



From trauma to apathy: on the hegemonic force of European authoritarian liberalism

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Abstract

Michael Wilkinson's *Authoritarian Liberalism* puts forward a challenging and controversial claim: the history of European integration and the trajectory of the constitutional orders of the founding Member States have always been driven by authoritarian liberalism. This comment focuses on a certain slack, in Wilkinson's analysis, between the material constitution of European states and authoritarian liberalism as a form of government. More specifically, the comment highlights the need to retrieve a more conflictual relation between, on one hand, the material constitution of the welfare state and its industrial involvement, and on the other hand, the constitutional forms adopted by authoritarian liberalism.

Keywords: trauma; material constitution; political agency; labour movement

1. Introduction

In the absence of ethnographic and psychological observation it is difficult to generalise, but there seems to be a diffuse sense of powerlessness among many European citizens and, less importantly, academics. This disturbing feeling is, prominently, one of political frustration. The perception is of a lack of agency or, to use Wilkinson's term, a loss of political freedom.¹ No matter what one votes for or actively engages with, the outcome of the political process does not mutate. As shown brilliantly by Alexander Somek,² this sentiment of a lack of (and even disinterest in) political agency was coupled to a consumerist and individualist pretension that had inspired European governance in the period up to the 2008 financial crisis, which was a turning point for the new ethos of austerity driving most legal and political interventions intended to cope with the crisis. In both consumerism and austerity, trauma lies at the core of European citizens' lived experience. There is trauma when action is not possible or cannot be articulated.³ To avoid any misunderstanding, the trauma of the European citizen is caused not by a formal prohibition of political action (eg, in the form of a ban on political association), but by the lack of any potential for action itself. In particular, the perception that triggering a new beginning (an essential feature of the capacity for agency) is not an available option profoundly shapes the contemporary constitutional imagination. In this sense, the condition of the European citizen is closer to what Kant denounced as a state of minority. Under current conditions, the critique of the democratic deficit of the

¹This is the expression used by Wilkinson, a clear reference to Hannah Arendt, *On Revolution* (Penguin 1996).

²Alexander Somek, *Individualism* (Oxford University Press 2008).

³It is to Jacques Rancière that we owe the intuition of how claims of agency can be performed by those who are suffering: 'Who is the Subject of the Rights of Man?' 103 (2004) *South Atlantic Quarterly* 297.

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European Union (EU) concerns the impossible identification of the EU as a constitutional project by its own citizens.⁴ Note that such diagnosis of the lack of political agency in the contemporary age is not exclusive to EU studies. This same concern has shown up frequently in recent times,⁵ but it is sufficient to widen the scope of observation to find similar worries in other fields. The recent wave of publications on constituent power from historical, theoretical and comparative perspectives,⁶ signals a stubborn concern for the lack of constituent politics in Europe and beyond.⁷ Or, in the field of political science, a new series of studies that valorises partisanship or the role of direct democratic involvement in organising collective political action expresses a sense of urgency for new organised forms of political agency.⁸ The point shared by these diagnoses is the informal inhibition of political action despite the absence of a formal interdiction, explained either in terms of the organisational complexity of society or as a state of affairs plotted by elites.

*Authoritarian Liberalism*⁹ offers a remarkable analysis of the factors that caused a rejection of social and political conflict from European integration and, while doing so, it also reconstructs a century of European constitutional history. Central to the book is the identification of the lack of political action in European integration. Wilkinson's argument pivots on an original trauma during the interwar period that generated an apathetic citizenry. Indeed, Wilkinson presents authoritarian liberalism as both a form of government and as a political *ethos* whose main purpose is to contain the political power of the people by stifling the potential for collective agency. In discharging its governing task, authoritarian liberalism found a natural ally in powerful capitalist groups whose status felt threatened at the beginning of the 20th century by the rise of mass democracy. One of the boldest and most challenging claims of the volume expands on this point with a controversial twofold argument: European integration has been engineered (on purpose) to contain democratic politics from its inception, and this was the outcome of a projection of the constitutional orders of (at the very least) three of the founding (and largest) Member States (France, Italy and West Germany), with the support of their dominant Christian democratic political parties. Wilkinson adds an important point to an argument that many would find persuasive – it is not only the development of a supranational level that has hampered collective political action and imposed market rationality as the basic norm of European integration. Most controversially, it was first the constitutional projects of Member States that have pushed for a process of integration that would allow them to limit the space of democratic politics. It is not at random that these states had to be reconstructed in large parts after WWII. Constitution-making was driven by fear of a repetition of previous failures. The motives that animate this type of constitutional politics, according to Wilkinson, are clear and they are embedded in the European history of the 20th century: containing popular sovereignty, reconstituting a stable liberal market economy, and addressing the German question. The descent into the disaster of WWII literally traumatised these societies and it is this background that has obstructed any possibility of re-articulating political institutions in a way that would foster political freedom. With a different formulation, we could say that the memory of the trauma has been constitutionalised in a manner that has dried up the space for emancipatory politics. The 'never ever again' became the core of these constitution-

