewey, *The Public and Its Problems* (New York, Henry Holt, 1927). By focusing on the potential of science and experimentation, Dewey arguably neglected the politics necessary to contain capitalism, see M. Wilkinson, ‘Dewey’s Democracy without Politics: The Failures of Liberalism and Frustrations of Experimentalism’ (2012) *Contemporary Pragmatism* 117 - 142.

And the framing of the justice deficit is political in a second and more basic sense that calls into question any statist assumptions. Although the 'Keynesian-Westphalian' co-evolution of a monopoly of legitimate violence and a community of fate is difficult to envisage beyond the state, it would be an error to think and act as if the state were therefore self-contained or insulated for the purposes of negotiating the tension between capitalism and democracy, market and social justice. Coercion, it must be remembered, can be and frequently is exercised *between* states and even through international institutions that lie over and above states. Both capitalism and democracy are linked to projects of state- and institution-building, both at home and abroad, most obviously in the guise of foreign and imperial adventures, however civilising their missions in the eyes of those who pursued them. Neither coercion nor community, in other words, is autonomous and independent from political action, internally or in external relations.

The framework of assumptions that implied a hermetically sealed national container was of course long ago shattered historically by exposing the links between political freedom, capital accumulation, and imperialism. As Arendt powerfully argues in 'The Origins of Totalitarianism', political emancipation of the bourgeoisie in the late nineteenth century was prompted by their desire for economic expansion, which in turn necessitated expanding the territorial logics of power beyond the nation-state.<sup>27</sup> In addition, the assumed role of the bourgeois state and state-sponsored ideology in protecting the security of the individual – determining its openness or closure towards immigration, fixing policies of asylum and assimilation, formulating citizenship tests as well as labour and welfare policies towards foreigners – demonstrates that the internal framework within which democracy and capital 'slug it out' is not fixed in regard to the outside world, but contingent on politics and political action.

Restricting the domain of justice to relations within the state has the effect of legitimising the 'de facto' inequality that exists between states, as if any inequality beyond the state was apolitical, natural, or beyond the domain of human action. Just as it is a mistake, in other words, to see the state only as an enabler of social justice or as an impartial arbitrator of the balance between markets and peoples, it is also a mistake to view it as an arbitrary but necessarily neutralised pivot of the balance of justice.

All of which is to say that the logics of market and social justice do not exist in a vacuum, and so to Streeck's account must be added the political context of their interaction. As a glance at the historical record confirms, to the longevity of the functional disequilibrium must be added its evolution through distinct stages of economic and political development, including, particularly in the second half of the twentieth century in which the project of European integration is born,

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<sup>27</sup> H. Arendt, *The Origins of Totalitarianism* (Harcourt, (1951) 1968) 123 - 157. More recently it has also been argued that it is predominantly Western imperialism and intrusion into the Arab world, rather than religious fundamentalism that is the root cause of the alienation felt by Muslims in Europe today. See P. Anderson, 'Portents of Eurabia' *The National*, 2009.

significant institutional and ideological elements which constrain the logics of capitalism and democracy, and in a way that is not captured by the bare categories of coercion and community.

### 3. HISTORICISING A JUSTICE DEFICIT: THE ROLE OF IDEOLOGY

In the postwar period in Western Europe, as classical economic models based on notions of unfettered competition and free markets are replaced with those of late, or ‘organised’, capitalism based on intervention with market mechanisms, tolerance of oligopoly and the generation and sustenance of large public sectors, government intervention in recalibrating the relationship between democracy and capitalism comes to be taken for granted. This continues to be the case to this day, even if rhetorically and opportunistically dismissed or derided by the cheerleaders of neo-liberalism, which does not hesitate to embrace the authoritarian state apparatus if necessary. Whether to ensure the smooth functioning of a market economy, assuage the financial markets, or on more radical accounts, continue the process of accumulation through dispossession, ensuring the continuation of the inequalities on which capitalism depends, governmental interference on both sides of the justice balance is ubiquitous.<sup>28</sup>

But not only is the economy increasingly and explicitly entangled with institutions of political democracy and state bureaucracy; struggles over market and social justice also assume more complex political and ideological forms, in part due to the reaction to the series of crises that engulfed Europe and elsewhere in the first half of the twentieth century, in the forms of fascism and Soviet communism. Social, political and economic struggles in the post-war State are tempered by what has been called ‘constrained democracy’ and ‘constrained capitalism’, collective commitments – often of a constitutional nature - which encourage or impose limits on the democratic and capitalist logics, in order for the society to maintain stability and avoid the extremism that potentially occurs as society relapses – or appears to be in the process of relapsing – into crisis.<sup>29</sup>

First, in Jan-Werner Müller’s narrative of post-war democracy in Europe, distrust of popular sovereignty and even parliamentary sovereignty was ubiquitous in the aftermath of World War II, with the goal of constraining democratic majorities uppermost in the minds of political and bureaucratic elites, to prevent backsliding into the authoritarian extremism that devastated Europe in the first

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<sup>28</sup> See further, M. Wilkinson, ‘The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union’ (2013) *German Law Journal* 527 - 560.

<sup>29</sup> See further, exploring the history in various national contexts, J-W. Müller, *Contesting Democracy* (Yale University Press, 2011).

half of the twentieth century.<sup>30</sup> This distrust of politics, and fear of both Right and Left was manifested in concrete national institutions, with liberal constitutionalism and strong constitutional courts in particular developing across the region, most notably in the Federal Republic of Germany, but complemented with supranational institutions in the EU (or EEC as it then was) and the ECHR.<sup>31</sup> Not only economically, but also institutionally, this was the hour of the 'European rescue of the nation-state', in Alan Milward's well-known narrative.<sup>32</sup>

But second, there was also, from the beginning of the post-war period until at least the mid-1970's and the dawn of the neo-liberal revolution, a Keynesian consensus on the need to protect society from the excesses of capitalism and market justice.<sup>33</sup> As well as laying the foundations of the social security or 'welfare state', this involved a bargain or social contract between capital and labour, a post-war 'class compromise', obtained by a set of mediating institutions, which attempted to organise capitalism in such a way that would unite state and society.<sup>34</sup> This strengthening of the bonds between state and society, and between business and labour, was complemented by a commitment to the collective pursuit of broader social goals, including economic development, technical innovation, full employment, regional income distribution, and national security.<sup>35</sup> 'Socialism', according to Müller, 'had been implemented from above to constrain capitalism' or as Tony Judt puts it, to save it.<sup>36</sup>

Politically, it was the 'moment of Christian Democracy' and other elite-led and state-sponsored ideologies that pushed for the attainment and entrenchment of stability by curtailing political extremism and avoiding economic imbalances and excessive levels of socio-economic inequality.<sup>37</sup> Constitutional and international commitments, internally and within the architecture of European legal regimes, increasingly 'take things off the table' for democratic contestation, at least if one wants to play within the rules. And of course the two dimensions of constraint – ideological and institutional – act most effectively in tandem in alleviating the perceived dangers of democratic and capitalist excesses.

