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SOCIAL RIGHTS CONSTITUTIONALISM: AN ANTAGONISTIC ENDORSEMENT

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ABSTRACT

*The paper discusses how we might understand solidarity as subtending the institutionalisation of social rights in a way that carries productive tension into the constitutional thinking of social protection. I argue that writing **solidarity** into social rights constitutionalism is the ‘prolegomenon’ of any credible understanding, and I borrow the term ‘dogma’ to express this. T H Marshall’s influential argument that social rights are **continuous** to civil and political rights has become both the grounding assumption in constitutional theory and at the same time the most obvious lie in the constitutional practice of advanced capitalist democracies, clearly belied in EU constitutional practice under conditions of **austerity**. In the second part of the essay I explore the various attempts to **accommodate** the continuity in the face of the contradictory articulation of social constitutionalism and capitalism. Against these various forms of containment, that oscillate between toothlessness, apologia and capture, I undertake in part 3 something of a defence of the **antinomic** significance of social rights constitutionalism; with an eye also on strategic opportunity, the paper probes what mileage might be left in ‘exploiting’ the contradiction between capitalist interests and social rights.*

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There is in capitalism a debt, and the creditor is the proletariat

Lyotard¹

I

PROLEGOMENA TO ANY FUTURE SOCIAL RIGHTS CONSTITUTIONALISM

SOCIAL RIGHTS IN THE ERA OF AUSTERITY

Lyotard's implicit reference to Marx in the above quote links politics to debt in a counter-intuitive reversal of the debtor/creditor relationship. It is a reversal that will be explored as an instance of the antinomic in the last part of this paper. We begin our discussion with a reference to debt and will close with it, tracing in its suffocating embrace of politics, perhaps something of an opportunity. But we begin with a prior question. We ask: *what does it mean to raise today – under conditions of austerity – the question of social rights constitutionalism?* The usual answer is that it means little. Under the dominant rationalisation social rights are increasingly less affordable compensations for the social costs of the integration of markets on a global scale. Social rights are the more obvious casualties, however 'regrettable', of the seemingly inexorable process of globalisation, a result of the economic freedom afforded to capital to circumvent the national systems of social protection by relocating to cheaper sites – whether it is the reality, or merely the threat, of relocation. Systems of social and labour protection have thereby been thrown into the vicious circle of competitive alignment, with the devaluation of labour as the principal adjustment factor. The effects that the 'race to the bottom' has had on social rights have been devastating. The *social constitution* entrusted with the redress of the worse effects of market integration can only be mobilized at the extreme end of the released social devastation, as *ultimum refugium* at the most basic level of guaranteeing the needs of biological existence, and remains otherwise toothless in regard of the majority of the effects of globalisation.

Austerity comes to compound the devastation. For those economies that austerity has locked into the vicious circle of shrinkage, the spectre of sovereign debt has come to displace social constitutionalism as such. The transition of the Southern European states from 'tax States' to 'debt States' - States, that is, that cover the larger part of their expenditure through borrowing rather than taxation and have to service that accumulating debt with an ever increasing share of their revenue² - introduces a faultline that cuts across the constitutional landscape and that only widens under the momentum of its own operation. The loss of budgetary sovereignty shrinks the political capacity of the State; state functions are transferred to markets; and the constitutive coincidence between addressors and addressees of law-making is broken. The problem is now that with states beholden to markets through sovereign debt, the earlier notion that states can also serve as addressees of social rights claims – typically as demands to shelter certain fundamentals of existence from market allocations – becomes meaningless. In the gesture of

¹ The original formulation by Lyotard, in the 'unpublished introduction to an unfinished book on the movement of March 22' runs like this: '(By calling it labor force Marx is perhaps only forcing bourgeois political economy to recognise that there is, in capitalism too, a debt, and that the creditor is the proletariat.)' In B Readings (ed) *Political Writings: J-F Lyotard* (1993). I have removed the brackets, and the caveats, and pared it down.

² For a fuller analysis see W Streeck, *Buying Time* (2014)

underwriting the credit-worthiness of states, markets perform an inclusionary move that collapses the opposition that gave social rights leverage, and reconfigures them as debts.

Austerity politics in the era of sovereign debt are the desperate, rushed and brutalising attempts to contain the contradiction between democracy and capitalism,³ and, in Wolfgang Streeck's eloquent title, characterise capitalism's attempt to *buy time*.⁴ The defeat of the Syriza 'interlude'⁵ in Greece in this context is variously instructive, offering lessons that we have only just begun to discern. The intensification of the contradiction, the rapid acceleration of the appropriation of surplus value out of the 'failed' experiment of monetary union (*failed for whom?*), the generalisation of market thinking at every turn, also stake the continuation of the system on an increasingly brutal implementation of necessity that walls itself up against alternatives. The development has a major effect on the question of legitimation, and what once might have been a reason to invoke a 'legitimation crisis'. The horizon of debt and the mutations and substitutions it effects, relieves Capitalism of the need to mobilise the customary legitimatory narratives of individual freedom, innovation, progress, rational choice, market veridiction. Instead it instils compulsion at the point of the recovery of meaning. With that move it substitutes reflexivity for necessity. It is against the false generalising of necessity⁶ that, one might hope, politics might re-discover its opportunity; not in the apocalyptic terms of a global response to global capital, but in a more local, pragmatic democratic assertion of solidarity - and the social rights it underwrites - as the animating principle of social constitutionalism, of the kind that dignified European post-war democratic societies.

When the democratic description of 'peoplehood' and our sense of our position as subjects become problematic, constitutionalism begins to falter on its social axis. It falters in those situations when the question of the social dimension of constitutionalism is begged: as it is, begged, in the paradoxical 'sovereign' decision of a people to hand over sovereign determination.⁷ These are shorthand formulations that cover over the more complex realities of the lived experience of constitutional practice coming undone at the seams, making it impossible for people to rationalise the political conditions under which they dwell, that shape their life chances and the ties of intergenerational solidarity. I will insist in what follows on this experiential dimension because it is this dimension onto which the antinomic grafts. Not because, as Husserl put it,⁸ 'all reflection undertaken for existential reasons is naturally critical', because the problem as we will see involves the emergence in the first place of a problem, or stake, as open to question and therefore to reflection. Nor, as per Ulrich Beck, can we assume that 'a public *emerg[es]* not on the basis of consensus of decision but *out of dissent* about the consensus of

³ The organising hypothesis of this contradiction has been developed by W Streeck in 'The crisis of democratic capitalism' *New Left review* 2011. (See also 'Markets and Peoples' *New Left Review* 2012)

⁴ Streeck, op. cit, n2

⁵ I am referring here to the period between January 2015, when the Left-wing party was voted into power, and July 2015 when, after the referendum that in effect rejected the EU's austerity package and conditionalities imposed, the government capitulated under the extreme pressure of the EU.

⁶ See also Clemens Kaupa's contribution in this issue

⁷ The case of Greece is instructive. The Greek Court of Cassation had the opportunity to reflect on the constitutionality of the first memorandum and the 'conditionalities' it contained in its decision 668/2012 in a case was brought before the Court by the Athens Bar arguing that the MoU, as incorporated in the legislation, compromised budgetary sovereignty because it transferred national competences to international bodies.

⁸ E Husserl, *The crisis of European sciences and transcendental phenomenology: An introduction to phenomenological philosophy* (1970) at p60

decisions,⁹ because what counts as ‘dissent’, and the scope of reflexivity, overstates the capacity of the constitutional subject to make sense of the constitutional situation that confronts it, the intelligibility, even, of the situation *as* constitutional. We will return to all this in the last section. Suffice it here to note that we may understand this reflexive dissent not in a key of imperfect or failed consensus but in a key of the antinomic, which makes it radically unproductive on a register of ‘deliberation’ aiming at rational consensus, but productive perhaps as a clear indicator of its constitutive limitation. A different tradition, of the *material* constitution, invites us to begin with the thought that those who produce value in a society also determine its disposal, and that *to act on the contradiction* – as will emerge here in the fraught articulation of social rights and capitalist interests – is to act against the usurpation of value and the denial of a speaking position to the producers of value. It may take the form of dissent against the integration of interests by the agents of capital as orchestrated through the EU. Or, in the constitutional key of this paper, it may take the form of the stubborn assertion of social rights, of constitutional warrant, against their elimination through ‘total’ market activity.

