

Farahat, Anuscheb/Arzoz, Xabier (eds.): Contesting Austerity – A Socio-Legal Inquiry. Oxford: Hart/Bloomsbury, 2021. Oñati International Series in Law and Society. ISBN 978-1-50994281-7 (hardback). 368 pp. £85.- / ISBN 978-1-50994282-4 (Ebook), £76.50.

The global financial crisis of 2007-8 revived the classical debates on how to respond to economic shocks.¹ According to Keynesians, to reduce the state's debt burden, governments should provide fiscal stimulus, thereby increasing growth (GDP). On the contrary, neoclassical proposals based on market discipline advocate fiscal consolidation: by applying budgetary cuts, governments would regain the confidence of the markets in the sustainability of the public debt, thereby rebalancing the country's borrowing capacity.² The latter approach prevailed in the European Union (EU), thus leading to a decade of austerity. This term is commonly defined as 'a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts, and deficits'.³ As for Greece, implementing the European measures effectively meant, among others, a reduction of the wages for public employees on average by 17 percent, while pensions exceeding €1,200 per month have been cut by 12 percent.⁴

From the beginning of the financial crisis, legal scholars examined the conceptual (ordo- and neoliberal) DNA of austerity,⁵ its impact on representative democracy⁶ and the role of law itself in implementing and reinforcing

¹ For an account of the genesis of this debate, see e. g. Nicholas Wapshott, *Keynes Hayek: The Clash That Defined Modern Economics* (New York/London: W. W. Norton & Company 2011).

² For a detailed explanation of these issues and the specific evolution of the debate at the EU level, see Markus Brunnermeier, Harold James and Jean-Pierre Landau, *The Euro and the Battle of Ideas* (Princeton and Oxford: Princeton University Press 2018), 137 ff.

³ Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press 2013), 121.

⁴ See IMF, *Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding* (30 November 2011), available at <<https://www.imf.org/external/np/loi/2011/grc/113011.pdf>> (last visited 10 May 2022).

⁵ On the differences between ordoliberalism and neoliberalism, see Thomas Biebricher, Frieder Vogelmann (eds), *The Birth of Austerity. German Ordoliberalism and Contemporary Neoliberalism*, (London/New York: Rowman Littlefield International 2017); Christian Joerges, 'Dead Man Walking? Current European Interest in the Ordoliberal Tradition', *ELJ* 24 (2018), 142-162.

⁶ See, e. g. Luis M. Poiares Pessoa Maduro, Bruno De Witte and Mattias Kumm (eds), 'The Democratic Governance of the Euro', *EUI RSCAS PP*, 2012/08, available at <<http://hdl.handle.net/1814/23981>> (last visited 10 May 2022); Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge: Cambridge University Press 2014, 179-207). More recently, on the meaning of representative democracy in relation to art. 10 para. 1 TEU, see Armin von Bogdandy, 'European Democracy: A Reconstruction Through Dismantling Misconceptions', *MPIL Research Paper No. 2022-02*, (21 January 2022, forthcoming in: *ELTE Law Journal* 2022), available at <<https://ssrn.com/abstract=4014445>> (last visited 10 May 2022).

the existing (ordo- and neoliberal) structures of the Eurozone and global capitalism.⁷ Other analyses emphasised the structural transformations of the EU legal order and its Economic Constitution, i. a., a shift towards intergovernmentalism, the use of discretion over rules in the area of monetary policy, and increased litigation in (macro)economic matters.⁸ Lastly, there is an extensive body of legal scholarship analysing the underlying imbalances between the EU's economic and social policies in the aftermath of the crisis. Some scholars have also deplored the lack of a 'political space for contestation and communication'.⁹ 'Contesting Austerity. A Socio-Legal Inquiry', the book under review here, adheres to this latter strand of literature.

The edited volume is an ambitious 'inquiry' into the modes of resistance to austerity, employing an interdisciplinary approach including both legal and socio-political perspectives. For the editors, the phrase 'contesting austerity' means 'raising awareness about political alternatives and [...] reinforcing constitutional standards as guidelines as to how to overcome a crisis situation' (p. 18).¹⁰ Notwithstanding the considerable number of chapters (seventeen), the common thread of the volume – to raise awareness about the constitutional meaning of alternatives (in general), and in particular, alternatives to austerity – unfolds clearly from the very beginning. Besides the inquiry into the different modes of resistance (institutional and extra-institutional) or actors (legal, political, and social), the book addresses their interrelation from a (transnational) macro-perspective, determining what has been 'the integrative potential of constitutional orders during the Eurozone crisis' (p. 11).