The project of European integration was considered a significant means to achieve this, internalising transnational externalities and softening the potential for

<sup>30</sup> Ibid. And on the recent Euro crisis, see J-W. Müller, 'Beyond Militant Democracy?' 44 (2012) *New Left Review* 239.

<sup>31</sup> Müller: 'European integration – this is crucial – was part and parcel of the new 'constitutionalist ethos', with its inbuilt distrust of popular sovereignty and the delegation of tasks to agencies that remained under the close supervision of national governments', *ibid.*

<sup>32</sup> A. Milward, *The European Rescue of the Nation-State* (London, Routledge, 1992).

<sup>33</sup> This was, Tony Judt, notes, an 'unusually broad consensus' on this, T. Judt, *Ill Fares the Land* (Penguin, 2010) 47.

<sup>34</sup> See C. Bickerton, *European Integration: From Nation-States to Member-States* (Oxford University Press, 2012).

<sup>35</sup> Ibid, 107.

<sup>36</sup> Ibid, 47.

<sup>37</sup> Müller describes Christian Democracy as 'the most important ideological innovation of the post-war period, and one of the most significant of the European twentieth century as a whole', in *Contesting Democracy*, above, note 29, at 130. The UK does not fit so neatly in this pattern; attaining relative stability and socio-economic equality in the postwar period but without constraining parliamentary supremacy.

sovereign violence. Along with the economic benefits thought to accrue from reducing obstacles to trade through the creation of a common market, this was the most convincing rationale for the state's voluntary 'containment' and surrender of 'limited sovereign rights'.<sup>38</sup>

European integration initially was considered a key aspect of the postwar constitutional settlement, a central feature in the narrative of the survival of the democratic sovereign state through constraining its dominant logics. Unlikely to transcend the nation-state or represent its evolution into a federal state writ large, because of the difficulty – let alone questionable desirability – of up-scaling the required combination of coercion and community, the EU would instead be an additional bulwark against the dangers of political and economic excesses.

The process was complemented from its early stages by a strong and proactive juridical project to create a transnational rule of law, based on subjective, and predominantly economic, rights. A glance at the subject matter of the foundational and even revolutionary case of *Costa v. ENEL* – often lost in the mist of the supremacy doctrine it gave birth to – is revealing: an Italian law that sought to nationalise electricity production and distribution, based on the disputed payment of a 1, 925 Italian lire bill.<sup>39</sup>

This ideological and institutional neutering of democratic and market logics was complemented by a 'golden age' of sustained economic growth, which facilitated the (temporary) satisfaction of the demands of both capital and labour, dramatically reducing levels of socio-economic inequality.<sup>40</sup> The precise contribution made by European integration to the peace and prosperity of the 'Trente Glorieuses' is contested. What is not contested is that from the mid-70's, coinciding with an end to easy economic growth, the 'long downturn', equilibrium between capitalism and democracy has become more difficult to maintain.<sup>41</sup>

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<sup>38</sup> For recent accounts of the argument from containment within EU free movement law and citizenship, see F. De Witte, 'Sex, Drugs & EU Law: The Recognition of Ethical and Moral Diversity in Europe' (2013, forthcoming) 50 *Common Market Law Review* and 'Union Citizenship and Constrained Democracy' in A.P. Van der Mei and M. De Visser (eds) *Twenty Years Treaty on European Union: Reflections from Maastricht* (Intersentia, 2013).

<sup>39</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585. The case was spearheaded by two members of the Italian bar actively pursuing the project of creating a European rule of law; see e.g. A. Vauchez, 'The Transnational Politics of Judicialisation. Van Gend en Loos and the Making of EU Polity' (2010) *European Law Journal* 1-28.

<sup>40</sup> According to Bickerton: 'The decades of prosperity were tied to a particular model of both state and society and a specific understanding of the relationship between politics and economics', above note 34, at 93.

<sup>41</sup> Financially, one solution was thought to be allowing high inflation, which can be seen as 'an expression of anomie in a society which, for structural reasons, cannot agree on common criteria of social justice;' a second then increasing credit: first government debt, then private credit, in both cases 'pulling future resources into present consumption'. If this accumulation of private and public debt foregrounds the most recent financial crisis, one current response in the UK at least is, it appears, more of the same: another debt-fuelled and state-assisted housing bubble. See Streeck, 'Crises of Democratic Capitalism', above n 7, 23. So-called 'privatised Keynesianism', which is advanced as the immediate cause if not the ultimate root of the current economic crisis, is suggested by Streeck as a concession to the democratic pressures exerted by the people. This highlights an ambiguity in Streeck's account. Historically 'privatised Keynesianism' was not, arguably, a response to democratic pressure but to capitalist pressure. For one

The forces of market justice have, in this period of neo-liberal ascendancy, come out firmly on top, creating a further critical imbalance in the relation between capitalism and democracy. The current period of crisis demonstrates once again how the state is called on dramatically to intervene, but, in doing so with austerity for the poor and primarily in order to regain international competitiveness under pressures of market justice, is doing so with scant regard for socio-economic equality and considerations of distributive or social justice. What kind of further democratic response, if any, this might lead to, remains to be seen.

In the brief aftermath of the collapse of the Soviet Union, the idea of the co-originality and co-evolution of democracy and capitalism took hold of our collective imagination, a marriage that signified, on some accounts, no less than the end of history itself.<sup>42</sup> Contributing to this eschatological sentiment in Europe was a narrative that paired wider integration with waves of democratisation and market liberalisation, as first Spain, Portugal and Greece emerge from political dictatorship to join the common market and later the countries of the former Soviet bloc apply for membership of the EU. And the 'Copenhagen criteria' for membership of the EU in the 1990's made the pairing of democracy, the rule of law and human rights with a functioning market economy both formal and explicit conditions.<sup>43</sup>

Any sense of having reached the plateau of liberal democratic constitutionalism was not to last long, however, as, well before the recent financial crisis, the EU began to face a more inward looking constitutional crisis of legitimacy, expressed both in popular rejection of the Constitutional Treaty and in juridical resistance to the constitutional jurisprudence of the European Court of Justice.<sup>44</sup> Both global and European narratives of a comfortable reconciliation of democracy and capitalism have now, in any case, been exposed if not completely exploded. Not least the role of the state has increasingly resumed centre stage, even if neo-liberalism has proved surprisingly ideologically resilient, as well as economically and politically powerful.<sup>45</sup>

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thing, it occurred most intensely in places where the working class was being weakened – with the neo-liberal war on the unions waged by Reagan and Thatcher. Does Streeck's argument imply that without democratic pressures, capitalism would exist in a natural equilibrium? That markets would be self-correcting if left to themselves, unperturbed by democratic pressure? For a different account of the golden age and subsequent 'long downturn' see R. Brenner, *The Economics of Global Turbulence* (London, Verso, 2005), emphasising the significance of the global unevenness and competition between national capitalisms.

