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‘Economic constitutionalism in a turbulent world’: a critical review

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Abstract
The article analyses the book *Economic Constitutionalism in a Turbulent World* edited by Skordas, Halmai and Mardikian, criticising the assumptions of societal constitutionalism and ordoliberalism on which it is based. The book concurs with the view that the current crisis of global legal institutions cannot be tackled going back to Nation States. Such an assumption seems to be inspired by societal constitutionalism *à la* Teubner. In contrast to traditional constitutionalism, which hinges on the dichotomy between constituent and constituted power, societal constitutionalism assigns a central role to independent institutions, whose main function is to avoid any hegemony of one social sub-system over another, in particular of politics over economics. The limit of societal constitutionalism lays in its assumption that the economic sub-system has its own rationality that the political–constitutional system can only irritate, taking for granted that the paradigm of that economic rationality is the one established after 1989, thus implicitly adhering to the neo-ordoliberal vision and legitimising its absolute immanentism. Coming to the materiality of the issues underlying the book, most of the contributions conceive globalisation as an engine for the increase of global prosperity. This confidence rests in the Ricardian theory of comparative advantage. However, the latter is valid only under condition of restrictions on the movement of capital. Another assumption made by several contributions is the theory of the varieties of capitalism, according to which individual models of capitalism tend to stabilise around certain production regimes whose key actors are large firms and business associations. According to an alternative, neo-Kaleckian paradigm, there is no natural convergence of the actors of the economic system towards a mutually beneficial institutional set-up, and it is quite unlikely that, without the external intervention of politics, the system can return to equilibrium.

Keywords: Constitutional law; European law; economic international law; societal constitutionalism; system theory; ordoliberalism

1. Introduction

According to the Editors of the book *Economic Constitutionalism in a Turbulent World*, ‘the central theme discussed by the contributors of this book is the role and strength of EU law and international law in preserving the stability of the international economic order and in managing crises and conflicts between economic and other collective interests’.[1] As for the methodologies, applying a ‘constitutional approach to the study of international and European economic law’ is ‘an intrinsic heuristic value that helps explain the direction in which world society is evolving’. The aim of the book is ‘to provide a sustained and comprehensive analysis of the concept of economic constitutionalism both as a descriptive and as a normative framework referring to the

[1]A Skordas, G Halmai and L Mardikian, ‘Introduction’ in Id (eds), *Economic Constitutionalism in a Turbulent World* (Elgar 2023) 1, 3.

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rules, principles and practices of a variety of actors – the state, transnational institutions and private/public economic networks – that shape and regulate the economic system'. The second objective of the book 'is to examine how the economic constitution responds to the triple pressures of economic crisis, populism and geopolitics, and whether it can address governance failures and preserve the *health* of the economic system at the European, national and global levels'. Each chapter should reflect 'the plurality of approaches' to the concept of *economic constitution*; the overarching idea of the book, though, is clearly inspired by systems theory, insofar 'economic constitutionalism (. . .) designates its co-existence with other types of constitutionalism, such as legal, political and societal'.[2]

The book is divided into three parts: the first is devoted to the need of '[r]ethinking core tenets of economic constitutionalism' and addresses the conceptual parameters of economic constitutionalism situating them within broader theoretical enquiries of constitutional law and sociology of law. In the second part ('Economic Constitutionalism and Economic Governance in the EU') economic constitutionalism is contextualised by analysing specific governance challenges in Europe, with alternative and stimulating interpretations of some of the hottest issues of European integration, such as Hungary's democratic backsliding, or the contested CJEU saga on economically inactive EU citizens. The third part ('Economic Constitutionalism and economic freedoms in the globalised economy') aims at unravelling the dilemmas posed by transnational economic governance in a globalised world economy. Analysing key cases, such as the crisis of WTO dispute settlement under the US friend shoring politics, or the politically disputed CETA, the contributions shed new light on the systemic interplay between political power, civil society and neutral multilevel governance institutions.