⁴Paul Kahn, *Origins of Order* (Yale University Press 2019) 8.

⁵For an attempt at re-thinking how constituent power has played out in European integration, see Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2020).

⁶See Camila Vergara, *Systemic Corruption* (Princeton University Press 2020); Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020); Joel Colón-Ríos, *Constituent Power and Law* (Oxford University Press 2020).

⁷A concern also shared by Wilkinson.

⁸Cf Lea Ypi and Jonathan White, *The Meaning of Partisanship* (Oxford University Press 2016).

⁹Michael Wilkinson, *Authoritarian Liberalism* (Oxford University Press 2021).

making experiences at the cost of articulating constitutional orders whose main task could have been to constitute political power.¹⁰ The traumatic condition of post-WWII manifests its symptoms in the lack of a desire for intense political activity.

2. The origins and development of authoritarian liberalism

Crucially for his argument, Wilkinson locates the origin of all three traumatic motives in the interwar period. For this reason, the first part of the volume concentrates heavily on Weimar and, less emphatically, on the experience of other European countries during the 1920s and 1930s. This is because Weimar epitomises all three motives: incapacity of maintaining a stable liberal economy; fear of mass democracy; and uncertainty over Germany's geopolitical position. The opening to a politics of the masses that had intensified the conflict between capital and democratic politics, both within the political system and in the political economy of each country (through the development of trade unions), characterised the constitutional life of the interwar period. The seeds of authoritarian liberalism were planted around this time. The contradictions generated by the extension of the franchise and the new political activism of the working class are perceived as a threat to the stability of the economic order and their interests (ie, of the masses) as disruptive of both domestic and international politics. Liberal constitutionalism is seen as incapable of dealing with the pressure exerted by these contradictions on the economic and the political system. During the Weimar years, the contradictions were managed, in the end, with an artillery of institutional instruments made of decrees and states of emergency, and a political theory that tried to isolate economic life from the vagaries of the political process. Wilkinson makes a lot out of these points, following Karl Polanyi's analysis of the interwar failures as his major guide.¹¹ Elites and conservatives (a group that would usually range from entrepreneurs and landowners to peasants, plus many liberally inclined analysts), worried by the outcomes of the extension of the franchise and the appearance of the masses on the political scene, formed a social bloc with the aim of frustrating the democratic potential of the situation. Yet, faced with the pressures of extended commodification of labour and money, the expansion of financial power, and an obsession with monetary stability, societies would (following Polanyi's analysis) need to reconstitute their political unity around a re-embedding of at least some of these productive factors. In the presence of a genuine political conflict over how to organise the countermovement, the choice (in Weimar) was between either a bottom-up reconstitution of important parts of the political economy and reformation of social solidarity, or a top-down and paternalistic intervention from the government and businesses. Scared by the perspective of a radical overhaul of economic organisation and a profound transformation of the political system, conservatives and liberals in several countries formed a defensive bloc against any move towards a democratic and socialist countermovement. The assumption behind this conservative solution was that the compression of democratic action was necessary for the stability and rationality of the system. Hence, the price to be paid from above for these interventions would be very high: from the rise of unemployment to the destitution of public servants and the loss of constitutional liberties. Even the suspension of market-based pattern of economic action was deemed necessary, but with the purpose of re-installing economic liberalism and market rationality. It is at this point that authoritarian liberalism takes up its institutional and social traits. This is a distinctive option and should not be confused with the other authoritarian solution, fascism, which by (at the very least) 1926 was already established in Italy and would later spread to other countries such as Spain and Portugal. It is worth insisting on this point – in authoritarian liberalism Wilkinson sees a doctrine and a political practice with a German imprint that addresses all three major motives of the

¹⁰For this reading of the function of constitutional government, see Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010).