The book is part of a larger research project led by co-editor Anuscheh Farahat, Professor of Law at the University Erlangen-Nürnberg in Germany.¹¹

⁷ Seminally on the intellectual history of neoliberal global capitalism, Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Ma.: Harvard University Press 2018). For a critical assessment of the role of law in the economic crisis: Michelle Everson, 'The Fault of Law in Economic Crisis', *Law and Critique* 24 (2013), 107-129; Alain Supiot, 'A Legal Perspective on the Economic Crisis of 2008', *International Labour Review* 149 (2010), 151-162.

⁸ See generally, Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis*, (Cambridge: Cambridge University Press 2013); Michael Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', *CML Rev.* 53 (2016), 1237-1282.

⁹ Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU After the Euro-Crisis', *M. L. R.* 76 (2013), 817-844, 826. Tuori and Tuori (n. 8).

¹⁰ For the definition of austerity, the editors rely on the work of Mark Blyth (n. 3). See p. 2 of the book.

¹¹ Farahat led the research group 'Transnational Solidarity Conflicts in Europe': <<https://www.tsc-project.org/en/>> (last visited 10 May 2022). See also her recent monograph *Transnationale Solidaritätskonflikte Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise* (Tübingen: Mohr Siebeck 2021).

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The book contains an introductory chapter and four main parts.

The introductory chapter clarifies how the work gradually descends from the terrain of the ought to be to the field of empirical reality or the concrete case (pp. 12-19). Part I (chapters two to five) develops the conceptual dimension of counter-austerity (pp. 27-98). Part II and III explore two specific channels of resistance to austerity: litigation – a classic legal mode of contestation (part II, chapters six to ten), and the activity of trade unions and social movements (part III, chapters eleven to fourteen). While the former defines (constitutional) courts as essential institutional actors for contestation, the latter focuses on the capacity of trade unions to defend, through social pressure, the capital-labour compromise enshrined in the post-war European constitutions. Lastly, part IV covers sectors of the population that presumably lack the resources to contest austerity: either due to the absence of material means or to the systemic neglect perpetuated by austerity policies themselves, applied to an avowedly neoliberal world. In this sense, three main criteria of socio-political marginalisation are considered: economic resources or poverty,¹² gender,¹³ and age.¹⁴

The book contains a variety of intertwined themes. When analysed together, it allows to understand the constitutional relevance of counter-austerity – its primary function as a tool that makes societal conflict visible and enables the constitution to unfold its full potential for societal integration. Therefore, the review focuses on the volume's methodological premises and its understanding of the role of contestation to austerity. The review further maps the fundamental components that, from the reader's perspective, complement the methodological assumptions and may build the work's normative backbone.

Overall, the book takes a critical stance against austerity. As the introductory chapter puts it: 'Contestation of austerity varies. There is not one unitary counter-hegemonic struggle against austerity but a series of contestatory attempts [...]. Yet, beyond [this] heterogeneity, the conflicts flaring up around the austerity regime show that the political strategy aimed at concealing the contingency of policy decision with the rhetoric of "no alternative" [...] can be hegemonic, but it cannot fully transcend the conflictual nature of a pluralist society' (p. 6). Hence, the opposition is not aimed against austerity

¹² Chapter fifteen: Akritas Kaidatzis (275-293).

¹³ Chapter sixteen: Nuria Pumar (295-315).

¹⁴ Chapter seventeen: Pau Mari-Klose and Francisco Javier Moreno-Fuentes (317-335).

as *policy* but the very absence of political alternatives and, in particular, its considerable potential of affecting a core value of democratic societies, i. e. pluralism.

It is in this context that the book considers whether austerity has led to an effective authoritarian drift of European economic governance, in which the European Central Bank (ECB) would occupy a central place (p. 86). Notwithstanding the controversial nature of the ECB (that is, potentially authoritarian and undemocratic, given its wide margin of discretion in decisions of monetary policy and the increase of its powers in times of crisis),¹⁵ its role in managing the financial and health crises has apparent redistributive effects for the EU (pp. 47, 86). Ultimately, some readers might argue that the ECB has a compensatory function for the – increasingly unsustainable – absence of a solid political-economic dimension to the Eurozone.

Indeed, the 2008 crisis developed as a ‘multifaceted’ crisis (p. 3) since it spilt from a ‘mere’ economic crunch to a crisis of democratic representation – or, as one of the book’s contributions puts it, a crisis of liberal thought itself which also put into question prevailing theories of justice.¹⁶ One facet of the 2008 crisis is the narrative of the irresponsible debtor states engaging in excessive borrowings. In this sense, the segregation of European countries according to the criterion of ‘deservingness’ – and the consequent absence of co-responsibility of the Member States in managing the crisis, that is, in the form of cross-border financial transfers – is underlined by several contributors to the volume (p. 6, 19, 44, 51, 76, 93, 318). Here, it is worth highlighting the insightful contribution by Marius Hildebrand, demonstrating how the media (mainly the press) has shaped the creation and maintenance of the hegemonic ‘deserving/undeserving State’ dichotomy.¹⁷

In sum, one might argue that the main reason justifying the need to contest austerity lies in the core principle of *TINA* (*there is no alternative*), which implies the lack of political debate. Ultimately, this paradigm prevents us from seeing – politically and legally – the very existence of social conflict inherent to constitutional law and democracy. Even better, according to the book under review here, the conflict is ‘reshaped’ and – while being nationalised (instead of supra-nationalised) – its essentially political character vanishes in the moral appearance driven by creditor-states (p. 44).