The book was conceived and written before the pandemic and the war in Ukraine, and its overriding intention appears to be that of warning against the claim made by populist politicians to re-hegemonise specific societal subsystems, especially the economic one. Today, as we face the risk of Trump's re-election to the US presidency and a worsening of war scenarios after the disproportionate Israeli military response to the Hamas attack, the world is much more turbulent than assumed by the Authors. The editors and the contributors seem to have assumed that the conceptual tools of post-modern functionalist constitutionalism, conceived in times of global equilibrium and neoliberal triumph, are flexible enough so that they can be adapted to (and thus be suitable in) very stormy times.

2. Models of European economic constitution and their overcoming through the constituent power of civil society

Neil Walker's contribution[3] begins with a provocative analysis of the relationship between the economy and the constitution resulting in an original description of the transition from the liberal to the post-World War II constitutionalism. Economics, unlike democracy, human rights, and the rule of law, is absent in revolutionary liberal constitutions, as they consider it a derivative component of the constitutional order pivoted on the self-assertion of popular sovereignty. The harsh lesson of 1929 called into question this assumption. Following Polanyi, capitalist commodification of land, labour and money represents the pre-conditions of liberal constitutionalism, according to the realist reading of the material constitution underlying the formal one. The fact that land, labour, and money are covered by the private law guarantee of private property and contract is simply taken for granted by liberal constitutions, which, far from subordinating the economic structure to the democratic and popular will, mask a somewhat different relationship between politics and economics. The Polanyian lesson seems to be learned by the post Second World War constitutions, which try to make explicit the relationship between

[2] Ibid., 4.

[3] N Walker, 'Where's the 'e' in constitution? A European puzzle' in Skordas et al. (n 1) 11.

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the *political* and the *economic constitution* in four different ways. The first is the 'sectorial model', characterised by the relative autonomy of the economic system with respect to the constitution as a whole, a model theorised by systems theories inspired by Luhmann; the second is the 'constructed model with ordoliberal ascendence'; the third is 'the model of priority' constructed around the normative primacy of economic considerations in constitutional design and interpretation, which was later theorised by Hayek and Buchanan; the fourth is 'the supplantive model', which is the negative image of the prior approach, critically engaged in denouncing the process of substitution of the constitution by a new transnational economic orthodoxy.

This conceptual framework is applied by Walker to the EU, which was born as an entity derivative from its founding states, at least in formal terms. But just as the socio-economic structure in liberal constitutions was hypocritically considered as 'derivative', so the EU was born as a concrete response to the need shared by the US and Western European states after the Second World War to develop regional and global markets, to guarantee both prosperity and sustained peace through 'insulation from the unilateral discretion of sovereign states'.

Delighted by this analytical framework on the concealment of economics by liberal constitutionalism and on Polanyi's realist lesson, the reader would have expected the Author going into a hand-to-hand fight with the material constitution of the EU, in order to critically unveil the balance of forces behind the hierarchy of values inscribed in the Treaties, as clearly revealed during the Euro-crisis.[4] Yet the conclusions the Author reaches go in a quite different direction, embracing Habermas' utopian vision on the exit from the current regulatory framework through a European constituent phase. Differently from the failed 2004 Constitutional Treaty, the present time would be ripe for a constituent phase, as the multiple crises that the EU and its Member States have gone through since then are supposed to have forged a different *ethos* in European citizens. Through the drafting of a European Constitution by a 'pouvoir constituant mixte' (European civil society together with the traditional national constituencies), the economic constitution would be the subject of public debates prior to the writing of a specific discipline in the constitution, so that it would be reduced to 'the always revisable product of democratic voice rather than its silent, and silencing, frame'.

Unfortunately, most recent facts seem to prove the expectations of the author unfounded. The 2022 Conference on the Future of Europe that Walker cites to support his hopes does not seem to have had any decisive impact on the political system of the EU and its Member States. But it may be added that negotiations (and their outcome) of the 'new' Stability and Growth Pact constitute even stronger evidence against Walker's assumptions. In brief, it would be an understatement to conclude that national governments do not seem to have learned the lessons of the euro crisis and the Covid syndemics.