¹¹Karl Polanyi, *The Great Transformation* (Beacon Press, 2002).

European malaise: mass democracy, stability of liberal economy and German question. The fact that authoritarian liberalism was practised and formalised during the Weimar period is not a contingent fact. Rather, it is the outcome of a process that could not be much different because, for geopolitical and economic reasons, the other doctrines available in the major countries, France and Italy, could provide no guidance for post-WWII reconstruction. In Wilkinson's retelling of the development of European integration, although short-lived in the Weimar period, the German version of authoritarian liberalism provided an ideal platform for shaping the constitutional pathway of the reconstruction with a depoliticisation of the economy and a containment of democratic politics through the multiplication of veto points, the empowerment of the judiciary, federalist or decentralising arrangements, and the rise of administrative agencies connected to the welfare state.

This is an important passage in the economy of Wilkinson's reconstruction, and it represents one of the volume's main contributions. After a brief parenthesis where resistance against Nazi-fascist forces politicised and mobilised parties, unions and movements, Wilkinson sees the new wave of constitutional reconstruction as a moment of 'restoration' or reaction, rather than innovation. This is a highly original reading of the constitutional wave that interested all the states that had lost the war or were heavily affected by the conflict. Contrary to the usual interpretation of the 'Glorious Thirty', the book states that this was a lost opportunity to democratise European societies. There are two reasons behind this failure. First, elites and institutional representatives interpreted the failure of the interwar period that paved the way to fascism and National Socialism, as a crisis of democracy and not as a crisis of capitalism. Too much politicisation of society had corrupting and totalising effects that would spiral down and give rise to totalitarian forms of government.¹² Second, this analysis of the interwar collapse incites a strong fear of the masses and their politics. The inclusion of new groups and actors in the political life of European states could not be managed by a fragmented and conflictual democratic mindset. Because elites and institutional actors share the fear of mass democracy, the process of de-democratisation was already at work at the inception of post-war constitutional orders. It is a process based on the remodelling of sovereignty, 'making the constitution and constitutional politics safe for economic liberalism'.¹³ Wilkinson's reading turns that reading upside down: the failure of interwar constitutional regimes was due to a crisis of capitalism and the lack of a healthy amount of politicisation of social life. For this reason, the end of WWII opened a window of opportunity for the democratisation of constitutional orders. For material and psychological reasons, the opportunity was not seized. Another conservative social and political bloc – assembled by Christian democratic parties with the support of liberals and at times social democratic forces, economic and financial groups, within a context of collective trauma for the ruinous effects of WWII over European societies – led to the enactment of new constitutional orders as constraining devices over democratic politics.¹⁴ In brief, the function of limiting power became prominent over the task of constituting political power. Such a solution would obtain popular passive support because capitalism and its appetites would have been moderated by a welfare and corporatist state. It is in this context that, after the failure of the European Defence Community (voted down by the French Parliament), a supranational project was launched without much clamour, as a part of the constellations of constraining factors, and with the support of national economic elites. Keynesianism provided the background conception of the political economy of this arrangement with ideas of an activist, but a-political state involved in economic policymaking.

¹²This view is supported, with a sophisticated argument based on functional differentiation, by Chris Thornhill, *A Sociology of Constitutions* (Cambridge University Press 2011) 308: 'The regimes established by Mussolini, Hitler and other authoritarian rulers of inter-war Europe were thus marked by salient distinctions. However, all were regimes that emerged because democratic states created after 1918 had possessed insufficient integrative power to assume the highly expanded functions, necessitating the integration of irremediably antagonistic social groups, imputed to them'.

¹³Wilkinson (n 9 above) 96.

¹⁴See the classic work by Jan-Werner Müller, *Contesting Democracy* (Yale University Press 2011).