At the point of entry let us state, as ‘prolegomena’, two fundamental premises that I assume near-axiomatic for any theorisation of *social rights constitutionalism*. Firstly, that as *social* rights they give institutional form to *solidarity*. Secondly, that this institutional form, as *constitutional*, involves constitutive assumptions about entrenchment, hierarchisation and rationalisation. A commitment is constitutionally *entrenched* when it can only be modified through political decisions as mandated through constitutional amendment procedures; *hierarchy* elevates constitutional provisions above ordinary institutional activity of the legal regulation of economic and social life; and ‘*rationalisation*’ means that the meaning of norms is informed by constitutional principle. As ‘prolegomena’, these constitutive conjunctures first, on the substantive level, with ‘solidarity’ and then, on the formal level, with the three aspects of the reflexivity it deploys, are conditions of the meaning of social rights constitutionalism.

The structure of the argument is as follows. In the remainder of this section we look at the ‘social’ of social constitutionalism, that is its connection with solidarity as *dogmatic resource* and as *frame and interdiction*. The accommodations of the following part (section II) relate to the continuity between generations of rights, as famously stated by T.H. Marshall.¹⁰ I will argue against these accommodations that they only ‘reconcile’ social rights to individual rights by subsuming the former to the latter. If Marshall’s continuity thesis is to be pursued, then *with* him we must theorise social class as contradictory to citizenship and understand continuity in light of this antinomy, where citizenship, as realised through social rights and the value of solidarity, involves a qualitative, transcendent, step. This is the subject of the third part (section III), where the argument will take its antagonistic turn, as it seeks to push antinomy onto constitutional terrain and to re-instate its lost connection with the dogmatic resources and the particular form of constitutional reflexivity they sustain. To insist along this practical-theoretical trajectory, even where these re-couplings have now come to be seen as improbable, is to tap the logic of immanent critique.¹¹ It is important, I argue, not to displace the antinomic significance of social rights constitutionalism. If the endorsement of social rights adopts a vocabulary of antagonism, it is to return *against* the dominant rationalisations to what is lost when market thinking eclipses solidarity, and to clear a space for strategic constitutional intervention.

⁹ U Beck *Cosmopolitan vision* (2006) at 339

¹⁰ T H Marshall, *Citizenship and social class in sociology at the Crossroads and other essays* (1963 [1949])

¹¹ I refer here to Marx’s notion, as developed in particular by Adorno.

SOLIDARITY AND CONSTITUTIONALITY

Alain Supiot reminds us that in its original juridical sense – that dates from Roman law – *solidarity* was the term for what was effectively a technique of holding co-responsible all those who played a role in the generation of a certain risk.¹² ‘The Roman legal concept *in solidum*,’ adds Hauke Brunkhorst, ‘means an obligation for the whole: joint liability, common debt, solidary obligation.’¹³ The original solidary ‘asymmetrical’ obligation is ‘sublated’ in the direction of *reciprocity*,¹⁴ and this sense of reciprocity is generalised with the advent of the Social State which introduced the pooling of the risks of existence and gave solidarity the organisational form of social security and public services, to which one contributed according to one’s resources and benefited according to one’s needs. That the crisis of social rights constitutionalism marks today the decline of solidarity as *organisational* form does not, for Supiot, mark also its decline as dogmatic resource. After all ‘the social state is simply one moment in the long history of human solidarities which have taken multiple forms, none of them neither definitive nor guaranteed.’¹⁵ This is because for him solidarity underpins and sustains juridical reason in a way that is never exhausted by any one of its (organisational) instantiations. He captures this with the concept of *dogma*. His *Homo Juridicus* is a restatement of *law as social hermeneutic*; the *hermeneia* referred to is unique to juridical reason and sustains the dignity and autonomy of *ratio juris*. Its achievement is to provide the shared symbolic medium that *binds* by ‘interposing shared meaning between people.’¹⁶ In its hermeneutic function, dogma furnishes the conditions of intelligibility and at the same time marks the limit beyond which *hermeneia* is undone. This notion of limit point is, I think, important; one might think of dogma as that which prevents passage to a different register to measure the adequacy of law’s solutions. In this gesture of self-reference, law turns its reflexivity back on itself as dogma and thereby resists the ‘truths’ of market veridiction.

As *constitutional value*, solidarity orientates teleological and systematic interpretation; it furnishes its particular instantiations in legal practice with meaning that will indeed be open to re-interpretation, but also marks the point beyond which no such (re-) interpretation can travel without becoming a lie. In terms of its institutional realisation it underwrites social and labour protection and the obligation of social security, legally buttressing them with forms of objective liability. The forms that the institutional support may take is negotiable, but the value the institutional forms support is not; it affords constitutional protection to collective forms of representation and action and collective procedures. We need go no deeper into the function of institutional instantiation, protection and warrant than to look at the sources of vulnerability that form solidarity’s specific vis-à-vis. To understand solidarity as the foundation of the social state and the founding commitment to mutualise the risks of existence through the provision of social protection, is to appreciate the gesture that understands societal valorisation as irreducibly collective, where even those less exposed to risks bear a duty of responsibility given that they partake as beneficiaries of the totality of social production.

¹² A Supiot, ‘Grandeur and misery of the social state’ in (2013) 82 *New Left R*, 99

¹³ H Brunkhorst, *Solidarity* (2015) 2

¹⁴ *Ibid.*, 60

¹⁵ Supiot, ‘Grandeur’, op cit. n.9, 99

¹⁶ A. Supiot, *Homo Juridicus*, (2007) xxiv

If *social rights* give institutional form to solidarity, the fact that they receive sanction as constitutional rights, involves, as we said earlier, a commitment to entrenchment, hierarchisation and rationalisation. Against the vagaries of market activity, Supiot gives us a way to hold on to solidarity under the framing conditions of the 'dogmatic' which installs at the root of the properly juridical a certain unquestionability: to constitutionalise solidarity in the forms of social rights, of social protection and social insurance, means, at minimum, to introduce it as axiomatic and non-negotiable interdiction. 'Collective self-determination' sanctions collective capacity for action in the forms of freedom to associate, to bargain and to strike. The institutions of social insurance, and public services offer collective defence against the risks of existence: together they offer the institutional realisation of solidarity, historical and therefore contingent, and subtended by legal dogma.

And while it would exaggerate the function of social constitutionalism to suggest it has ever *resolved* the contradiction between democracy and capitalism, it has had demonstrable capacity to shelter democracy from capitalist excess, imbuing democratic institutions *within* the economy with force, and enabling the recognition of the constituent role of *virtue* in the economy.¹⁷ It is but a symptom of the pathological expansion of total market thinking that to understand and theorise the economy by means of democratic and moral categories is either seen as some kind of category mistake, or folds into the a priori 'truths' of rational action thinking. We will return to this too. Let us simply say that when George Herbert Mead spoke of 'the working hypothesis in social reform' as the application of intelligence to the control of social conditions,¹⁸ he was talking about the economy as an expression of *democratic* life, and social policy in terms of the reciprocal recognition of vulnerability and dependency, and was certainly not invoking the banalities of rational action thinking.

II ACCOMMODATING CONTINUITIES

The accommodations explored here relate to the *continuity* between generations of rights, as famously stated by T.H. Marshall.¹⁹ Keen to remain with Marshall's normative argument about citizenship, current 'resolutions' to the contradiction between democracy and capitalism have variously invoked, rationalised and deployed social rights *as continuous* to civil and political rights. As we explore these 'accommodating' syntheses they are gradually exposed as forms of the reconciliation-cum-subsumption of democracy to capitalism, and all too often captive forms of thought.