It may then be argued that if the *material* dimension of the economic and geopolitical power relations underlying the current European constitution (with a 'c') are not first clarified, there is a risk of creating a European Constitution (with a 'C') that would make those power relations even more suffocating for some Member States and/or some regions and their citizens. The reforms adopted between 2011 and 2013, amidst a succession of market panics, have tightened the fiscal rules enshrined in the Treaties. The dysfunctionality of their underlying philosophy is well mirrored by the remarkable investment gap in Germany and the recent breach of the constitutional debt brake, whose strict interpretation the German constitutional Tribunal had reaffirmed in its decision on 15 November 2023.[5] No one can assure that a new European constituent phase will not be hegemonised again by the same German dysfunctional vision (not to mention the *Frugal Four*). There does not seem to be a sufficiently mature European political system to overcome the logic opposing creditor to debtor States. Faced with such a risk, it seems

[4] A Menéndez, 'The *Terrible* Functional Constitution of the European Union' in M Goldoni and M Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) 351.

[5] BVerfG, Urteil des Zweiten Senats vom 15. November 2023 – 2 BvF 1/22 -, Rn. 1–231.

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clear that writing a constitution with a 'C' would make it even more difficult to challenge the ordoliberal philosophy that still inspires the European constitution with a 'c'.

3. Beyond Hayek and ordoliberals: another imaginary is possible

The second contribution by Přibáň[6] sketches a critical analysis of the imaginary of the EU's economic constitution created by ordoliberals and Hayek. They portray the EU's economic constitution as the spontaneously self-evolving imperium of prosperity and peace promoted by markets, not least through competition. Not too differently from Hayek's critique of the anthropomorphic vision of society and political authority, Teubner's sociology of law distances itself from political constitutionalism, and instead assigns great value to 'non-political processes of societal self-constitution'. Societal constitutions require imaginaries grasping complex varieties of social interaction and communication manifested by some endogenously constituted equilibrium. The Hayekian paradigm could be generalised into a picture in which 'different societal rationalities and spontaneously evolving constitutions [are] driven [. . .] by economic profit, political enforcement and legal normativity'. The 'evolution of economic constitutionalism' in terms of 'spontaneous processes of evolution and communication in law and economy' corresponds to what has been the case in European integration. Consequently, the need of studying the latter and its crisis from 'a systems theoretical' standpoint, which 'appears to be a better approach than political existentialism of the Schmittian or any other style'.

According to Přibáň, both Hayekian and ordoliberal ideas 'only have [had an] indirect impact' on European integration. Therefore, we need 'to avoid both the poverty of both historicism and conspiracy theories seeking to explain the complexity of societal developments by the ideological manipulation and exploitation of [one] specific group'. It follows that '(t)he semantics of general theories of economy, law and society (. . .) has to be contrasted to the structural evolution of the EU's economic constitution'. After a brilliant excursus on the transition from microeconomic to macroeconomic European constitutionalism, ie, pre- and post-Maastricht, together with an efficacious sketch of the Euro crisis, Přibáň points to the risk posed by expansionist tendencies of both the political and the economic systems. Society needs, following Teubner, a 'societal constitutionalism', capable of conceptualising the interactions of economy, politics and the law. Indeed, it is imperative to preserve their distinct internal codes and to avoid arbitrary de-differentiation. Along this perspective, both the political integration of the EU through its economic constitution and the incorporation of all societal constitutions in a 'legislated constitution' are equally wrong. It follows that more confidence needs to be put on the 'self-constituting potential of society' and less on 'the parliamentary legislator'. The economic crises have reversed the (ordoliberal) imaginary of the market as 'social institution of individual freedom and autonomy', in favour of the (equally erroneous) idealisation of politics, considered by the populist imaginary as the only way to overcome the enormous force of money. But the history of European economic constitutionalism offers a way out of this fruitless dichotomy. The 'mutual constitutionalisation of the system of EU economy, law and politics is considered an important societal value itself, namely the value of functional differentiation protecting European society from being colonised by one dominating system'.

The Author places a great deal of trust in the self-legitimising forces of society, but it is not clear what power resources European society has to react in a sufficiently coordinated way to the opposite menaces of economic colonisation and populism. The limits of idealising *civil society* have been highlighted in the different context of the crisis of socialist regimes in Central and Eastern Europe before 1989. The impossibility of putting forwards political–institutional reforms to the *really existing socialism* in that repressive context led opponents of the regimes to take

[6]J Přibáň, 'Imaginary of the *imperium* of prosperity and economic constitutionalism in the EU: A socio-legal perspective of spontaneity of the common market and its limits' in Skordas et al. (n 1) 38.