<sup>42</sup> The reference of course is to Francis Fukuyama, *The End of History and the Last Man*. For more nuanced accounts, rejecting both the internal relation and internal tension between capitalism and democracy, see e.g. P. Wagner, *The Crisis of Democratic Capitalism: Reflections on Political and Economic Modernity in Europe*, LEQS Paper 44/2011 and before the recent crisis, A. Touraine, *What is Democracy?* (Westview Press, 1997).

<sup>43</sup> Laid down at the June 1993 European Council meeting in Copenhagen.

<sup>44</sup> The strongest resistance in terms of influence has been from the German Constitutional Court. See e.g. D. Grimm, 'Defending Sovereign Statehood Against Transforming the Union into a State' (2009) *European Constitutional Law Review* 353.

<sup>45</sup> See C. Crouch, *The Strange Non-Death of Neo-Liberalism* (London, Polity Press, 2011).

Obituaries for an end of history thesis already deconsecrated by its own author are unnecessary, which is not to say we have definitively moved beyond its paradigms. But however resilient the modern liberal state, the crises and contradictions of democratic capitalism have undoubtedly escaped its confines, becoming Europeanised and globalised, most apparently in the latest economic crises in the Eurozone, which of course were set in motion by events on the other side of the Atlantic.<sup>46</sup> So too the site of struggle between market justice and social justice has now shifted, at least partially, beyond the state, being played out between electorates and financial institutions, governments and international organisations.

#### 4. FRAMING THE EU'S SOCIAL JUSTICE DEFICIT

Through the evolution of political and legal institutions in the EU, both coercive and consensual aspects of political rule would emerge beyond the state, even if only in incipient form. But this gradual outsourcing of political authority and of constitutional checks and balances, rather than protecting the Keynesian-Westphalian 'nation-state', now threatens rather to transform it, into a post-Westphalian 'member state'.<sup>47</sup>

There are many aspects to the erosion of the national political frame and the demise of its social-democratic Keynesian compromise; the precise role that the EU has played in this narrative is far from straightforward. And to be sure, our specific judgment may vary depending on which of the varieties of capitalism from amongst the various Member States we take as our exemplar.<sup>48</sup> Even on a single state, the effects of European integration may vary over time, as laws and institutions at national and supranational level themselves evolve.

The purpose of Streeck's account was, however, to suggest that, despite the possibility and actuality of regional variation in terms of the precise political construction of and response to the capitalist economy, there is a singular logic and ethic of capitalism and market justice, which not only can be abstracted from its varieties, but is integral to its institutional and ideational form.

And, however persuasive the varieties of capitalism literature in comparative context, there is a strong current of opinion, in states as varied in their political and constitutional economies as the UK and Germany,<sup>49</sup> which holds that

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<sup>46</sup> For an account of this single globalised crisis of financial capitalism see e.g. M. Aglietta, 'European Vortex' (2012) 75 *New Left Review* 15.

<sup>47</sup> See Bickerton, note 34 above, chapter 2. I borrow the term Keynesian-Westphalian from Nancy Fraser.

<sup>48</sup> See e.g. P. Hall and D. Soskice (eds.) *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001).

<sup>49</sup> In the UK context, see D. Nicol, *The Constitutional Protection of Capitalism* (Oxford, Hart, 2010); in the German context see F. Scharpf, 'The Asymmetry of European Integration: or Why Europe Can't Have a Social Market Economy' (2010) 8 *Socio-Economic Review* 211.

European integration has been a significant factor in the erosion and even overall demise of the 'Keynesian-Westphalian' compromise due to the structural asymmetries that the EU creates and maintains.<sup>50</sup>

Institutions and practices of social justice, both public and private, at the national level, if not found disproportionate in their effects on trade, may become a burden of comparative disadvantage due to the effects of competition and free movement norms. The juridification of the default rules of free circulation of the factors of production in the EU, combined with the political difficulties of re-regulation or even Treaty amendment (in areas where the EU lacks competence), particularly in light of the consensus politics with which it operates, favours and even entrenches a firmly, if not unambiguously, neo-liberalising trajectory.<sup>51</sup>

Idiosyncratic features of supranational integration not only combine to prevent cogent political-democratic response to the social dysfunctionality of the market but also deter the creation of possibilities for such response: a central bank unable to buy government debt and bound to the single objective of ensuring price stability, the relative lack of labour mobility due to cultural and linguistic heterogeneity, unprecedented wage repression in the largest economic bloc, an eclectic mix of economic development and bureaucracies in different phases of modernisation, and above all the (real or perceived) absence of a supranational community of fate.<sup>52</sup>

The structural asymmetries imposed by Europe's peculiar brand of federalism tips any balance of justice overwhelmingly in favour of market and against social justice, pushing the dynamic disequilibrium of democratic capitalism to tipping point. There are simply insufficient channels of contestation to generate the social and political legitimacy for any Polanyian double movement at the supranational level that might correct these biases and imbalances.

Although there is a powerful and growing body of academic opinion to say that political union must now ultimately ensue, either to deal with the German question or to resolve the Greek problem,<sup>53</sup> the EU emphatically has not itself followed in the footsteps of the statist model or developed a fully-fledged transnational social contract. Arenas of distributional conflict are becoming ever more remote from domestic politics, but the imperative to upscale the democratic political framework for the negotiation and re-negotiation of justice claims has been resisted.<sup>54</sup> The political response to redistributive questions in Europe – to

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<sup>50</sup> It is Fritz Scharpf, above all, who has conceptualised and described in institutional detail the social and economic imbalances caused by Europe's constitutional asymmetry. See recently, on the role of European law in this process, F. Scharpf, 'The Asymmetry of European Integration: or Why Europe Can't Have a Social Market Economy' (2010) 8 *Socio-Economic Review* 211. And for a broader examination of this asymmetry in the terms of constitutional theory, see N. Walker, 'The Place of European Law', in J. Weiler and G. DeBurca (eds) *The Worlds of European Constitutionalism* (Cambridge, CUP, 2011).

<sup>51</sup> See Scharpf's exhaustive analysis of the asymmetry between market and social rules, law and politics in the EU, *ibid.*

<sup>52</sup> See P. Anderson, 'After the Event' (2012) 73 *New Left Review* 49 – 61.