(i) BUDGETARY CONTINUITY

In his seminal 1949 lecture, Thomas Marshall argued that successive waves of rights - civil, political and social - should be conceived along a continuous trajectory as markers of society's

¹⁷ See M Glasman, *Unnecessary suffering: managing market utopia* (1994), chapter 1: 'the Virtue economy'

¹⁸ As Mead says, "In social reform, or the application of intelligence to the control of social conditions, we must make a like assumption, and this assumption takes the form of belief in the essentially social character of human impulse and endeavor. We cannot make persons social by legislative enactment, but we can allow the essentially social nature of their actions to come to expression under conditions which favor this." G H Mead 'The working hypothesis in social reform' *American Journal of Sociology*, 5 /3 (1899) 367, at 370

¹⁹ T H Marshall, *Citizenship and social class in sociology at the Crossroads and other essays* (1963 [1949])

struggle to contain and *overcome* the constitutive significance of class. Social rights in the continuity argument are tied to the efforts of ‘political power to supersede, supplement or modify operations of the economic system in order to achieve results which the economic system would not achieve on its own, ... guided by values other than those determined by market forces.’ His theory engaged a ‘secondary system of industrial citizenship’, where syndicalist activity assumes ‘the guise of an action modifying the whole pattern of social inequality.’²⁰

The ‘continuity argument’ appears to stumble early on the objection that the successive categories of rights involve different bases of justification. To argue for their continuity presupposes therefore some prior alignment at the deeper level of justification. For theorists of *discontinuity*, to place the categories on a continuum misses the fundamental opposition between the rationales of entitlement and liberty, underlying civic rights, participation, underlying political rights, and need satisfaction, underlying social rights. For them, where not actually zero-sum, the rights might align in a relationship of mutual limitation, or, at best, mutual correction. Continuity arguments, their objection goes, miss this.

Take the varieties of the argument popularised under the rubric of ‘tragedy of the commons’. With its connotations of overstepping and inexorability, it stands as a warning against *hubris*. The lesson conveyed is that rational action – taken unquestionably by the theorists of tragedy as coincident with the maximisation of individual returns - cannot guarantee the sustainability of the commons. Although presented as an argument that individual motivations, typically greed, stand in the way of sustainable use, it is only a small step to the argument that the satisfaction of need, inexhaustible and unchecked, will invite a raiding of the common pool of resources through overfarming, overfishing, etc, where that pool as freely available is bereft of the sanction of the exclusionary device of individual property. Property and civil rights typically come to the rescue as framing conditions to what the requirements of ordering the commons might require. Discontinuities abound: property rights are pitted against the potentially overwhelming demands carried by social rights, and pitted also against political rights, the apparent risk here being that the motivation of politicians to promise too much to electorates to secure re-election, makes democracy an inappropriate register and means to achieve any kind of equilibrium, let alone the delivery of efficient outcomes. The rational response in the face of the tragedy is to understand the individual (negative) rights as corrective of social (positive) rights. Against the hubris of organising a society solely on the principle of need satisfaction, the threatened raiding of the common pool of societal resources is controlled through individual negative rights and property title.

In their much quoted and admired book *The Cost of Rights*,²¹ Stephen Holmes and Cass Sunstein, took issue with Garrett Hardin’s influential rendering of the ‘tragedy’ thesis²² and argued against the naïve separation of negative and positive rights that marks out the discontinuity thesis, and in favour of the *budgetary* continuity between categories of rights. The ‘negative rights/positive rights distinction’ turns out to ‘be based on fundamental confusions,’ they argued, for ‘all legally enforced rights are necessarily positive rights, as the legal maxim “where there is a right, there is a remedy” highlights.’²³ Every first generation civil/political right is exercised in the shadow of public enforcement: the right to vote requires a publicly-funded polling station; the right to

²⁰ *Ibid.*, at 28

²¹ S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999)

²² G Hardin, ‘The Tragedy of the Commons’ in 162 (1968) *Science*, 1243–1248

²³ Holmes, *op cit.* n.18, 43

property must be protected by fire fighters and the police; contracts would be useless if creditors could not instigate a public judicial procedure against a defaulting debtor.²⁴ Importantly the normative separation of the private and the State realms is unsustainable, as even ‘rights in contract law and tort law are not only enforced but also created, interpreted, and revised by public agencies.’²⁵ In short, the ‘opposition between “government” and “free markets”’ turns out to be largely spurious.²⁶ Finally, a budgetary perspective of rights undermines the notion that some rights are non-derogable, or ‘absolutes’, for if rights imply budgetary costs, then their enforcement engenders opportunity costs, and in a world of scarce resources a ‘no-compromise attitude will therefore produce confusion and arbitrariness and may, on balance, disserve the very rights it intends to promote.’²⁷ In short, the ‘cost of rights’ approach undermines a plethora of conventional binary oppositions (negative rights vs. positive rights; private law vs. public law; government vs. free markets; etc) which may obfuscate more than they clarify.

In an eloquent acclamatory comment on the Holmes/Sunstein thesis, David Garland also invites us to ‘question the distinction between social rights and individual rights,’ and to see instead that ‘individual rights are themselves thoroughly social.’ He says:

All rights, including those we conventionally call “individual” rights, are *positive* (they imply remedies, provide benefits and entitlements, trigger state action and the resources needed to make it effective); all rights have *costs* (they entail the transfer of resources, typically from general taxation); and all rights are *social* (they mobilize social resources and social authority to remedy rights violations or facilitate the exercise of political and civil rights). And all rights are fundamentally *public*, involving social resources, state authority, and the supportive conduct of state officials.²⁸

For Garland, ‘rights, properly so-called, are legally actionable claims that the rights-holder may make against others. Rights are thus power resources – allocated to, and at the disposal of, rights-holders. In this “social rights” are certainly not “anomalous” with respect to “bourgeois law”. In both directions a relatively smooth continuity holds across the continuum, both as an empirical matter (‘social rights ... have been established in the legal systems of many capitalist nations for more than half a century, without noticeably disruptive or revolutionary effects’) and in terms of theoretical construction, ‘if we look more closely at supposedly “non-social” individual rights, setting aside the ideological terms in which these are usually discussed,’ and acknowledge that ‘they too have these same redistributive, co-operative, economic characteristics.’²⁹

At one level Garland is right of course.³⁰ But why, we ask, such relentless moderation? What theoretical-political leverage is this form of (‘non-ideological’) continuity argument to offer social rights, especially as smothered under austerity’s budgetary stringency? That is not to say that the professed ‘accommodation’ suggested by the budgetary continuity argument is not problematic

²⁴ Id. 53; 13; 48

²⁵ Id. 49

²⁶ Id. 64

²⁷ Id. 125

²⁸ D Garland ‘On the concept of social rights’ in *Social and Legal Studies*, vol 24, 2015, 622, at 626.

²⁹ *Ibid.*, 625

³⁰ Especially if one insists on his suggestion to ‘use [social rights] to rethink what that standard conception ought to be,’ although it is not clear how radically he takes the argument: ‘Our jurisprudence too often embraces a liberal individualist conception of rights when in fact *all rights are social.*’ (Id.) Much depends on how far one is prepared to take the suggestion – see my last section ‘Constitutionalising contradiction’.

on its own terms, even before we get to the brutality of austerity politics. Why assume that the fact that the defence of all categories of rights are overlaid by their administration by the State effecting transfers and making public provision is salient or *decisive* to continuity? Or the fact that they all involve costs, collapse any qualitative definitional feature and place civil and social rights on a continuum, the latter distinct from the former as a question of ‘degree rather than kind’ in being ‘more expensive and more redistributive’?³¹ Why would the fact that ‘all rights depend on the availability of economic resources and political will’ establish any kind of common denominator that might accommodate continuity other than in its most surface manifestation, given that the political question and the fight are over the justification of the allocations? The political question thus re-invokes a deep *discontinuity*, under which the tenuous accommodations across the faultline of democracy and capitalism are potentially torn asunder.