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refuge in the elusive virtue of the 'morality' of civil society.[7] Today, as then (albeit the context is remarkably different), the impossibility of imagining political–institutional alternatives to the *really existing Europeanism* could be the hidden motive for the praise of civil society. Imagining reformist alternatives centred on politics implies untying the knot of hegemony in the European polity. Going forward with integration without reforming the Maastricht architecture – even foreshadowing other East enlargements of the Union – not only does not render certain that we will avert future financial crises, but moreover seems to entrust intergovernmentalism and the ECB's *extra-ordinem* powers with the task of governing any states of exception that we may be confronted within the future. It is not necessary to add what this may entail in terms of the structure of power relations between Member States, or, for that matter, to comment on the impact this would have in terms of widening of socio-economic asymmetries.

4. Overcoming the anger of neglected peripheries through 'transformative constitutionalism'

The contribution of Ladeur[8] addresses the issue of the creation of regional inequalities and their ensuing growing dynamics, propelled by both globalisation processes and by technological innovations. A possible solution may be to consent margins of flexibility to the communities most penalised by industrial and energy conversion. Or, what is the same, allowing (at least temporarily) the use of a skilful mix of old and new technologies (eg coal-fired power plants equipped with new purification systems). 'Regions at risk should have a *collective social right* (. . .) to demand the preservation of industrial or agricultural structures whose rapid transformation would induce too high a level of stress on their knowledge structure'. The processes of economic reconversion of some communities presuppose a revisiting of the dominant liberal conceptions of the relationship between individual freedoms and society, through the concept of 'transformative constitutionalism'. A neglected component of liberal societies which needs to be rediscovered is the 'societal self-organisation as an experimental design', capable of generating a 'productive *common knowledge* that serves the interests of everybody'. This type of common good is widely distributed and heterarchical. It basically corresponds to the idea of *neighbourhood*, typical of cities, as opposed to that of nationality, characteristic of states. '(T)he idea of neighbourhood that contains webs of interrelationships might help construct new collective procedural rights that would imply (. . .) a collective right to the establishment of an experimental design', so that the legislator will be 'obliged in a way to transform the legal system and the other social systems and life forms towards more inclusion in the basic achievement of the economic system'. This should be achieved not through delegating to courts the difficult task of enforcing social rights but guaranteeing 'participation in the deliberation of [a sort of] working plan'. At the global level, this conception of constitutionalism implies the duty of Western industrial states 'to participate in financing realistic economic strategies that have been approved by reliable experts' within networks of cooperation between groups of northern and southern states or public-private entities. The increasing fragmentation of society in both the western societies and the 'Global South' need 'a more pragmatic look at different types of tensions and forces that limit the impact of a constitutional normative order', avoiding the dichotomy of state against market and giving more emphasis to the 'societal self-organisation of order'.

Ladeur's thesis presupposes the inadequacy of democratic procedures to decide the industrial and economic policies of a state, given the extent to which they fail to include all those affected. Given the composite nature of representative institutions (especially in Germany, from which

[7] J Komárek, 'Waiting for the Existential Revolution in Europe' 12 (1) (2014) International Journal of Constitutional Law 190.

[8] KH Ladeur, 'Including a cognitive perspective into a vision of *transformative constitutionalism*' in Skordas et al. (n 1) 64.

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the examples are taken), it could be possible to explore a complementary explanation of the inadequate involvement of the communities concerned, whose responsibility lays not only on the intrinsic inability of politics but also on the choices made by the major political parties more than thirty years ago, aimed at delegating the fundamental ordering functions to the market. This in turn transformed the *ethos* of citizens, called upon to reconvert themselves into individual market actors by renouncing any form of collective political action.[9] More than the identity crisis of *representatives*, therefore, we are witnessing the crisis of the *represented*. Which, in turn, produces a further deterioration of the political class and of political representation.[10] New heterarchical forms of societal action are welcomed to face the problems analysed by the Author, but they can hardly succeed without a robust reinvigoration of traditional form of political representation.