<sup>53</sup> See e.g. U. Beck, *A German Europe* (Cambridge, Polity Press, 2013).

<sup>54</sup> Streeck, 'Crises of Democratic Capitalism', n 7 above, 27.



questions of social justice not only within but also between states – has occurred, if at all, *sotto voce*, behind the backs of the electorates.

If taking market logic and market justice beyond the state has been celebrated in Europe in an era of ordo- and then neo-liberalism, taking democracy and social justice beyond the state has proven theoretically and practically problematic, to say the least.<sup>55</sup> Democracy, it is only too clear, has not become fully supra-nationalised in response to the freedom of capital and other factors of production to roam beyond borders. And if the democratic deficit in the EU was already notorious, it has now become critical, with constraints placed on the core of national democratic sovereignty in the ESM and ‘Fiscal Compact’.<sup>56</sup>

And yet, on the dominant ordo-liberal account, the asymmetry of European integration was entirely justified: the supposed virtues of inter-state competition and the perceived economic benefits of the free circulation of goods, workers, and capital better attained without political interference.<sup>57</sup> Founded on ‘guarantees of economic freedom’, the EU’s legitimacy - according to a leading figure in the ordo-liberal school - is quite ‘independent’ of its ‘democratic and socio-political future’.<sup>58</sup> From a market liberal perspective, moreover, the absence of a ‘demos’ represented a solution rather than a problem: our reduction to ‘mere’ individuals, ‘consumers’ or ‘entrepreneurs’, is motivated by perfect economic rationality.

An economic constitution celebrates the absence of a ‘demos’ because political redistribution of wealth, whether unjustified or merely irrational, is less likely to be feasible in the absence of community or social solidarity, a ‘we-feeling’ amongst the members of a polity.<sup>59</sup> Ordo-liberalism, in tune with its neo-liberal cousin, ‘has more confidence in the economic constitution than in democracy’.<sup>60</sup> This divorce of political authority from control over economic resources leaves market justice to triumph over its rival.

But it is now becoming clear that not only would the EU fail to develop the political capacity to deal with perceived injustice across its borders, it would also impede the existing states from reconciling their own tensions and the writing and re-negotiation of their own social contracts:

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<sup>55</sup> For an account of the political traits of neo-liberalism, see D. Harvey, *A Brief History of Neo-Liberalism* (Oxford: Oxford University Press, 2007).

<sup>56</sup> ‘Treaty Establishing the European Stability Mechanism’ (ESM), July 11, 2011, O.J. (L 91) and the ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ (‘Fiscal Compact’) <http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=en>, last accessed on 16 January 2014. For analysis, see e.g. M. Dawson and F. De Witte, ‘Constitutional Balance in the EU after the Euro-Crisis’ (2013) 76 *Modern Law Review* 817.

<sup>57</sup> The ordo-liberal account of the EU is presented by Ernst-Joachim Mestmacker, see e.g. ‘European Touchstones of Dominion and Law’ (2007) *The Ordo Yearbook of Economic and Social Order* 4. On regulatory competition, see A. Sayde, ‘One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law’, (2011) *Cambridge Yearbook of European Legal Studies*, 365-413.

<sup>58</sup> Mestmacker, *ibid*, 7.

<sup>59</sup> Hayek favoured a form of interstate federalism to assuage the perceived threat of redistribution. For discussion, see A. Somek, ‘The Social Question in a Transnational Context’, LEQS Papers, 39/2011.

<sup>60</sup> J. Habermas, *The Crisis of the European Union: A Response* (London, Polity Press, 2012) 129.

the construction of Europe as an economic and monetary union, without corresponding political and fiscal integration, disabled the protective capacities of member-states without creating broader, European-wide equivalents to take up the slack. Today, the evidence is all around us: Greece is reduced to a protectorate, Spain, Portugal and Ireland are ruled from Brussels, and central bankers set limits to domestic policy even in Germany and France. The upshot is that the project of social protection can no longer be envisioned in the national frame.<sup>61</sup>

Regarding the national level, there is a strong case to say that whatever was left of the Nordic model of welfare capitalism after the neo-liberal onslaught of the late 1990's has been further undermined by the rulings of the court of justice in its recent case-law on the free movement of establishment and freedom to provide services.<sup>62</sup> Far from the European rescue of the nation-state, the EU now seems to be in the process of contributing to its transformation.

The sense of a serious *imbalance* between capitalism and democracy, caused or exacerbated at least in part by Europe's constitutional asymmetry, is becoming increasingly pervasive. Jürgen Habermas, an otherwise avid if not stubborn supporter of the project of integration, now notes that 'political management', 'uncoupled' from the democratic pressures and dynamics 'of a mobilised political public sphere and civil society', is deprived of the motivational strength to resist capitalism, unable 'to contain and redirect' its 'profit-oriented imperatives' into 'socially compatible channels'. As result, governing authorities increasingly 'yield' to the neo-liberal pattern of politics:

A technocracy without democratic roots would not have the motivation to accord sufficient weight to the demands of the electorate for a just distribution of income and property, for status security, public services, and collective goods when these conflicted with the systemic demands for competitiveness and economic growth.<sup>63</sup>

Market discipline had been supposed to perform the function of stabilising economic systems, to compensate for the merely soft, symbolic sanctions against fiscal excess in the Stability and Growth Pact (violated almost immediately by France and Germany)<sup>64</sup> and for the 'no bail-out' rule enshrined in the Treaty (Article 125 TFEU) that prevented, in theory, transnational sharing of the burdens

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<sup>61</sup> N. Fraser, 'Triple Movement' (2013) *New Left Review* 126.

<sup>62</sup> For recent analysis, see e.g. E. Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (2013) 14 *German Law Journal* 2006.

<sup>63</sup> J. Habermas, 'Democracy, Solidarity and the European Crisis', lecture delivered at Leuven, in April 2013, a full transcript is accessible at: <http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis>, last accessed on 16 January 2014.

<sup>64</sup> A violation side-stepped by the Court of Justice in Case C-27/04 *Commission v Council*.

of any economic crisis, until the Court rules otherwise in its *Pringle* decision.<sup>65</sup> But soft measures are now to be substituted for the harder rules contained in the ESM and ‘Fiscal Compact’.<sup>66</sup> Although, strictly speaking, these take place outside the EU *acquis*, they threaten the constitutional balance of the European Union, by calling into question the most cherished principles of integration – democracy, Member State equality, the balance of powers, the ‘community method’, and even respect for the rule of law itself.<sup>67</sup>

If the EU was destined to become a civilised, ‘non-imperial Empire’,<sup>68</sup> then the financial crisis and responses to it are threatening to tear away this thin veneer of respectability. Disorder, in the present critical conjuncture has spilled over from the economic to the political domain, upsetting not only the ‘system integration’, but also the ‘social integration’ of contemporary societies, as the life-world becomes increasingly precarious, with austerity programs, in the southern Europe in particular, wrecking lives.