3. How to limit the masses' political agency

The combination of these constraining instruments is manufactured with a view to realise the limiting function of constitutionalism in order to achieve at least two goals. First, containment of political extremism, both of left and right, which would be achieved by formal and informal instruments.¹⁵ Second, stabilisation of tempered economic liberalism as the default political economy of the state. Basically, any prospect of emancipation through a radical overhaul of societal relations is banned from the horizon. For this reason, Wilkinson registers the constitutional exclusion of substantive social transformation as the sign of the renaissance of authoritarian liberalism.

Chapter 4 of *Authoritarian Liberalism* is key because it details how masses were demobilised during the reconstruction following WWII. It is the coupling between constraining constitutions at the national level and the rise of a supranational economic constitution by stealth that allowed authoritarian liberalism to thrive once again across the continent and become the philosophy of the new material constitution. More specifically, Wilkinson states that authoritarian liberalism animates a militant economic liberalism that succeeded in suppressing (or disarming) the original constituent power and limiting enormously the ordinary political-democratic process. Constitutionally speaking, constituent power would be replaced by constitutional rights as vehicles of social integration¹⁶ and it would be, in any case, severely reduced by the introduction of eternity clauses. Sustained economic growth and a Keynesian consensus helped in cementing a compromise between capital and work, with political centrism as the core of the political system. All these aspects of post-World War II constitutionalism concur in neutralising political action, pushing citizens towards political lethargy and passive acceptance of the status quo. After all, Wilkinson argues that it was not only the elites who were fearing the masses. The people distrusted themselves as well (77). Hence, the process of depoliticisation was not imposed by coercion over the people. Rather, elites profited from widespread fear of the political. A foundational myth was also provided for this process: a narrative of pacification of the continent, enriched with vapid statements about political union, gave some legitimacy to the project of containing democracy.

Perhaps the prominence of political apathy, under this reading, comes across as evident in part because of the institutional view adopted to assess political action in continental Europe and, in part, by a neglect of the political economy and of the non-institutional dimension of class and gender struggles animated by labour and social movements. The consequences of this view of political action and the prominence given to the formal political system (not without good reasons, it should be added) are that the development of the welfare and industrial state is often equated to the domination of bureaucracy and administrative agencies. Following this line of reasoning, the trauma of the interwar failure led to the delegation of political responsibility to mostly experts, technocrats and judges. Quoting the historian Martin Conway, Wilkinson states that the working class of Europe 'were strangely invisible in much of the political life of post-war Europe'.¹⁷ In a nutshell, what drove social and legal transformation, according to this narrative, were top-down processes that were led by technocrats or professional politicians connected with economic elites. The welfare and industrial state form a bureaucratic machine that serves the purpose of stabilising a volatile capitalist economy.¹⁸

Wilkinson gives some recognition to the fact that the welfare state contains contradictions between processes of elite-led political and economic rationalisation, on the one hand, and democratic citizenship, on the other, but he downscales them to 'friction'. This is a crucial point for the story that Wilkinson is telling because, in the reconstruction of how authoritarian liberalism

¹⁵These interventions would go from the ban of the communist and national socialist parties in West Germany, to the informal convention of excluding communist parties' access to government in other countries.

¹⁶Cf Thornhill, *A Sociology of Transnational Constitutions* (n 12).

¹⁷Wilkinson (n 9 above) 99.

¹⁸For a different reading of the welfare state, see Alain Supiot, *The Spirit of Philadelphia* (Verso 2010).

governed Europe during the 20th century, it draws a line of solid continuity. It also strengthens the idea that European societies went through the post-war period without experiencing the pressure of any intense political conflict.