The budgetary argument that establishes continuity by stringing together the shared *surface* characteristics of rights offers an argument for continuity-cum-elision. Where the difference of kind (of social rights vis-à-vis individual rights) is transfigured into a difference of degree, their *differentia specifica* – their eidetic specificity – collapsed, they are forced to blend seamlessly into the long postscript of the political, then social, accommodations of capitalism. And with this blending-in the very thing they name, *solidarity*, is supercoded to capitalist determinations and thereby cancelled out. To argue that both social and property rights are ‘positive’, institutional’, ‘costly’ and ‘social’ is hardly controversial but certainly inattentive to the redistributive demand at the heart of the clash of their respective essential justifications. Unless an argument is offered that writes re-distributive demands into property relations, in the way, say, of deviationist doctrine or ‘the commons’, the ‘social’ nature of the property rights regime remains comfortably immune to the demands of solidarity.

And this is all *before* we get to the governance of austerity and its field of fierce appropriations. Because if the ‘budgetary continuity’ argument already falters on its own gathering principle, it certainly collapses with the transition from the tax state to the debt state, that gives the lie to the proffered accommodation of liberty - negative, positive, collective, what have you - under conditions of sovereign debt and the partial or wholesale hollowing out of budgetary sovereignty the first to lose any credible line of defence to the ‘Matthew effect’ of globalisation.³² The separation of economic from social constitutionalism creates the conditions of a staggering asymmetry between the damage that labour markets wield and the remedies available in terms of social rights jurisprudence, and ‘budgetary continuity’ simply seals over this damage.

Take the example of the European Union and the unleashing of its very particular brand of austerity.³³ The Maastricht Treaty had already introduced the key requirement that in the absence of a lender of last resort, Member States’ self-imposed frugality would ensure the smooth function of the currency against potential turbulence from financial speculation; frugality that (already enshrined in the accession criteria) involved the reduction of the State deficit and of public debt vis-à-vis the national GDP, forcing States into the contraction of public expenditure,

³¹ *Ibid.*, at 627

³² Alain Supiot refers to the bizarre effect ‘where the very commitment of national economies to political redress of the social costs of globalization becomes self-defeating because it weakens the state’s ability to deliver it. Accordingly those most in need of protection are those most bereft of it, due to the labour market’s flexibility at circumventing the costs of social protection by relocating to cheaper sites. A. Supiot, *L’esprit de la Philadelphie: la justice social face au marché total* (2010)

³³ Marco Goldoni and I have developed this argument in our paper ‘The Political Economy of European Social Rights’ *forthcoming*

which in turn would supposedly attract investors to buy their national bonds. When the 2008 crisis transformed public debts into sovereign debts, the only solution envisaged for near-defaulting states, now constitutionally unable to self-finance and with their budgetary sovereignty handed over to EU bodies, would be to regain the confidence of markets by slashing their welfare budgets.³⁴ A series of *ersatz* legislation imposed through emergency procedures and without democratic scrutiny ensured that the monetary area is actually governed through strict criteria of budgetary austerity. These included the large-scale privatisation of public services, cuts to pensions, salary moderation, attacks on trade unionism and the wholesale flexibilisation of labour. There can be little doubt that in all this we witness a transformation of the role of the State protecting social rights, where it has to resort to financial markets in order to fund social services. The whole ‘philosophy’ of Euro governance is in effect geared toward the entrenchment of austerity policies in such a way that the decoupling of social rights from European citizenship is fully realised in the name of competitiveness and ‘total market’ thinking.

A short aside: a powerful illustration of how citizenship has been transfigured and class re-invigorated in these processes is provided by Maurizio Lazzarato in *The Making of the indebted man*.³⁵ Lazzarato argues that whereas the ‘real’ economy impoverishes wage earners through wage freezes and a variety of forms of flexibilisation of employment, and while it impoverishes social rights claimants through rolling back social spending, it ostensibly offers *finance* as a means to ‘enrich’ them through credit and stock market investment. The ‘entrepreneurs of self’ under the new dispensation are in debt, poor and precarious; their ‘entrepreneurship’ consists in managing their employability, debt repayments, and drop in wages. Their ‘stake-holding’ is a holding of debt. This form of political participation – their ‘partaking of the sensible’ as Rancière would put it – involves what they take upon themselves as a matter of responsibility, and deeper of self-discipline and constitution, their self-valorisation in the mirror of financial capital: all in all an indebtedness that instils unprecedented levels of existential precariousness through the risks and costs that Capital externalises on to society. What is achieved in the process is a comprehensive shift in the experience of the right-holder as debtor, bent on maximising his/her employability, self-equipping in preparedness, availability, flexibility. This is what Marx in his *Comment on James Mill* called ‘the lie of moral recognition’ and ‘the immoral vileness of this morality’ where ‘the moral recognition of man takes the form of credit.’

(ii) JUSTICIABILITY

A second, highly popular, statement of the continuity thesis explains it in terms of a justiciable constitutional guarantee to individuals of all rights across the three categories. In his important book *Law and Irresponsibility*, and in the process of discussing the complex ways in which the *legal form* both organises and dissipates responsibility, Scott Veitch revisits the ‘legalisation of politics’ thesis and the generalisation of the language of rights.³⁶ Significantly the demand that

³⁴ In the most recent case the French National Assembly has finally approved the labour-undercutting ‘El Khomri’ Law, drafted without any prior consultation with trade unions and rushed through the emergency procedure of Article 49.3 of the French Constitution, which stipulates the emergency procedure that allows the government to pass a Bill into law *without a vote*, unless a majority of deputies pass a motion of non-confidence, thus forcing the prime minister to resign.

³⁵ M. Lazzarato, *The making of the indebted man: An essay on the neoliberal condition* (2012).

³⁶ S Veitch, *Law and irresponsibility: On the legitimation of human suffering* (2007). By ‘justiciability’ he understands the ‘insertion into the realm of political conflict [of] a mode of dealing with that conflict, which

society provide solution to its political conflicts (and as far as social constitutionalism is concerned the demands of distributive justice and the meeting of needs) drives this ‘legalisation of politics’, the instrumental deployment of law that carries justiciability as the answer, and with it, as Veitch puts it, a certain reversal is effected where ‘the demand of law, can be seen as providing the demands for law’: the delivery of authoritative verdicts. Justiciability becomes the legal reduction of politics, and this ‘reduction achievement’, to use Niklas Luhmann’s term, conditions the claims of social constitutionalism and its authentication. The shift in expectations and presentation that comes with the presence of legal rights and third-party decidability,’ says Veitch, ‘affects how the original normative practice or conflicts arising from it are understood.’ Here ‘other forms of normative claim that seek authentication, recognition or approval’ must be made to conform to the specific modes of legal cognition, reasoning and decision making.³⁷

The important point to take from this is that the recognition of social rights as individual actionable entitlements and as ‘authentication’ of individual demands are at the same time forms of *blockage* of collective claims of distributive equality and societal needs satisfaction as a political-democratic question. Simply stated, social rights are *not* individual entitlements to societal resources, actionable in Courts. The social right to solidarity and dignity, as informing the protection of health, housing, work, education, etc, are not, and should not, be cashed out as the State obligation to provide a diabetes sufferer with treatment (*Soobramoney* in 1997), a homeless person with a home (*Grootboom* in 2000) or the inhabitants of the Soweto with free water (*Mazibuko* in 2009). I refer to South African cases here for a reason;³⁸ ‘activist’/transformative constitutionalism has rarely been as insightfully developed as it was in the post-apartheid constitutional jurisprudence, that had to face up courageously to such dilemmas.³⁹ The Court struggled with what was the unworkable and unjust constitutional practice of allocating limited societal resources on a ‘first-come, first-serve’ basis that would make a mockery of the political responsibility of government to all its citizens. While the proper limits of the reasonableness of judicial review waged for over a decade in both the courts and the academy, the constitutional consensus gradually emerged that ‘it is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected from the state, is that it act reasonably to provide access to socio-economic rights,⁴⁰ and within the available resources ‘to achieve a progressive realisation’⁴¹ of social rights. The question of judicial oversight of governmental action in the direction of meeting urgent social needs has been recommended, rightly, as a further constitutional commitment to the protection of social rights. That such political responsibility be directed to distributive justice and conform to the ideal of solidarity is what social rights constitutionalism demands, and of course there is an important

now comes to be understood in justiciable terms.’ (83) The introduction of the legal form allows for a resolvability of political conflict on the back of law’s introduction of commensurability into politics.