Not only is political democracy in practice suspended in debtor countries, but the economic constitution itself is bypassed, because of the imperatives of the financial markets and the concerns of creditor states.<sup>69</sup> And where that is the case, as, arguably, it already is in countries like Greece, Ireland and Portugal, ‘street riots and popular insurrection may be the last remaining mode of political expression for those devoid of market power’.<sup>70</sup> This tampering with an already precarious equilibrium threatens to explode – if not already detonated – into outright revolt in Europe. If there was already a democratic deficit in Europe, there is now a crisis of democracy.

And because of the power – real or imagined – of the troika and even the credit rating agencies themselves, citizens increasingly perceive their governments, ‘not as *their* agents, but as those of other states or of international organisations’,<sup>71</sup> who utilise the messages sent by the financial markets to control and cajole if not to coerce their populations. The financial markets, we are increasingly informed, will simply not tolerate certain political outcomes, or more often, political indecision, giving new lease of life to the sentiment that ‘time is money’.<sup>72</sup> And international organisations, such as the IMF and the European Union, are ‘immeasurably more insulated from electoral pressure than was the traditional

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<sup>65</sup> Case C-370/12, *Pringle v Ireland*. For analysis, see A. Menendez, ‘The Existential Crisis of the European Union’ (2013) *German Law Journal* 453 - 526.

<sup>66</sup> Note 51 above.

<sup>67</sup> See M. Dawson and F. De Witte, above note 56.

<sup>68</sup> In the words of Jose Manuel Barroso, see <http://www.brusselsjournal.com/node/2244>, last accessed on 16 January 2014.

<sup>69</sup> See C. Joerges, ‘Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation’, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179595#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595#), last accessed on 16 January 2014.

<sup>70</sup> Streeck, ‘Crises of Democratic Capitalism’, n 7 above, 28.

<sup>71</sup> Streeck, ‘Crises of Democratic Capitalism’, n 7 above, 26.

<sup>72</sup> Accredited of course by Max Weber to Benjamin Franklin.

nation-state'.<sup>73</sup> Whereas in the post-war constitutional settlement this insulation (or democratic constraint) was considered one of the EU's supposed strengths – and in the *ordo-liberal* account, a real virtue – it is now increasingly being perceived as a disruptive and dangerous vice.

As a result, extreme nationalist political parties prosper, with promises, however unrealistic, to regain the harnesses of power and smash the mythical power of fate, personified now by faceless bureaucrats and troika representatives. The need to 're-embed' the market economy has been exploited by reactionary movements of right-wing populism rather than transnational movements of pan-European solidarity. The promise of regaining collective autonomy, which only appears institutionally possible at the national level, however illusory in practice, is a far from unattractive platform from which to gain popular electoral support.<sup>74</sup>

In the wake of the financial crisis, we have witnessed the results of capitalism acting 'more like itself', with capital movement and market justice having increasingly strained at the leash of democratic and territorial controls. And in the absence of a European demos and democratically legitimate European institutions, it is not markets themselves but strong states that appear to take up the slack, however reluctantly, to ensure the survival of transnational capitalism and the market economy. In this way, the financial crisis has not only revealed the fragility of the constitutional principles of the EU; it has also exposed a horizontal asymmetry between larger and smaller member states, or economically stronger and economically weaker states, that was previously concealed.

So although strong statehood is lacking at the supranational level, there is at least one contender at the national level, which in conjunction with technocratic governance structures in the EU has been able to call the shots: the Federal Republic of Germany.<sup>75</sup> In the absence of political channels of contestation, dictats and coercive measures prevail. And they appear to emanate from one source in particular. As Perry Anderson puts it,

In the European simulacrum of federalism, there could be no 'transfer union' along American lines. Once crisis struck, cohesion in the Eurozone could only come, not from social expenditure, but political dictation—the enforcement by Germany, at the head of a bloc of smaller northern states, of draconian austerity programmes, unthinkable for its own citizens, on the southern periphery, no longer able to recover competitiveness by devaluation.<sup>76</sup>

Coercive elements of rule are becoming increasingly prominent and exposed, from the centralised supranational authority and its representatives in the Commission

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<sup>73</sup> Streeck, 'Crisis of Democratic Capitalism' n 7, above, 26.

<sup>74</sup> This is most evident in Greece with the rise of Golden Dawn. Greece is perhaps unique in also giving rise to a major new left-wing and anti-austerity party, Syriza, which, although maintaining support for the Eurozone was considered a threat by the liberal establishment, particularly in Germany.

<sup>75</sup> See e.g. Beck, note 53 above.

<sup>76</sup> Anderson, note 52 above.

and European Central Bank, to international organisations such as the IMF,<sup>77</sup> as well as among the Member States themselves. Real economic power discrepancies are even becoming translated into political norms, as is the case of the voting weights in the European Stability Mechanism.<sup>78</sup>

European integration not only adds an additional layer of complexity to the relationship between democracy and capitalism; it also makes the core tension more visible. It exposes the justice deficit in broad daylight and the coercion necessary to sustain the background conditions of transnational economic order. Preventing conflict from becoming critical and destructive of the project of the Euro must, we are told, be achieved at all costs.

The post-war narratives of ‘constrained democracy’ and ‘constrained capitalism’ therefore appear to be coming to an abrupt end in the current phase of European integration. And, in a conjuncture of exquisite irony, it seems that the constitutional model of the European Union is to be forcefully remade due to the political and economic strength of the one country that integration was supposed above all to contain. Mann’s nightmarish vision of a ‘German Europe’ rather than a ‘European Germany’ is in danger of becoming a reality.<sup>79</sup>

## 5. POLITICISING JUSTICE DEFICITS

There are many attempts to justify the institutional responses to the financial crisis, to suggest, for example, that they are necessary temporarily, in the short-term, to ensure the stability of the integration process, or at least its currency, in the long run. There have been attempts to justify the constitutional asymmetries and justice deficits in the EU. Some also deny that European integration creates, contributes to or maintains such deficits at all. But it is becoming increasingly difficult to persuade persons, and indeed entire peoples, that integration merely expands the pie for all, that there are not real transnational redistributive implications of membership in the EU or even that they remain in collective control of their fates. And many influential commentators now argue that Europe will need to engage in huge and explicit redistributive programs and therefore develop into full political union in order to deal with the social and economic effects of the recent financial crises.<sup>80</sup>

But in the absence of the requisite transnational solidarity to support this democratically, openly and voluntarily, the emergency ‘rescue operation’ is being

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<sup>77</sup> For analysis of the institutionalisation of this ‘troika’, see Menendez, note 65 above.