5. Neglecting the role of unions in constituent processes: at the root of democratic backsliding in Hungary

Through the analysis of the Hungarian case, from the transition to capitalism to the establishment of Orbán's illiberal regime, the contribution of Arato and Halmai[11] aims at identifying the constituent phase as the crucial element for the stability of a liberal-democratic constitution. The Authors note how the constitutional transition of Hungary and Poland in the early 1990s saw a lack of inclusiveness in the procedures governing the subsequent constitutional revision. The *round tables* did not include trade unions, as strong labour representation was perceived as an obstacle to the faster and more effective establishment of the capitalist economy. The strong dependence of these states on transnational capital, as well as the role of international institutions such as the IMF, had a significant influence on this. This original limitation is supposed to account for the failure of the constitutional revision in Hungary in 1996-97, while the popular discontent aroused by the shock therapy sponsored by the social-liberal parties in those years explains Orbán's subsequent success. The Hungarian Constitutional Court played a weak corrective role in those years. The judges referred constantly to the concept of *human dignity,* which they borrowed from the German constitutional Court's jurisprudence. However, they were unable to correct in an effective manner the genetic failure of the lack of representation of labour in the constitutional transition. Quite different is the example of the South African Constitutional Court, whose decisive role in protecting social rights during the constitutional transition was made possible by the existence of 'strong left-wing labour-oriented politics'. Something similar happened in the constitutional transition in Spain after the fall of Francoism. There, the Socialist Party (PSOE, the main social-democratic party) together with the Communist Party (PCE) were strong enough to propose, and get partially inscribed in the constitution, genuinely social-democratic principles, not least thanks to their alliance with trade unions. The Spanish lesson was lost due to the change in international economic paradigms. The abolition of capital controls sponsored by international institutions undermined (and keeps on undermining) not only progressive taxation, but also trade unions.

This is an important passage, perhaps the only one in the book devoted to the free movement of capital and its paralyzing effect on democratic self-rule. However, the connections of this crucial element of neoliberalism with both economic and societal constitutionalism remain unexplored, so that the Authors' recipes for avoiding future Hungarian or Polish cases rest on what might be labelled as rather unprovable assumptions. For the Authors, it is a matter of creating a 'corporatist constitutionalism', through the inclusion of trade unions and employer organisations in the

[9] A Somek, *Individualism. An Essay on the Authority of the European Union* (Oxford University Press 2008).

[10] M Luciani, *Ogni cosa al suo posto* (Giuffrè 2023) 229–30.

[11] A Arato and G Halmai, 'Economic constitutionalism, the challenge of populism and the role of the constituent power' in Skordas et al. (n 1) 87–108.

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constituent phase, with a view to constitutionalise 'social partnership arrangements', which, in turn, would complement and not replace democratic politics. It is not clear, however, how such an institutional remedy can act as a corrective to the *real existing economic constitutionalism* without calling into question the liberalisation of capital at the global and/or EU level.

6. Defending varieties of capitalisms in the EU: recipes to de-constitutionalise the European economic constitution?

Both the contributions of Dermine,[12] and Varju and Papp[13] address the problem of the homogenising push which European economic governance exercises over the varieties of capitalism in the Member States. Dermine criticises the CJEU's deference to the measures taken to deal with the euro crisis (from *Pringle* to *Ledra*, *Florescu* and *Portuguese Judges*). He argues that such an attitude is increasingly at odds with an economic governance which is no longer *soft*. In this new framework, the coordination of national economic policies has been transformed into a hidden harmonisation tool used to advance a single, predominantly supply-side model of capitalism. The Commission's increasingly intense conditionality has surreptitiously widened the grip of EU law on national policies, including those expressly reserved to Member States by the Treaties. The proposal to revise the attitude of the CJEU is not viewed as panacea, as the Author does not ignore the need to intervene also at a political level: 'Political accountability and legal accountability' must go hand in hand.[14] While respecting political discretion, the CJEU must ensure that decisions on economic coordination are not undermined by the biased viewpoint adopted by EU institutions. This would require opening up decision-making processes to inputs from civil society. In the various procedures of EU economic governance, systematic use of social impact assessments should be made to rebalance cognitive structures through 'social mainstreaming', on the basis of art. 9 TFEU (the so-called horizontal social clause). To that end 'the Court should loosen its standing requirements so that actors whose voice has been silenced during the decision-making process are not prevented from judicially challenging their side-lining, and eventually securing their right to access the deliberation process in the future'.