The book’s methodological starting point is the definition of conflict as the (dis)integrative axis sustaining constitutional legitimacy. Hence, resistance to

¹⁵ See, e. g. Marco Goldoni, ‘The Limits of Legal Accountability of the European Central Bank’, *George Mason Law Review* 24 (2017), 595-616.

¹⁶ See pp. 27-42 of the book.

¹⁷ Chapter four, 59-78.

austerity is seen, as the introductory chapter clarifies, as intrinsically capable of ‘unleashing the integrative potential of social conflicts’ (p. 16). However, this capability requires a set of structural preconditions; among them, the existence of inclusive judicial channels (p. 11). Furthermore, the opposition of constitutional courts to austerity measures should be internalised by the social and political actors to influence the democratic structure effectively (p. 15). Only then – one may conclude – could these institutional actors maintain their privileged place in the democratic dynamics of resistance to austerity (as well as in the structure of the book, Part II: ‘Austerity Measures under European and National Judicial Review’). In other words, the volume assumes the capacity of constitutional courts to reflexively channel the disintegrative risk inherent in transnational social conflicts.

Indeed, the natural space for conflict is defined as ‘transnational’: ‘the crisis revealed a multiplicity of political conflicts in terms of the distribution of costs and benefits built into a highly interdependent transnational polity’ (p. 3). On a positive note, this definition successfully indicates the nature of the financial crisis (as well as the current health crisis). However, given the term’s broad conceptual baggage, some ambiguity remains as to how the editors effectively understand ‘transnational’. Hence, further clarification would have been desirable.

Moreover, analysing transnational conflicts through the lenses of ‘solidarity’ raises the need to indicate a (minimum) definition of this concept. In this sense, the contribution by Ana Bobić overcomes the main narrative of ‘conditional solidarity’, in which ‘eurozone Member States unable to refinance their public expenditures and deficits received credits under conditions of strict austerity’ (p. 1). The contribution¹⁸ focuses on the role of the individual in the transnational context, rejecting the ‘budgetary autonomy of Member States’ as a possible criterion for resolving solidarity conflicts (p. 123). In turn, Ana Bobić interprets the principle of solidarity in light of the principle of equality of Member States, thus potentially materialising the financial assistance between Member States ‘not simply [as] handout, but an investment in the prosperity of the euro area and all its members’ (p. 123).

Nevertheless, this normative proposal builds on the assumption of a reflexive capacity of the European integration process, i. e. the capacity to correct its inconsistencies and achieve *de facto* solidarity on the basis of a ‘shared project’ (p. 124). Moreover, the positive law of the European Union – and its interpretation by the Court of Justice throughout the various European crises – show how little room is available for the citizen beyond her

¹⁸ Chapter seven, ‘(Re)Turning to Solidarity EU Economic Governance: A Normative Proposal’, 115–134.

economic rights and freedoms. The limited procedural toolkit for the individual to challenge austerity is proof of this, as Carlos Aymerich insightfully suggests.¹⁹

Overall, the book is – to some extent – an analysis of the past. In the aftermath of the COVID-19 crisis, there is enough evidence to suggest that ‘austerity is no longer the only game in town’ (p. 94).²⁰ Notwithstanding its meaning for the past, it is one of those rare works that point to promising developments for the future. In this sense, the book offers an essential contribution to both society at large and academia to reflect on and react to any hegemonic narrative that seeks to override social pluralism and reject the central meaning of conflict. If one assumes the intrinsic connection of law with social reality, the volume comprises an outstanding transformative potential. It is a highly recommended reading for anyone open to understanding that conflicts can hardly be reduced to the national framework alone, resolved exclusively by State power, and unleash their integrative potential in the absence of real transnational solidarity.

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¹⁹ Chapter six, ‘Challenging Austerity Before European Courts’, 99–114.

²⁰ As part of the EU’s COVID-19 response, ‘*NextGenerationEU*’ package makes available €723.8 billion in loans (€385.8 billion) and, for the first time, in grants (€338 billion). In addition, the requirements of the Stability and Growth Pact have been temporarily abandoned. See Communication from the Commission to the Council on the activation of the general escape clause of the stability and growth pact, COM(2020)123 final; Communication from the Commission on the review of the flexibility under the stability and growth pact, COM(2018) 335 final.