4. Labour and feminist movements' political autonomy

When applied to labour, however, the picture might come across in a significantly different way. Although the language of class struggle might have lost some of its traction because of the moderation (and at times co-option) of most leftist political parties during the 1950s and the 1960s, this does not do justice to the intensity of the conflict, both in political and social terms. Take, for example, the case of strikes led by trade unions and labour movements and organised in the manufacturing sector during the 1960s and the early 1970s. Although it is not easy to formulate a qualitative judgement out of the available statistics,¹⁹ the increase and intensity of strikes peaked during that period.²⁰ It is also the case that many creative techniques (eg, wildcat strikes) were smartly deployed by workers, suggesting a high level of political consciousness. Moreover, some of these strikes were quite successful in politicising conflicts over working conditions. They certainly did not amount to a form of sweeping constituent power and did not have the potential for a complete emancipation of the working class; nevertheless, they were an expression of a genuinely political conflict and they managed to detach, at least in part, wages from the growth of productivity. In several countries, for example, wages were indexed at a higher level than the relative increase of productivity throughout 1968 and 1969.²¹ There is much to be said about the conditions that made such a wave of strikes possible and this relates heavily to the material constitution of post-WWII European countries. Concentration of production in industrial factories and a state actively involved in production in strategic sectors (eg, electricity, oil extraction and communication) facilitated the development of class struggle rather than stifled it. The organisation of these struggles shows that, at least for a certain time, authoritarian liberalism's grip on society was not so strong to the point of quashing workers' initiatives.²² They prove that labour had political subjectivity as well, despite not having a clear immediate electoral impact on the composition of governing political majorities. Furthermore, some of these struggles would not only secure economic gains for the workers, but they would also obtain a partial decommodification of certain aspects of labour law (more leisure time and time for education) through the approval of new legislation for the workplace. This means that although parliaments and political parties were not at the forefront of these struggles, they had to register their capacity for political action and lawmaking.²³ Wilkinson does not make much of the fact that some of the most important attempts at resisting commodification of social rights were done through legislation: school reforms with more involvement from students and parents in their governance; direct involvement of the state in planning housing schemes; and the establishment of national healthcare systems.²⁴

¹⁹The methodological issues underlying a quantitative analysis of strike activities have been highlighted by, among others, Lauren Stern, 'Methodological Issues in Quantitative Strike Analysis' 17 (1978) *Industrial Relations* 32.

²⁰Lorenzo Bordogna and Gian Primo Cella, 'Decline or Transformation? Change in Industrial Conflict and Its Challenges' 8 (2002) *European Review of Labour and Research* 585.

²¹For an overview of class struggles in the decade 1968–78, see Colin Crouch and Alessandro Pizzorno, *The Resurgence of Class Struggle in Western Europe after 1968* (MacMillan 1978) (see, in particular, the chapter by David Soskice).

²²Another important factor that Wilkinson highlights is the presence of the Soviet Union, perceived as a concrete threat for the compromise between capital and labour. This threat certainly made the adversaries of labour more cautious and, hence, attentive to labour's protests.

²³The most important example of these outcomes is represented by the Italian Statuto dei Lavoratori (Workers' Statute), a statute elaborated and approved by the Italian Parliament in 1970 as a response to the impulses coming from social movements, whose symbolic and material strengths were difficult to overstate.

²⁴The right to food was managed in a partially different way and, as Wilkinson notes, it implied an active role of the European communities in virtue of the Common Agricultural Policy. Addressing access to food was understood to be a continental issue and was addressed by heavily subsidising agricultural production at the supranational level.