³⁷ *Ibid.*

³⁸ It is not just the South Africans who have struggled with these dilemmas. A debate has also been had in the North American academy over the actionability and justiciability of social rights. Frank Michelman has been a leading figure in this debate, and the shift in his position from advocating a justiciable constitutional guarantee of basic welfare benefits in 1969 (see F Michelman ‘On protecting the poor through the 14th amendment’ 83 [1969] *Harv L R* 7 -59) to treating them as constitutional aspirations to which governments can be held accountable (see F Michelman ‘Socio-economic rights in Constitutional Law: explaining America away’ 6 [2008] *Int.J.Const.L* 663-686.) For an illuminating account of the shift, and Michelman’s work more generally see J van der Walt ‘Delegitimation by Constitution?’ in 98 [2015] *KritV/CritQ*, 303-333

³⁹ See Karl Klare’s influential statement to this effect: Klare, ‘Legal culture and transformative constitutionalism,’ (1998) 14 *S. Afr. J. on Hum. Rts.* 146.

⁴⁰ *Minister of Health v Treatment Action campaign*, 2002 (5) SA 721 (CC) at para 35

⁴¹ D Davis, ‘Socioeconomic rights: do they deliver the goods?’ (2008) 6, I CON., 687-711

place for justiciability in this; but that actionable individual rights is its proper *modus operandi* misconceives it as an individual entitlement, and miscasts continuity on the back of that misconception.

(iii) CAPABILITY

A third line that the restoration of continuity takes, involves the highly influential thesis of enhancing market-participation. According to the theory of ‘capabilities’, uncontrolled – or ‘disembedded’ markets – deplete human resources, and thus threaten the very conditions on which markets depend for their operation. The answer comes in the form of a participation-enhancing *social market*.

The argument runs along the following lines: while the market, as harnessed to capitalist production, grants societies a significant increase in productivity and innovation, it also effects a significant increase in social inequality and social exclusion, with the very real threat of generating vicious circles that cause the depletion of the human resources. For capabilities-theories, social rights are conceived as an answer to the inequality and the depletion. If capitalism privatises the gains and socialises the costs of running the economy, social rights orchestrate (at least in part) the attempt to meet those costs of the operation of markets and guarantee the conditions of participation and meaningful citizenship. If ‘negative rights’ underpin and sustain liberty in the sense of a demand that the State do not encroach on private spheres of activity, in a complementary gesture social rights sustain ‘positive duties’, demands on the State to meet the population’s needs for education, healthcare, sustenance, housing, etc, *without* which personal autonomy or meaningful participation in society would remain fundamentally unrealised, and *with* which, growth and macroeconomic performance can be achieved on the back of such ‘fiscal multipliers’.

In the last few decades Amartya Sen’s work has been at the centre of the general attempt to invest in the capabilities of the poor to engage in economic activity in order to address the problem that there are actors who do not possess the practical capability to pursue their interest – or to take action – within the market system as it stands.⁴² While the market is unwaveringly held up by the ‘capabilities’ theorists as the mechanism that best distributes social resources amongst possible uses, once it is acknowledged that the conditions of general competition will never obtain empirically, the efficiency of ‘actually existing’ markets becomes questionable. The capabilities approach is an attempt to consolidate, not substitute, the range of *information* that is available through the price mechanism. And the enhancement has to do with addressing the opportunities that economic actors actually have of revealing their preferences through their choices. With an eye on opportunity-structure, equality – understood as equal basic capability - measures itself against the promise of equal participation. For Sen and the capabilities theorists, a market order must *complement* its distribution of formal bargaining positions (that secure equal formal participatory positions in the market economy) with the just distribution of ‘conversion factors’ that allow economic actors to pursue their advantage within the framework of the exchange, to furnish them, in other words, with the *capabilities* necessary to undertake autonomous action in the context of market exchange. As Simon Deakin, one of the theory’s most eloquent and fervent defenders transfers the insight across to his own thinking about

⁴² A Sen, *The Idea of Justice*, (2009), 7-8

'capacitas',⁴³ what is new are 'the elements of a concept that goes beyond purely formal guarantees of market access, to encompass the conditions needed for effective participation in the complex economic orders which characterise our time.'⁴⁴ 'Capacitas,' he says, 'should be thought of as the juridical concept through which the legal system defines the conditions of access to the market by human persons ... In a narrow conception, capacity is defined as the ability to engage in rational economic action ... In a wider conception it is the sum total of the preconditions of effective participation in market relations.'⁴⁵ Against paradigms where 'resources, endowments and preferences are taken as given' and so 'exogenous to the operation of the market mechanism'⁴⁶ the *capacitas* argument asks whether the economic actor is self-sufficiently capable of revealing his preferences through his/her choices – and re-orientes our attention to 'the process by which preferences and endowments are formed'⁴⁷ and thus to the conditions needed for effective participation in the economic order.

For a position that balances finely between market-enhancing and market-correcting logics, its privileging of market over political allocations in the final instance leaves it tainted for the Left, while the fact that its prescriptions *must* involve some welfarist leverage in order to materialise opportunity-structure for the powerless and therefore cannot avoid regulatory 'coercive transfers' leaves it tainted for the Right. Theorists on the Right will go further; Luhmann argued that under conditions of the separation of the political and the economic systems it becomes non-sensical to attempt to redress deficits on the supply side of the economy with political devices like social rights.⁴⁸ Given the attacks from both Left and Right, given the difficulties of sustaining capability-enhancing programmes under conditions of the global organisation of production, and given the vulnerability of the continuity argument to the antinomies that must be tamed to establish complementarities of sorts, it is perhaps no wonder that social rights have receded to such an extent, only 'to blunt the harsh edge of market forces on the fabric of social life,'⁴⁹ 'blunting' devices for the redress of the more extreme pathologies, results and costs of economic systems. With the public/private law divide replicating that between politics and the economy, social rights are left to hover on the borderline, toothless in the face of property title and 'discredited' as policy or regulation interference by the champions of market thinking. Attractive as the notion of a *social* market is in theory, it has been shown in practice that the market does not entertain predicates lightly. Instead the market has the unnerving power to enfold and define for itself what is 'social' about it, reflexively, so that any *political* attempt to vary market allocations *must* take a form of external limitation, buttress and containment.

(iv) PROPORTIONALITY

To understand proportionality as a language of accommodation, we need to apprehend how it came to cast continuity as commensuration between rights and as 'optimisation'. An older constitutional *problématique* defined the test of proportionality exercised by constitutional courts as a corrective *within* the democratic framework and not *of* it, as its more recent,

⁴³ S Deakin and A Supiot (eds), *Capacitas* (2009)

⁴⁴ Deakin, *ibid.*, 1

⁴⁵ *Ibid.* 28

⁴⁶ *Id.*

⁴⁷ *Ibid.* 19

⁴⁸ N Luhmann, *Law as a Social system*, (2004) chapter 12.