The intent of Dermine's proposal seems to this reviewer laudable. However, it is not clear how such a general principle (as enshrined in Article 9 TFEU) can reverse the homogenising push adopted by the Commission and the Council in the different economic governance procedures (a push reinforced by the far from negligible contribution of the ECB). The proposed solution assumes that the CJEU can make a difference. However, this is the very same institution that in the past has played a crucial role in triggering the phenomenon of *law shopping*,[15] clearly easing the spread of the neoliberal deregulatory model within the EU. The legitimacy of secondary legislation that has led to the transformation of soft economic coordination into hard economic coordination, with the consequent surreptitious extension of the EU's powers, remains unresolved at the heart of the problem of pluralism of economic models in the EU.

Even more concerned about respecting the varieties of capitalisms in the Member States are Varju and Papp.[16] Despite the institutional convergence achieved over the past decades, the European Union keeps on being characterised by the diversity of the national institutional structures, and in particular, of national socio-economic structures. The latter continue to reflect competing (and in certain aspects, contradictory) conceptions of the 'ideal model' of the market

[12]P Dermine, 'The ECJ and the protection of fundamental rights under the new economic governance of the eurozone: Present situation and future prospects' in Skordas et al. (n 1) 109.

[13]M Varju and M Papp, 'Varieties of Member State capitalisms and the European economic constitution: a folly or flexible framework?' in Skordas et al. (n 1) 136.

[14]Dermine (n 12), 128–9.

[15]A Supiot, *La gouvernance par les nombres* (Fayard 2020) 174.

[16]Varju and Papp (n 13).

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economy. This is so because they are considerably shaped by local circumstances. It follows that the European economic constitution needs to be conceived as a flexible framework, so that EU institutions and procedures could factor in the legitimate differences (and differentiation) of national institutional models as well as the ensuing diverging policy choices. Such choices respond to the socioeconomic interests and needs particular to each Member State. They are also concretised by national governments operating under local, democratically established political mandates. The Authors provide an analytical lens for conceptualising the current stages of economic integration in the EU, where conflicts over its future direction are expected to intensify. Moreover, further institutional convergence across Europe may lead to 'clashes' among the different national conceptions and varieties of capitalism. Through the analysis of the EU regulation of working time – a common policy area characterised by national heterogeneity – the Authors conclude that there are practices under the European economic constitution which can be seen as paradigmatic examples of flexibility and also openness (neutrality) towards national institutional models.

The criticism they put forward (inspired by the works of Scharpf and Sauter) of the negative integration triggered by the Court of Justice to overcome the resistance of national governments to harmonisation,[17] is certainly to be welcomed. The Italian example, in which the mixed economy model was improvidently abandoned in the 1990s to join the Eurozone, should, however, draw attention to the extreme difficulty of any reversing of structural choices. National economic models are always very difficult to change.[18] The constraints of a single monetary policy, which incessantly produces winners and losers,[19] together with those stemming from the Stability Pact, make it almost impossible for Member States to preserve or recover genuine autonomy over fundamental economic choices. To achieve the goal advocated by the Authors, the most obvious path is that of *de-constitutionalising* the European economic constitution, as suggested by Grimm[20] and Scharpf[21] (to whom the chapter makes explicit reference). Attaining this goal in the absence of treaty amendments, and, above all, with a totally independent Central Bank, seems hardly practicable. This judgment would not be challenged even if 'best practices' would be followed, such as, in the case study at hand, the political negotiation and the jurisprudential management of the working-time regulation.