Another wave of important struggles was organised by feminist movements. These reached their peak after 1968 and brought about important social and legal changes. Again, strikes and street protests, together with a granular network of local associations and cultural activity, politicised the issue of gender (a notoriously thorny issue in all European countries). Although it is difficult to quantify how much feminist struggles obtained in terms of constitutional change, it is clear that their fights were eminently political and realised important change in key institutions of the material constitution such as the family, the school and the workplace.²⁵ A comparison with the authoritarian liberalism of the post-Maastricht phase is quite telling of the difference between these two ages. First, some expressions of the ‘countermovement’ against the financialisation of the economy took a nationalist and right-wing turn. Although observed with a certain level of preoccupation, these movements were never bashed by state or supranational coercion. As we shall mention later, the reaction from the other side was to push towards a reorganisation of the material constitution. The situation is different with popular reactions against the new phase of the EU. The movements born out of the 2008 financial crisis generated political subjects against the newly imposed regime of austerity. The Greek case of Syriza exposes the authoritarian underpinnings of supranational institutions’ reactions. Despite the presence of a lively and participated movement across different southern European countries and a political party expressing the desire to break out of austerity, no negotiation was allowed, and conflict was soon absorbed by an array of direct interventions into Greek political economy. While one may concede with Wilkinson that Syriza’s political strategy was weak and lacked any traction because it had no exit plan, a memorandum that formalised harsher conditions of austerity was ultimately imposed over Greece as a disciplining measure. This time around, the forces of authoritarian liberalism had a stronger hold over social and political movements. Perhaps the more effective repression of the bottom-up countermovement might teach us something about the quality of political conflict during the first phase of European integration. Wilkinson insists in many points that elites wanted a passive citizenry, and that the working class was quite keen to retreat to their private spheres once they had cast their vote. Wilkinson’s reading of the struggles in the 1960s and early 1970s made them compatible with his overall narrative of a development compatible with political apathy. He recognises that ‘there would be . . . a return of working-class militancy in some areas, with industrial unrest and strike waves occurring, not just in France, and also in Germany and Italy’.²⁶ However, ‘the pattern of social and political conflict that grew out of the events of 1968 would be “the polar opposite of the class conflict model”, with the new areas of struggle for recognition “occupied by middle-class radicals” and other post-socialist demands mobilised under various banners of group identity’ (ibid, quoting Offe). Ultimately, these events ‘had little lasting structural impact on the political system, the constitutional order, or the dynamic of its political economy’.²⁷ Wilkinson, following Claus Offe, portrays these conflicts as a ‘mobilisation for non-institutional political action’ (ibid) with no influence over the development of the constitutional order.

This assessment of the constitutional dynamics post-World War II appears to be affected by two problems. First, it is unclear why the non-institutional action would be less effective on constitutional change and culture than institutional politics. Here, perhaps, Wilkinson is too formalist in focusing on formal change of the constitutional order. Second, the material constitution of each of the two phases mutated in fundamental aspects. The mode of production will come to be organised, in a progressive but steady way from the mid-1970s, around the embedding of finance in industrial production;²⁸ the relations of production will also change because the factory as the productive space, at least in Western Europe, despite remaining an important site of labour, will lose its centrality; technological innovation will enable (through information technology

²⁵Cf Maud Bracke, *Women and the Reinvention of the Political: Feminism in Italy, 1968–1983* (Routledge 2014).

²⁶Wilkinson (n 9 above) 134.

²⁷Wilkinson (n 9 above) 135.

²⁸Costas Lapavistas, *Profiting without Producing* (Verso 2011).

and logistics) a more intense level of commodities' circulation; and public and private debts, policed by financial markets, will become the main source of financial support. Wilkinson notes that 'substantively, this transition involved the dismantling of the social contract between labour and capital, the unravelling of post-war class compromise, and the freeing of capitalism from political constraints'.²⁹ Although Wilkinson recognises the differences between a Fordist material constitution and a financialised one,³⁰ he does not highlight the reasons behind the transformation. In his narrative, European integration and national constitutional orders develop towards a more repressive form of authoritarian liberalism as a logical development of the way that the material constitution of the post-war period was designed. To resort again to the language of trauma, the traumatic condition of the masses (and the distracting task of identity politics) left plenty of room for powerful economic interests and political elites to consolidate their domination. In other words, crises can be explained as an inner feature of capitalist development and the expansion of authoritarian liberalism is a consequence of the political space left empty by the masses. But is this enough to explain the transformation of the material constitution? If the material constitution of the post-war years was successful in establishing authoritarian liberalism and protecting vested interests of various elites, why would capital and its representatives push for an overhaul of economic relations? There was international pressure to move towards that direction. The Wilkinson's volume mentions and stresses the changing role of the United States (USA) (from an economy of production to one of consumption) and the consolidation of transnational networks.³¹ But it seems that Wilkinson underestimates the active role of the struggles previously mentioned in pushing capital to answer their challenge by restructuring the modes and relations of production and, hence, modifying the material constitution. In short, one could say that the capacity for political agency of labour is assessed rather slowly from the very beginning. Other alternative explanations of the changes that occurred during that period are more sympathetic to the active role of labour. Wolfgang Streeck, for example, explains the rise of the new political economy as capital's answer to antagonist forms of labour struggles. It is the high level of social and political mobilisation and conflict (which is also one of the causes of the lowering of the profit rate) that pushes capital to invent new ways of buying time.³² Labour remains, even during the post-war phase, the most expensive factor of production for capital and its capacity of mobilisation and resistance irritates capital's expectations of economic return. Under this reading, for at least a certain period, in Western Europe labour was not really apathetic, and far from being a victim of the elites' greed, it struggled to achieve a certain level of political autonomy.³³ Such a view of labour's political agency has an impact on the explanation of the formation of the material constitution. The new material constitution, which would consolidate itself around Europe by the 1980s, was a successful attempt by capital and other interests to tame antagonistic forces and to restructure the welfare state.³⁴ It is at this stage of development that new constitutional actors emerged and took up the role of governing forces. The change in the form and organisation of political parties has been consolidated by the spread of the cartel-party and later the catch-all political party, which, by definition, is no longer organised around class divisions.³⁵ New powerful agencies are elevated to the informal status of constitutional organs. The most striking example is