<sup>78</sup> See De Witte and Dawson, note 56 above.

<sup>79</sup> See Beck, note 53 above.

<sup>80</sup> See e.g. Offe, ‘Europe Entrapped: Does the EU Have the Political Capacity to Overcome its Current Crisis’ (2013) *European Law Journal* 595 – 611.

conducted in an 'undemocratic, depoliticized, and technocratic mode'.<sup>81</sup> This raises the danger of new forms of authoritarianism emerging, both nationally and transnationally.<sup>82</sup> A recalibration of the 'moral calculus' of integration – of transnational solidarity – will not however to come top-down from elites, but, if at all, from the recognition by the peoples of Europe of the injustice of those suffering from the austerity measures being imposed upon them.<sup>83</sup>

The justice deficit, however, is frequently *de-politicised* by naturalising the ascendancy of market justice. There is, for example, a strong tendency to perceive the initial movement of capitalist logic and market justice in quasi-naturalistic terms, as an unstoppable social and evolutionary force, which democratic politics can do nothing more than attempt to tame or civilise in response. This perception of the capitalist economy as natural and autonomous is most explicit and developed in systems theory and can be traced back through to Weber's rationalisation thesis of modernity, and even beyond, to the natural law understanding of the economy that substitutes the state for civil society, in the work of thinkers such as Adam Smith and Thomas Paine. De-politicisation of the public sphere finds support in elite theories of democracy and systems theory, because, in common with the classical doctrines of political economy, they appeal to an evolutionary narrative of social reproduction, whether normatively or merely descriptively.<sup>84</sup>

Common to these varied positions is the viewpoint that the economic is not only autonomous; it is foundational for the polity and for political development.<sup>85</sup> It is a view that even (sympathetic) critics of Weber such as Jürgen Habermas have come to adopt.<sup>86</sup> Since the fall of the Berlin wall and the collapse of the Soviet Union, he claims, it has become 'impossible' to break free from the world of capitalism; 'the only remaining option is to civilise and tame the capitalist dynamic from within'.<sup>87</sup> And the transformation of law and politics in the process of European integration, Habermas argues, is bound up with this capitalist dynamics, framed by a 'functionally driven opening' of integration and inclusion followed by a 'socially integrative closure', or re-embedding of the market.<sup>88</sup>

There is a broader point here. Escape from democratic politics signalled by the practice and discourse of ordo- and neo-liberalism is not new; its sentiment is as old as philosophy itself. Liberalism's attempt to escape from politics through

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<sup>81</sup> Offe, *ibid.*

<sup>82</sup> See Wilkinson, above note 28.

<sup>83</sup> The term 'moral calculus' is Offe's, see note 80 above.

<sup>84</sup> For Weber, rationalisation is an aspect of our loss of freedom in modernity, see, for discussion, e.g. K. Breen, 'Under Weber's Shadow: Modernity, Subjectivity and Politics' in *Habermas, Arendt and MacIntyre* (Ashgate, 2012). On Smith and Paine, see e.g. M. Loughlin, *Foundations of Public Law* (Oxford, OUP, 2010) 347. Teubner's work is an important exception here, providing a critique of the naturalisation of economic rationality from within systems theory; see note 18 above.

<sup>85</sup> Foucault identifies this reversal as central to understanding neo and ordo-liberalism. See M. Foucault, *The Birth of Bio-Politics: Lectures at the College de France* (London: Palgrave MacMillan, 2010).

<sup>86</sup> Cf. Breen, note 84 above.

<sup>87</sup> Habermas note 60 above, 106.

<sup>88</sup> *ibid.*, 113.

economics, as Hannah Arendt argued, is not a departure, but a continuation of the philosophical tradition that begins with Plato and ends with Marx.<sup>89</sup> Once a substitute for action is found – which is traditionally the role of the ‘absolute’, in modern times Sieyes’ nation or Jefferson’s self-evident truths – politics becomes mere administrative execution, analogous to the private economic decisions of the household. The loss of the political comes with the identification of a source of authority ‘beyond the sphere of power’ and, whether the law of nature or the commands of God, not itself ‘man-made’. The source of authority apparently ‘beyond the sphere of power’ and therefore beyond the sphere of democratic politics is now the market itself and global capital markets in particular, their authority anonymised in the form of barely comprehensible and virtually unaccountable credit rating agencies.

The suggestion of the ‘naturalness’ of any existing order and the inequalities in which it results is ideologically potent, particularly when it is accompanied by an ethos of competition and an individualism that might be attractive for other moral or cultural reasons.<sup>90</sup> The high water-mark of this reification of the capitalist economic logic is the neo-liberal insistence that ‘there is no alternative’ (TINA), propagated so forcefully by Margaret Thatcher that it was swallowed whole not only by her Conservative but by her ‘Third Way’ successors, in the UK and elsewhere.<sup>91</sup>

Can the justice deficit be *politicised or re-politicised*? This, it is argued, is a condition for it to be democratised, however democratisation might then be institutionally imagined and implemented. Although this will not of course convince those who deny there is a social justice deficit at all in the EU, it remains, if correct, a contribution to an account of why social (or market) justice deficits are in large measure political artefacts, whether or not they exist in any particular place at any particular time.

The struggle for social justice must be viewed not only in terms of the possibilities of reacting through existing channels to the (actual or perceived) injustice perpetuated by market capitalism but in terms of the creation of markets and of the channels of response to them *in the first place*. We can then consider in particular the way that politics facilitates or hinders a democratic response to that actual or perceived injustice as well as its complicity in the initial movements of market making and inducing the extension of market logic.

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<sup>89</sup> See H. Arendt, *Between Past and Future* (Penguin, 1968) 17 – 19. The point is made as strongly in *The Human Condition* (University of Chicago, 1958) 222: ‘Escape from the frailty of human affairs into the solidity of quiet and order,’ Arendt notes, ‘has in fact so much to recommend it that the greater part of political philosophy since Plato could easily be interpreted as various attempts to find theoretical foundations and practical ways for an escape from politics altogether’.

<sup>90</sup> On the supposed natural quality of the economic order in neo-liberalism, see e.g. M. Foucault, *The Birth of Bio-Politics: Lectures at the College de France* (London: Palgrave MacMillan, 2010), O. Parker, *Cosmopolitan Government in Europe* (London: Routledge, 2012). On how neo-liberalism splits the left, by co-opting liberal social causes, see Harvey, above note 55.

<sup>91</sup> Thatcher, when asked to name her greatest legacy, famously responds, ‘Tony Blair’.