⁴⁹ K Rittich, 'Social Rights and Social Policy', in *Exploring Social Rights: Between Theory and Practice*, ed. D Barak-Erez, A M Gross, (2008) , p110

expansive, restatement does. In that older, more modest understanding, the Court would make sure that legislative and executive action complied with the requirements of appropriateness (is the action compatible with democratic law-making?), rationality (do means correlate to ends?) and necessity (is the action, amongst functional equivalents, the least intrusive available?) There is nothing incompatible with democracy about proportionality in this classical form; in Johan van der Walt's insightful formulation, it stipulates 'the scope of judicial scrutiny [as] limited to the way parliamentary majorities have *decided*- through a simple procedure of voting that testifies to its own groundlessness- *exactly that which cannot be balanced.*'⁵⁰

But it was difficult for this self-restriction to sustain itself in the forcefield of the contradiction between democratic organisation and capitalist accumulation. Already with the German Federal court's 1957 decision in *Lüth* and its reference to the balancing of competing values, the test of proportionality becomes unhinged from its classical, limited, conception⁵¹ to be released in a self-propelling move as substitute for democratic decision-making. By the time we reach the European Constitutional Court's decisions in *Laval* and *Viking*, and the flurry of the subsequent jurisprudence entrenching the economic freedoms of capital against labour protection, the test of proportionality has been magnified out-of-proportion to a travesty of its former self, as involving a comprehensive pooling of stakes, values and interests, to be calibrated on the vague metric of 'optimisation'. Proportionality in this form mobilises a measure of 'proportion' that answers the 'tragedy of the commons'-related fear of democratic excess and of the irrationality of the moment of decision, in order to rein in the 'disproportion' of industrial action and protect the economic freedom of employers.

For the workers of the Nordic States little more needs to be said about how injurious the removal of key questions of the organisation of labour and social protection from democratic fora has proven.⁵² But the jurisprudence of EU Law remains strangely inattentive to this catastrophe, and under the loud proclamations of the 'new' members, a paralysing dissensus appears to be emerging over what precisely is at stake. A certain unease can be detected amongst academic commentators too, once the argument is re-packaged away from the clash between economic freedoms and social rights and instead as a clash between the social rights of different constituencies of workers in terms organised by the logic of 'market access' with its very particular recasting of inclusion. How remarkable, in this context, that the dominant position in legal thinking has shifted enough to lend credence to this abdication from democracy and the transferral of key political decisions to the courts. And is this failure to understand social rights as devices that *stem* rather than *facilitate* social dumping not an indicator of how the critical nerve of constitutional thinking has been dulled?

Let us ask instead the question that critical theory invites: with the help of what distinctions are we able to resist the surrender of democracy and the subsumption of solidarity to market thinking? Against the market's move to flood the field with functional equivalents, let us fasten onto the non-negotiability of solidarity as constitutional *value* and as *achievement* of political

⁵⁰ In J Van der Walt 'Deligitimation by Constitution? Liberal Democratic Experimentalism and the Question of socio-economic rights', in (2014b) 97 *KritV* pp303-333, at 329; and for a more extensive treatment his excellent *Horizontal Effect Revolution* (2014a) 361-399

⁵¹ Van der Walt (2014b)

⁵² *Laval & Viking* decisions of the CJEU: Case C-341/05, *Laval un Partneri Ltd*, ECR 2007, I-11767 and Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECR 2007, I-10779.

constitutionalism. As such it is non-negotiable as a matter of the self-determination of political society. This does not of course mean that the interpretive questions over what solidarity requires in any one practical context will go away, or that the question over relative thresholds will become uncontroversial. As a question of *determinatio* such questions remain central to how we understand and operationalise constitutional reason.⁵³ But what it does mean is that a significant distinction emerges between the (contextual) determination of constitutional value and the optimisation of constitutional goods,⁵⁴ and that, further, decisions over relative thresholds are not subject to the pricing of their relative weights. In the lexicon famously introduced into jurisprudence by Lon Fuller, solidarity (as constitutional value) remains the aspiration on which any instantiation in any particular case is measured, enjoining, as a matter of definition collective categories, and forging relationality on its own, particular register. And while any instantiation remains an interpretive matter, one that is forced to drop below a certain threshold (Fuller called it the 'morality of duty') surrenders the value altogether and (however 'optimal' on some free floating register) can no longer count as an instantiation of *that* value.

There is of course a great deal more that can be said about all four of these accommodations but suffice it for present purposes to see how uneasily they connect capitalism and democracy, individual and social rights, how unsustainable the professed continuity: first, as strung alongside the more robust property- and civil-rights counterparts in an argument about budgetary continuity, in the face of the obvious realisation that such sovereignty has been handed over to creditors and markets; secondly, in the inflationary invocation of social rights as individual rights in the shrill tones of an unrealistic justiciability across the board; thirdly, as harnessed to capabilities to facilitate 'market access' and enhance market participation in an attempt to initiate a potentially *virtuous* cycle in the global race to increase the rates of return for capitals; fourthly, as flattened out in the relentless weightings and calibrations of 'proportional' balancings. Against the various problematic syntheses of rights, we ask what it might mean to allow *their contradictory articulation* to be played out in constitutional practice.

Before that, two caveats.

Firstly, the argument that follows is not an abandonment of Marshall's argument about continuity but its (improbable) restatement in the framework of fundamental antinomy. To hold on to continuity in the face of the contradictory articulation of categories of rights gives antinomy its epistemological significance. Secondly, the insistence on the question of continuity addresses it not (only or principally) as a matter of political philosophy, but of institutional practice. Perfectionist forms of liberal thinking have long advocated a liberalism that constitutively implicates the embeddedness of individual life, identity and capacity in their social context, arguing that the well-being of the individual is dependent on the social environment. My concern is not with that, which I accept, but with the difficult 'constitutional' juncture. Because it is one thing to say that individual goods and the exercise of negative freedoms must be conceptualised *in tandem* with the positive freedoms. It is quite another to establish on that basis a smooth passage between individual and social rights where under conditions of liberal economic arrangements, capitalist control over social resources trumps redistributive demands of social justice. The 'accommodationist' positions did indeed address the question of continuity

⁵³ See J Finnis, *Natural law and natural rights* (1980)

⁵⁴ I have offered a short elaboration of the value/good distinction in 'The European Court of Justice and "Total Market" Thinking' (2013) 14 *German Law Journal*

institutionally; and it was the institutional junctures of selective coupling and de-coupling that invited us to probe the dynamics of selective alignment on which so much of their casting of continuity in fact hangs *and falters*. The continuity-as-commensurability of the ‘budgetary continuity’ argument, the toothless corrective of the *social* market, the insidious attribution of proportionate weightings, cast continuity on a register where market allocations always-already skew distribution, where *re*-distribution comes too late, where the recuperation of what is owed to the producers of value – Lyotard’s injunction – is obscured and undercut.⁵⁵

III

THE ANTINOMIC SIGNIFICANCE OF THE SOCIAL CONSTITUTION

‘ANOMALOUS GRAFTING’

In an intriguing contribution to the debate on social rights,⁵⁶ Fernando Atria prompts us to look at how the demands that solidarity places on the constitution forces *a competition* within the rights category itself. If Atria’s is an argument about *discontinuity*, it is emphatically not because individual rights are not social or sensitive to social context. On the contrary, for him, ‘[s]ocial rights arise as a way of affirming – in terms of justice – the importance of understanding human self-realization as reciprocal rather than individual’. For him individual rights (negative freedom rights) and social rights (positive freedom rights) cannot be conceived or thematised on a continuum except at the cost of hollowing out social rights or collapsing them in a way that ‘de-socialises’ them. Individual rights depend on a paradigm of ‘contractualism’ that as a ‘way [of] bridg[ing] the gap between interest and duty [...] implies that what is politically relevant is not equality but poverty (more or less extreme).’ But social rights – we have already insisted on this – properly understood realize the principle of reciprocity, not charity. In the context of the contractual paradigm, Atria will insist, ‘the ideal of citizenship cannot play but a secondary role, because what is politically fundamental is the protection of interests.’ For Atria, successes in securing the justiciability of social rights are nothing but toothless victories at best, at worst a sign of how their political leverage has been wasted, in his terms ‘of how the ‘political meaning of social rights properly so-called has been defeated.’ The contradiction that besets the category of rights replicates the contradiction between two competing logics of resource allocation: on the one hand on the basis of what is revealed as merit in the free play of market forces and on the other on the basis of social need or entitlement as conferred through democratic choices. This is a real contradiction between individual rights and social rights that cannot be sealed over or harmonised, but instead sustains their political potential. That is why for Atria, ‘it is central to the very idea of social rights to preserve the distinction between them and individual rights, because the point of social rights is to subvert the idea of individual rights, to turn it against itself.’⁵⁷ And why ‘social rights can only be understood as anomalous grafts in bourgeois law; the foundation for the latter is the idea of individual rights.’⁵⁸

⁵⁵ Thanks to Scott Veitch for suggesting the link back to Lyotard’s opening: ‘There is in capitalism a debt’, and ‘it is this – their –debt that is being called in.’