²⁹Wilkinson (n 9 above) 129.

³⁰Wilkinson also highlights the transformation of the common market into a single market and how this change pushed national economic champions to change modes of production and business models.

³¹For this point, see the seminal contribution by Nicos Poulantzas, *Law, State, and Marxism* (Verso 2007) chapter 9.

³²Wolfgang Streeck, *Buying Time* (London 2014) 72ff.

³³This is the thought behind Mario Tronti's famous thesis on the political autonomy of labour: Mario Tronti, *Capital and Workers* (London 2019). It should be added that the struggle was ultimately lost by labour, leading to a new material constitution.

³⁴One could say, following Chris Bickerton, *European Integration* (Oxford University Press 2012), that the transformation of European states into Member States is achieved at this point.

³⁵See Piero Ignazi, *Parties and Democracy* (Oxford University Press 2017).

the affirmation of the independence of central banks from politics and their subjection to market inputs, which was established and entrenched in the 1980s.³⁶

5. Juridification and constitutional courts

On the point of neutral and independent powers, Wilkinson insists in several places that the prominent role of courts as agents of demobilisation was already visible during post-war reconstruction. In his view, parliamentarism declined because its main actors (ie, political parties) quickly dismissed any attempt at organising an active electorate, accepted the new liberal constitutionalism (a key passage is the change of the Social Democratic Party's political stance taken at Bad Godesberg) and morphed into state-party cartels. Later, parties became intertwined with state bureaucracies and were therefore co-opted by interests different from those of their original constituencies. The judiciary occupied this void by monopolising the interpretation of constitutional rights, and the expansion of its remit did not meet any meaningful resistance. Wilkinson notes that the critique of judicial review of legislation typical of the interwar period and formulated with admirable intellectual astuteness by the likes of Edouard Lambert, Harold Laski, Herman Heller and Franz Neumann, is forgotten after WWII, in favour of the establishment of a new type (mostly centralised) of constitutional review.³⁷ This is reflected in the legal debates of the time. While US constitutional theory would obsess over the counter-majoritarian difficulty (think of Alexander Bickel's³⁸ and John Ely's³⁹ classic books), European counterparts did not notice the issue for a long time. In fact, one could imagine that the absence of the counter-majoritarian difficulty from European debates was perhaps due to the fact that the rise of judicial power had not been perceived. Apart from West Germany and its powerful central bank and constitutional court, the other countries involved in the project of European integration would not display pervasive patterns of judicial activism for quite some time. In fact, the idea of introducing specialised constitutional courts was inspired more by Hans Kelsen's idea of a binary control of constitutionality (valid/invalid) rather than constitutional review of fundamental rights and its horizontal application. The Constitutional Council in France waited until 1971 to introject the declaration of rights into the constitution and the reform of its jurisdiction closer to that of a constitutional court will have to wait until 2008.⁴⁰ The Italian Republican Constitution introduced a constitutional court with a centralised and incidental mechanism of constitutional review. While it is not incorrect to say that the motivations for establishing a constitutional court were less linked to the resistance against fascism than to a sort of insurance in case of electoral victory of the left parties,⁴¹ it is notable that the court was not only established and started operating only in 1956, but that it also did not venture into proper adjudication of legislation enacted after the entry into force of the constitution until the mid-1970s.⁴² In fact, in the first years of its activity, it struck down only statutes and decrees enacted before the republican period and deemed incompatible with the new constitution. Even at the moment of joining the European Communities in 1973, countries such as Denmark and the United Kingdom had little experience of activist judicial