Politicisation of the justice deficit points at how capitalist market logic depends upon the state and on political action not only for its maintenance and 'taming', but also for its creation and re-creation. This can occur both through action and inaction. It suggests that the state is at once both problem and solution to the crises of democratic capitalism; both poison and cure.

According to a radical philosophical tradition, the state apparatus is not only responsible for an initial, often violent, movement of original or 'primitive' accumulation that sets up the economic and social conditions for market capitalism (Marx's 'doubly free labourer'), but also constantly or periodically re-constitutes these conditions through 'accumulation by dispossession'.<sup>92</sup> But others – including those less radical – have identified political action, coercion and violence, whether through internal corruption, war or in the form of global imperialism ('political capitalism'), as central to at least some types and certain periods of market formation and continuing in aspects of modern capitalism.<sup>93</sup>

Violence, coercion and imperialism, however, are only contingently necessary to alter the balance of forces between democracy and capital. In the most recent era of neo-liberalism, to the conceptual dynamic of social and market justice must also be added political and legal changes made to and by the State which tip the balance between democracy and capitalism in favour of capital, such as the hollowing out of state powers, the turn from government to governance, wholesale privatisation programs, the removal of issues from the democratic agenda and into the regulatory arena of experts and technocrats and constitutionalisation – and therefore judicialisation – of economic rules, particularly through international institutions.<sup>94</sup> There is a strong affinity between privatisation and regulation on the one hand and technocratic, expert government on the other, and of course in the EU this was captured by Majone's notion of the 'regulatory state', although it is also an aspect of the ideology of 'constrained democracy' that we explored above.<sup>95</sup>

There was, and is, nothing inevitable about the turn to the regulatory state; it is the expression of political choices and planned structures. Placing the political and its most potent manifestation, the modern state, at the root of the political economy of capitalism (whether classical, late or 'post-modern') and the seemingly inexorable spread of market logic, highlights the contingency of the market as an economic and normative form, however powerfully articulated and cultivated institutionally and ideologically. As Joseph Weiler acknowledged with respect to the process of market-building as the centerpiece of European integration:

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<sup>92</sup> See D. Harvey, *The New Imperialism* (Oxford, OUP, 2003); E. Meiksins Wood, *Empire of Capital* (London, Verso, 2003). For an earlier account, see Arendt, note 27 above, 148, drawing on Rosa Luxemburg.

<sup>93</sup> Such as Max Weber himself, with his category of 'political capitalism'. See e.g. R. Swedberg, *Max Weber and the Idea of Economic Sociology* (1998) 46 - 53.

<sup>94</sup> See e.g. S. Gill, *Power and Resistance in the New World Order* (London and New York, Macmillan-Palgrave, 2003), D. Nicol, *The Constitutional Protection of Capitalism* (Oxford, Hart, 2010), W. Bonefeld, 'Neo-Liberal Europe and the transformation of democracy' in Nousios, Overbeek and Tsolakis (eds) *Globalisation and European Integration* (London, Routledge, 2011).

<sup>95</sup> See G. Majone, *Regulating Europe* (London, Routledge, 1996).



A “*single European market*” is a concept which still has the power to stir, but it is also a “single European *market*”. It is not simply a technocratic programme to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicised choice of ethos, ideology and political culture: the culture of “the market”[...] premised on the assumption of formal equality of individuals [...] Crucially, this not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values.<sup>96</sup>

Of course de-politicisation was in some sense a deliberate choice in the designs of the various European communities, which favoured consensual over conflictual evolution, at least the consensus of powerful political and economic elites.<sup>97</sup> The transnational economy would be based on legal guarantees, technical regulations and even ‘soft laws’ such as the Stability and Growth Pact, rather than centralised political controls subject to democratic contestation. One might say, adopting Weiler’s influential narrative, that it was based on this combination of law and technocracy precisely *because* political controls remained with the Member States, reluctant to surrender them, particularly in the early stages of integration.<sup>98</sup>

But once the political nature of transnational market logics is acknowledged, then alternatives to the fundamentals of the current set-up – and not merely tinkering around the edges – might be explored as a genuine possibility. The crisis is, in any case, already exposing the weakness of the rule of law in the face of political response to economic emergency, as developments in the grey zone of the Union method evolve, although it is too early yet to say precisely what this portends.<sup>99</sup>

## 6. DEMOCRATISING THE JUSTICE DEFICIT?

The ‘Keynesian-Westphalian’ negotiation of market and social justice through a combination of ‘constrained capitalism’ and ‘constrained democracy’ can no longer be taken for granted, if not already consigned to the history books.<sup>100</sup> We have sketched the role that European integration has played in this negotiation

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<sup>96</sup> J. Weiler, ‘The Transformation of Europe’ (1991) *Yale Law Journal* 2477.

<sup>97</sup> For an account, see M. Dani, ‘Rehabilitating Social Conflicts in European Public Law’ (2012) 18 *European Law Journal* 621 – 643.

<sup>98</sup> *Ibid.*

<sup>99</sup> See A. Menendez, note 65 above, for the long view.

<sup>100</sup> Müller himself thinks we have recently turned a corner and that the EU has changed qualitatively, no longer able to lock in states to democratic and social commitments, see ‘Beyond Militant Democracy’ (2012) 73 *New Left Review* 39.

and its transformation, although of course it is a story that touches on all the states of the democratic capitalist world.

The effect of globalisation and Europeanisation has been 'to destabilise' the existing structures of political claims and to change the dynamics of market and social justice.<sup>101</sup> With this destabilisation, even explosion, of the national frame, the assumption no longer holds that the modern territorial state is the exclusive site of justice claims. Neither is it clear that the citizens of such states are exclusively the relevant subjects of debates about justice. As Nancy Fraser argues, not just the 'what' but also the 'who' of justice must now be up for grabs.<sup>102</sup> This is nowhere more evident than in contemporary Europe, where integration now directly raises the question of what, if anything, Germans owe Greeks (or vice versa), either as the result of a 'moral calculus' of integration or for the benefit of their own long-term self-interest.