⁵⁶ F. Atria, ‘Social Rights, Social Contract, and Socialism’, in *Social and Legal Studies*, vol 24, 2015, pp. 598-613

⁵⁷ *Ibid.*, 605

⁵⁸ *Ibid.*, 603

Further on the metaphor of ‘grafting’:

Grafting creates an unstable situation, that is, a situation which has an immanent tendency towards its resolution. This resolution can, in principle, adopt one of two forms: the transformation of the host or the normalization of the graft.⁵⁹

The metaphor of ‘anomalous grafting’ is wonderfully apt. It might be objected that grafting is already too high a demand and too ‘thick’ an assumption in the following sense: that if, with Atria, we take the argument about the ‘deep grammar’ of rights seriously, the operation may be lacking a host altogether, its meaning deprived a register. We must confront this as a real danger, that the language of social rights becomes merely an attempt that achieves no traction in a system rationalised in a way that already, constitutively, undercuts any notion of *the public* or collective as an *irreducible* category. The assumption that a *more fundamental* notion of the public is available as grounding for social rights is axiomatic here: it is ‘dogmatic’. Otherwise, for Atria, the inflationary use of social rights becomes merely ideological.

Atria runs the argument about institutional innovation (grafting) alongside one about ‘slow pedagogy’, the relation between the two arguments consistently intriguing. The argument turns on the potential release of learning processes that dovetail with the embeddedness, and re-embedding, of practices. Ultimately what is fashioned in the context of *slow* pedagogy, and against the form of *abrupt* market adaptation, is the unfolding of processes of recognition and solidarity, such as are harboured in the notion of social rights. Atria’s is not an argument against the market as such. The tenor that remains unwavering in Atria’s defence of social rights is the resistance to their (full) internalisation by the market and their measurement on *its* solutions, and the insistence, instead, that the solutions that we need to find for the demands that social rights articulate remains political, on the register of political justice, engaging collective categories and decided as a matter of and for democracy.

We began from the fundamental, if controversial, premise that social rights are incongruous to capitalism and its particular structures of opportunity and reward.⁶⁰ Where the market does *all* the work of allocating value to resources amongst possible uses, the distribution of resources with the explicit aim to meet needs is, from the point of view of market thinking, *irrational*. This incongruity made the ‘accommodations’ problematic, incapable of managing the faultline between democracy and capitalism except by subsuming the former to the latter. What does it mean to insist on the incongruity, and to act on this assumed ‘irrationality’? In essence, I suggest that if social rights are beset by the contradiction between capitalism and democracy, that we explore the significance of their constitutional iteration, as enunciated, that is, with constitutional force, and as unyielding to the various accommodations we explored above. With the urgent appeal not to displace the antinomic significance of social constitutionalism, we might begin to conceptualise how the insistent strategic use of social rights may import a real contradiction, the Hegelian/Marxist moment of the *Dasein der Widersprach*, from which the system cannot retract. Let us look a little more gradually about what this means, and why antinomy matters.

⁵⁹ Id.

⁶⁰ A Foucauldian reading of incongruity in the theory of rights is suggested by Ben Golder; ‘[Foucault’s] invocations of rights are strategic in this *incongruous* sense as they are situated within the spaces of political formation but are intended to resist and go beyond that formation, to transcend it.’ In B. Golder, ‘Foucault’s critical (yet ambivalent) affirmation: Three figures of rights.’ *Social & Legal Studies*, 20.3, 2011, pp 283-312, at 295

CONSTITUTIONALISING CONTRADICTION

To focus on antinomy is to pick up from Hegel, with Marx, not the drive to culmination and synthesis, but the self-undermining moment of contradiction, of thought hitting upon its limit *given* the categories available to it. While in Marx contradictions are indices of concrete historical situations, contrary to the cruder materialisms (of Engels and others) they [contradictions] are not to be understood as merely the reflections in thought of real material antagonisms. They point instead to a shortfall of the categories available to us to make sense of the processes of value production and social reproduction, the mismatch between the categories of thought and the modes of social being. Their emergence as contradictions marks the crisis-points of articulation, of expressibility and of intelligibility: of *meaninglessness* that is experienced as such. It is important to emphasise this experiential dimension, the lived incomprehensibility (the '*Dasein*' of the contradiction, as it were) that emerges in particular experiential contexts and that carries its potential energies. It is the lived dimension that is the potential site of disruption of the economy of representation that would otherwise organise meaning, seal it over and, in this state of self-immunisation, place it out of reach. For Frederic Jameson who has given us one of the most thoughtful restatements of the concept, it is the *dialectic* that disrupts such finitude, that refuses the sealing-over, that, to use his formulation, 'translates the experience of finitude back into upsurges of transcendence.'⁶¹ Whether, as in Marx, this movement receives a historical guarantee, is a separate issue. The complexities that attend both Marx's and Jameson's positions need not concern us here. Let us focus instead on what forces through as contradiction against the structural conditions that make such appearance, one might put it, *improbable*. The reference to structural conditions here are those under which people dwell and experience meaninglessness.

This discussion points us in a direction that we cannot possibly take here, and I retain only the elements that return it to our concern with social rights. And the key point is this: social rights as markers of society's commitment to sustain lives of dignity for all its members, extend a vocabulary on which meaninglessness may achieve - what we might call - *hermeneutic traction* as *injustice*. To retrieve the hermeneutic link to injustice, let alone to act on it, is improbable precisely because the register of justice that would authenticate such a link has been disarticulated under the compulsion of market thinking. Under these conditions, that the injunction 'this is unjust' may still invoke the aspiration of solidarity contained in social constitutionalism is at once the mark of the antinomic and of constitutional 'traction'.

Let us be clearer through the use of a few examples. The following are instances of meaninglessness felt and lived as an experiential deficit. In each case (political) reflexivity, i.e. the notion that things could be otherwise, has collapsed into a semblance of necessity. The critical task is to disrupt this semblance and to level against that which carries the mark and seal of necessity an injunction against injustice: to confront it as *unnecessary suffering*.⁶² In each case, then, the critical task is to discern in the situation the antinomy that might acquire hermeneutic traction, be signified as injustice, and acted on as such. It is here that the constitutional contradictory iteration of social rights constitutionalism against market thinking, and the former's