³⁶Omar Chessa, *La Costituzione della moneta* (Jovene 2016); Paul Tucker, *Unelected Power* (Princeton 2016). Of course, one could still point to a German exception with the Bundesbank. See Jeremy Leaman, *The Bundesbank Myth* (Palgrave 2001).

³⁷Although it should be noted that for Lambert and Laski the target was more the jurisprudence of *Lochner* and judicial review US-style.

³⁸Alexander Bickel, *The Least Dangerous Branch* (Yale University Press, 1986).

³⁹John Ely, *Democracy and Distrust* (Harvard University Press, 1980).

⁴⁰For a reconstruction that puts emphasis on the expansion of judicial power in France from 1970, see Alec Stone Sweet, *The Birth of Judicial Politics in France* (Oxford University Press 1997).

⁴¹For a recent analysis by an external observer, see Bruce Ackerman, *Revolutionary Constitutions* (Harvard University Press 2019) chapter 4.

⁴²Vittoria Barsotti, Paolo Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015) 37–8.

review. The use of proportionality, which after the example of the German constitutional court in *Lüth* became standard as a method of adjudication in many European countries, was not designed, at the beginning, as an appropriation of political judgement by the courts.⁴³ Wilkinson is right to note that proportionality has been deployed as an instrument for entrenching the commodification of constitutional goods and to allow the judiciary to occupy a political space that should have been allocated to the legislature.⁴⁴ Labour provides a perfect case of how courts have adopted proportionality as a mechanism for optimising its regulation in the market, as the infamous quartet of cases from the Court of Justice of the European Union (CJEU) proved a few years ago. Adjudicating questions concerning strikes through proportionality analysis in the CJEU introduced a measure of commensurability between market rationality and the political meaning of the strikes, effectively emptying out the latter's capacity for resisting commodification. In doing so, the CJEU moved 'from a Herculean balancing of values framework to a seemingly innocuous and purely factual review of Pareto efficiency'.⁴⁵ But the use of proportionality as an *optimising* device only later became a standard of adjudication and a model for many national constitutional courts.

This different reading of the transformation of the role of neutral agencies could be an effect of the relation between the material constitution and authoritarian liberalism. In Wilkinson's frame, the change from the post-war to the Maastricht material constitution (for lack of a better definition) does not trigger a change in authoritarian liberalism. It is authoritarian liberalism that, by profiting from the incapacity of the masses to organise and act politically, realises a fundamental change of the material constitution according to the interests of its supporting elites. Action is on the side of authoritarian liberalism, while apathy is what mostly characterises the antagonist side. Under this description, authoritarian liberalism is a governing ethos and regime capable of moulding the material and ideological features of the constitutional order. Wilkinson identifies the origins of this form of government in the interwar period and he tracks how, after the brief parenthesis of WWII, authoritarian liberalism resurrects and becomes the hegemonic force of European integration. By tracking a general sense of direction of European integration, the diagnosis formulated by Wilkinson is correct. But the drawing of this long arc comes at the cost of overlooking, on one hand, the contradictions animating authoritarian liberalism's political economy and, on the other hand, the autonomy of social and political movements. Ultimately, authoritarian liberalism comes across as a non-remarkable force whose progression is due to the lack of strength from those who are exploited by it. However, this picture underestimates in important ways both the coercive and canny methods of authoritarian liberalism and the political agency of movements, unions and political parties.

⁴³Moshe Cohen-Elyia and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) chapter 1.

⁴⁴See Jacco Bomhof, *Balancing Constitutional Rights* (Cambridge University Press 2013).

⁴⁵Antonio Marzal, 'From Hercules to Pareto: of Bathos, Proportionality, and EU Law' 15 (2017) *International Journal of Constitutional Law* 621, 622.