In addition to the usual first order questions of distribution and recognition within a particular community, second-order questions are increasingly being raised about justice in the EU. Not only the substance of justice, but also the 'frame' is increasingly in dispute, and demands are increasingly being made for a post-Westphalian theory of justice.<sup>103</sup>

And yet, in recalling the priority of politics we cannot ignore the question of *the political*, or *le politique*, which, fundamentally, defines the parameters of who is to be counted amongst the members of the relevant community, and, in its most infamous formulation, between who is friend and enemy.<sup>104</sup> The point is not merely to highlight the priority of action and contingency over decisionism and necessity, because, as Fraser herself acknowledges, *the political* 'furnishes the stage on which struggles over distribution and recognition are played out'. She continues:

Establishing criteria of social belonging, and thus determining who counts as a member, the political dimension of justice specifies the reach of those other dimensions: it tells us who is included in, and who excluded from, the circle of those entitled to a just distribution and reciprocal recognition.<sup>105</sup>

The framing of 'the political' determines not only who can make justice claims, by virtue of establishing who is a member of the relevant community, but also how such claims are to be made, judged and acted upon, and of course the precise procedures are significant because they not only exclude certain voices, but also

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<sup>101</sup> See N. Fraser, 'Reframing Justice in a Globalizing World' (2005) *New Left Review* 69.

<sup>102</sup> *Ibid.*

<sup>103</sup> Fraser, note 101 above, at 73.

<sup>104</sup> C. Schmitt, *The Concept of the Political* (University of Chicago Press, 1927), 2007. For an account of European constitutionalism which gives priority to the political, but in more dynamic and reflexive terms, see M. Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 *Modern Law Review* 191 – 222.

<sup>105</sup> Fraser note 101 above, 75.

privilege some interests over others in stipulating the rules and conditions of access.

Political justice is therefore concerned chiefly with the idea and the practice of *representation*, where misrepresentation would point to the distinctively political obstacles to equality of representation, in addition to in justice presented by maldistribution and misrecognition within a polity.

Misrepresentation can occur at the first ordinary, domestic level of the democratic process, where, for example, the rules and internal constituencies of the electoral system itself are drawn. This is far from straightforward in a compound polity such as the EU, which has to balance the basic principle of the equality of persons with the more complex principle of the equality of states, because the constitutional identity of the component parts matters.<sup>106</sup> A balance is sought through the electoral system of the European Parliament, with its system of degressive proportionality, engagement with national parliaments, and in conjunction with forms of indirect representation through the European Commission and Council. Although this balance is difficult in any federal or compound polity it has special resonance in the EU because of the continuing sovereignty claims of the constituent parts, as so forcefully articulated, however disingenuously, by the German constitutional court in the Lisbon decision, which insists on maintaining the constitutional power to guarantee its own social state.<sup>107</sup>

Misrepresentation can also occur at a second level, which concerns the basic boundary-setting aspect of ‘the political’. Here misrepresentation takes the form of *mis*-framing, where the injustice is not insufficient representation but wrongful exclusion from any kind of political representation. Although the process of economic globalisation exposes this mis-framing because it reveals our interconnectedness in a more comprehensive and immediate manner, it must be remembered, with Arendt, that the Keynesian – Westphalian frame itself mis-framed in significant respects, with political emancipation tied in with legacies of capitalist expansion and imperialism.<sup>108</sup>

If political obstacles to full and fair representation existed within the Keynesian – Westphalian frame of the territorial state, European integration - and economic globalisation more generally - exposes the injustice of the frame itself, because those affected by it are marginalised from its political decision-making centres in spite of the legal and political equality they are formally attributed. The enhanced possibility of political gerrymandering comes at the expense of the marginalised and powerless, who can only, if at all, channel their claims through relatively ineffective political channels. The allocation of votes in the European Stability Mechanism, weighted by capital contributions, is a good example of the

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<sup>106</sup> See e.g. C. Lord and J. Pollak, ‘Unequal but Democratic? Equality According to Karlsruhe’ (2013) 20 *European Journal of Public Policy* 190 – 205.

<sup>107</sup> For a critique of the German court’s understanding of political equality see Lord and Pollak, *ibid.*

<sup>108</sup> See note 27 above.

normalisation of the conflation of economic and political power, which has potentially dramatic effects on the principle of political representation.

Europeanisation and globalisation are politicising the normal Westphalian frame of justice by making a dimension of *in*justice more visible. A special kind of meta-injustice is exposed, where some are wrongly excluded from consideration, 'denied the chance to press first-order claims' within a community.<sup>109</sup>

Metapolitical misrepresentation arises when states and transnational elites monopolize the activity of frame-setting, denying voice to those who may be harmed in the process, and blocking creation of democratic arenas where the latter's claims can be vetted and redressed. The effect is to exclude the overwhelming majority of people from participation in the meta-discourses that determine the authoritative division of political space.<sup>110</sup>

In the EU, those who consider their voices silenced by processes beyond their individual and even collective control will take to the streets instead, as we have seen from Athens to Madrid and from Lisbon to Paris. But, one might ask, in the new light of the redistributive implications of economic and monetary union, why is it that the political code is still predominantly nation versus nation? What explains the absence or weakness of transnational social movements in comparison to the power of transnational capital? Is it a straightforward failure of elites?

To begin to answer this, a third element of social struggle must be explored, working alongside economic and social justice, in order to appreciate the full complexity of the justice deficit: 'emancipation'. Really existing social struggles do not neatly fit the contours of a Polanyian double movement or of Streeck's rebalancing of the relationship between market and social justice. Instead they have exposed problems not only with marketisation and the spread of market logic but also with the socially protective responses to it that, in the name of social justice, have depended on an exclusionary rhetoric of communitarianism, homogeneity and popular consensus.<sup>111</sup> Struggles for emancipation are now cross-cultural, transnational, plural and heterogeneous; from feminism to the anti-war movements, Occupy to trade unionism, environmentalism to the *indignados*, the voices of social justice are diverse and dispersed.<sup>112</sup>

A politics of representation must 'aim to democratize the process of frame-setting',<sup>113</sup> to contest the way in which boundaries themselves are drawn. This is

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<sup>109</sup> Fraser, note 101 above, 77.

<sup>110</sup> Fraser note 101 above, 85.

<sup>111</sup> On the exclusion and sovereign violence of the social contract model See Parker, above n 90.

<sup>112</sup> See the report on subterranean politics. In the eyes of the Habermas-Derrida initiative, it was the anti-war movements coordinated on 15 February against the invasion of Iraq that gave birth to a European public sphere. See 'February 15, Or What Binds Europeans Together' reprinted in (2003) 10 *Constellations* 291 – 297.

<sup>113</sup> Fraser, note 101 above, 80.

no easy task.<sup>114</sup> But what it suggests is that to the tension between the logics of democracy and capitalism must be added the logic of the state, and its external and internal manner of setting the scene for this ceaseless antagonism of interests and values, including the shaping of transnational political spaces such as the EU. Streeck's dilemma of market and social justice must be substituted for a trilemma: of market, social and democratic justice. Only then might the destabilisation of the national frame signal democracy's graduation rather than its retirement.

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<sup>114</sup> This is an area, however, where democratic experimentalism has presented certain insights about the need to keep open, contingent and provisional the form and content of the democratic community.