⁶¹ F Jameson, *Valences of the dialectic* (2009) at 34

⁶² The term 'unnecessary suffering' is borrowed from Maurice Glasman, who in his important book under this title used this formulation to capture the threshold of political rationality. Unnecessary suffering is what we, as a society, can attempt to redress, and this possibility is what constitutively invokes the political. See M Glasman, *ibid*, note 17

unwavering insistence on solidarity, may provide the leverage. Where it *is made to appear* that there is no other rational way to organise the economy than through markets, political-democratic alternatives are eclipsed as a matter of reason. Necessity takes the form of the 'unaffordability' of social protection, antinomic because it occurs in the midst of a general increase in resources that derives from expanded capitalist reproduction. The antinomy *appears* in the life of those who toil to generate value for the market, is experienced as the injury of massive job insecurity and stagnant wages, and can emerge as the injustice of the withdrawal of recognition. Where it *is made to appear* that there is no other rational way to organise social labour than through the de-regulation of the labour market, the injury is expressed as the sacrifice of a generation, where with unemployment raging at over 50% amongst the young (I am referring here to the cases of Greece and Spain) only one in two are likely to be able to *ever work at all*. Meaninglessness inheres in the situation of a sacrifice exacted and not acknowledged. The antinomic is experienced as a crisis of intelligibility and expressibility: an injunction of injustice that cannot achieve inscription on a register of market justice, but only as a claim against the withdrawal of (intergenerational) solidarity. Where it *is made to appear* that there is no other rational way to organise social production than through the profit-motive and through market-driven innovation, it appears as the meaninglessness of the destruction of work, where labour-intensive forms of production radically yield to capital-intensive forms, rendering labour superfluous and turning working people into redundant populations: the meaninglessness lies in the experience of redundancy, and, as above, the withdrawal of recognition. Where it *is made to appear* that there is no other rational way to organise the workplace than through the maximisation of individual utility, it appears in the assumption of *individual* responsibility for one's occupational degradation, the necessary surrender to the dictates of management. The meaninglessness is felt as the privatisation of discontent and sense of occupational failure. The 'antinomic' here points to the withdrawal of *collective* speaking positions and *collective* action opportunities to reverse the degradation, as underwritten and guaranteed by the social right to work properly understood as enjoining collective and democratic categories.

At none of the junctures on which the withdrawal of meaning occurs is a communicative-'agonistic' stance capable of redressing the usurpation of value or the withdrawal of speaking position; the collapse, in other words, of democratic defence to capitalist expropriation. Recognition, dignity, solidarity can only be interpreted as *antagonistic* to the given economies of representation, the recognition orders, the given distributions of contingency and necessity, what Rancière with such insight called the '*partage du sensible*'. The antinomic here, expressed by Rancière as 'dissensus' elevates contradiction as condition of staging of political subjectivities, where the collective is not thought of in terms of identification but of enactment.

We can transfer this insight of Rancière's to radicalise Marshall's, in the only way that does justice to his argument about continuity, one that could not have foreseen at the time the paradigm change brought about by the totalising ideology of the market. If Marshall argued for the continuity of generations of rights as a means to overcome the injuries of class, it is because the form of continuity that culminates in social rights can be read back across the preceding generations to disturb received distributions and class positions as sanctioned by property rights, *by means* of political rights. To the dialectic unfolding of rights, each successive generation promises a moment of transcendence. There is a clear message in Marshall against the priority of market allocations and a synthesis that projects back along the path of its culmination a different logic of distribution: at this point the sequential dialectic turns *transversal*. For the radicalised Marshall, then, continuity is understood as antinomic or not at all.

A useful practical example refers us back to the right to strike. In *Laval* and *Viking*, the social right of Scandinavian workers to act to protect the significant achievements of decades of social and labour protection was deemed disproportionate vis-à-vis the economic rights of entrepreneurs to move their capital and hired labour around in a classic case of the race to the bottom. Emboldened, perhaps, by the new constitutional mindset of Europe's constitutional Court, the Employers' group at the ILO, in a move that has created a protracted deadlock particularly conducive to the interests of capital, challenged the settled interpretation of Convention 87 and decades-long jurisprudence of the ILO that the constitutional protection of the Freedom of Association extends to the right to strike.⁶³ Note how clearly the collectivist and individualist paradigms diverge here to fall on either side of this dispute. Understood as a *social* right, freedom of association enjoins democratic and collective categories and is therefore inseparable from the right to strike as the collective-democratic expression of its exercise. As an *individual* right, freedom of association attaches to the individual's right to (or not to) associate, and is in fact inimical to collective democratic expression and ultimately, to the extent that it may undercut collective agreements and syndicalism, a clear move to 'de-socialise' freedom of association. Pooling the rights and their interpretations here achieves nothing except an insidious commensuration, and the right, as a social right, needs to be understood and exercised, against market-driven harmonious and proportionate realignments, in its *contradictory* articulation to individualism.

A series of political, and therefore reversible, decisions⁶⁴ have constructed, buttressed and underwritten the collapse of the constitutional imaginary into its market form. There has been nothing necessary about this construction or its protection; in fact it marks the increasingly desperate attempts of Europe's commissars to protect the market from itself.⁶⁵ The result has been an insidious constitutionalisation of soft instruments, a creeping, rushed and unsystematic campaign to shore up monetary union that receives the aegis of the constitutional, backed by the noxious exercise of proportionality as optimisation according to market metrics. The modest suggestion of this paper is to insist on the constitutionality of the political decisions of societies to protect solidarity; that we insert 'social rights' in the gap between normative language and social experience, to enable the hermeneutic traction I suggested earlier, to provide a measure against which suffering is experienced not as necessary, but as a wrong. The suggestion is, in other words, to import constitutional contradiction and to act on it.

As ever there are important limits to this political-phenomenological endeavour to be conceded. We cannot suggest that the constitutional iteration will provide anything like full expression: whatever the dividends of the recourse to social rights, they will be 'disciplined' to the Constitution's semantic reach and the relative inertia of its imagination.⁶⁶ Whatever the constitutional register provides as means to harbour resistance to market allocations will be over-

⁶³ See T Novitz *International and European protection of the right to strike* (2003) and C La Hovary "Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike." *Industrial law journal* (2013) 42.4 338

⁶⁴ See Supiot *Grandeur et misère de l'État social: Leçon inaugurale prononcée le jeudi 29 novembre 2012*. No. 231. Fayard/Collège de France, 2013.

⁶⁵ What, one might ask, from the market perspective, allows one to draw the line, à la Draghi, between usual and unusual market turbulence that licenses the ECB's highly selective and arbitrary decisions over the grant of liquidity?

⁶⁶ I have written about this in "The inertia of institutional imagination: a reply to Roberto Unger," in *The Modern Law Review* (1996), 59.3, 377

determined by the particular selectivity of the medium, in terms of what limits are placed on content, its self-referential reach, its immunisation toward a range of alternatives, its constitutive reductions. There is a second, more pervasive, danger, to be discerned. In time there emerges a mis-alignment between the constitutional semantic of social rights protection and the structures of market expansion. For Luhmann 'if the level of complexity changes, the semantics that orients experience and action must adapt to that change, otherwise it loses its connection to reality.'⁶⁷ In other words, when the embeddedness of the (constitutional) semantics in the social structures that they give expression to, is troubled, the ensuing *strain* between semantics and structures calls forth a re-alignment of the former to the latter, an adaptation of semantics to the new configuration of structure. Against this evolutionism, with its threat of a comprehensive shift of the constitutional terrain, the question of holding on to the semantics of solidarity and dignity becomes key to a *critical* project of constitutionalism. The elevation of solidarity - as *dogmatic* resource - to constitutional value at the substantive level, and the constitutional entrenchment of its non-negotiability at formal level, expresses the political achievement of social rights constitutionalism, the *decision* to hold on to the aspiration of solidarity in the face of all that the market presents under the sign of necessity.

How interesting to re-think the notion of a 'constitutional *placeholder*' on the cusp of antinomy of the critical project: hostage to no functionality – because what is functional about contradiction? – but with an emphasis now on what is being *held*, and held *to*, the constitutional marks the limit point beyond which there can be no yielding to market determinations without collapsing the constitutional achievement itself.

⁶⁷ See N Luhmann, *Gesellschaftsstruktur und Semantik*, vol 1, 1980, 22. For Luhmann's problem-oriented functional analysis the disruption of the fit between the meaning of the constitution as attached to nation-state structures and the post sovereign structural formation to which it is transferred, is emphatically not an abandonment to 'floating' signification; it is instead a productive mis-alignment that accompanies and enables a definitive shift, a shift that will re-orient a constitutional semantics-in-crisis to emerging structural patterns.