7. Within the paradigm of functionalism: the *Achmea* case and the saga of the economically inactive citizens

The last two contributions of the second part of the book are devoted to two central features of European economic constitutionalism: the protection of foreign investments and the free movement of persons. In his contribution on intra-EU Bilateral Investment Treaties (BITs),[22] Nagy engages with the right to private property in the form of foreign investments. In particular, he considers the extent to which EU law guarantees a sufficient level protection vis-à-vis national measures restricting investors' rights. Focusing on the CJEU's *Achmea* judgment on the incompatibility between BITs among Member States and the EU legal order, Nagy points to the fact that a comprehensive framework of protection of property rights depends not only on

[17]See F Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy"' 8 (2010) Socio-Economic Review 211; W. Sauter, 'The Economic Constitution of the EU' 4 (1998) Columbia Journal of European Law 27.

[18]L Baccaro and J Pontusson, 'The Politics of Growth Models' 10 (2) (2022) Review of Keynesian Economics 221.

[19]A Modi, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018).

[20]D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' 21 (4) (2015) European Law Journal 460.

[21]F Scharpf, 'De-constitutionalisation and majority rule: A democratic vision for Europe' 23 (5) (2017) European Law Journal 315.

[22]C I Nagy, 'Economic constitutionalism and the constitutionalisation of the internal market' in Skordas et al. (n 1) 161.

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the existence of guarantees of economic freedoms under the rules of the internal market, but also on the legal guarantees of the rule of law and of judicial independence, as well as on the provision of effective remedies and in ensuring the application of the Charter of Fundamental Rights. A close look at the remit of EU law on these issues, in general, and the case law of the CJEU on the right to property, in particular, lead the Author to conclude that foreign investors are left with inadequate forms of redress for infringement of their rights under EU law as opposed to what is the case with investment arbitration. The *Achmea* judgement, nonetheless, could induce investors to bringing their cases under EU law and thus transforming their 'creative forces' into factors of evolution of the jurisprudence of the CJEU.

The contribution of Mardikian[23] provides a critical reappraisal of the CJEU saga on economically inactive EU citizens (*Dano*, *Alimanovic*, *Garcia Nieto* and *Commission v. UK*). The author seems to suggest that scholarly criticism was unsound. In her view, the CJEU did not reverse its precedents on the matter. Instead, the Luxembourg judges ruled aligning with EU legislation. Scholars' criticism towards this line of jurisprudence is based on a concept of social solidarity among EU citizens which can only prevail in a full-fledged federal system. Instead, equal treatment in EU primary and secondary law aims at facilitating 'economic activity and integration of economically active persons in the economic and social life of the host State'. Following Tuori[24] and Thornhill,[25] the Author argues that the EU offers only a 'networked, heterarchical model of governance', not the foundation for redistributive solidarity. The interpretation most consistent with the actual architecture of the EU is that of functional differentiation, according to which European citizenship aims at integrating the citizens of the Member States into the 'self-organisational system', where traditional national citizenship and the solidarity that binds to it are not necessary. We are confronted with a specific kind of constituency, a '"stakeholder constituency" of the EU economic system', which 'refers to the partial and multifunctional integration of actors in differing societal roles who have a stake in participating in functionally limited domains of action and have a right to be taken into account in decision-making processes'.

The Author sketches with rigorous coherence a 'stakeholder constituency' model based on 'societal constitutionalism' and on the free integration in spontaneous social systems, a model which fits with a realistic picture of the EU. One can however ponder about the implications of such a conceptualisation. For example, do healthcare professionals make up a truly spontaneous social system? Can we really conclude that the very training of healthcare professionals is independent from the national health care model and system (and the latter, in turn, from the national welfare state)? Several European public health systems, including the Italian and the Spanish one, are currently experiencing a serious shortage of medical personnel. A far from negligible reason for that state of affairs is to be found in the high numbers of doctors and nurses who prefer working in other wealthier Member States. It remains the case that the training of medical personnel keeps on being basically funded at the national level, due to the very same taxes that operationalise solidaristic ties between citizens.[26] Under such circumstances, can this flow of economic migration be hailed as a positive component of the post-national turn fostered by the EU and magnified by functionalist conceptualisations of European integration? By the same token, many of the contemporary economic-professional spheres are far from being 'self-created' in the social subsystems of professions, but rather are closely linked to the national welfare states. This is at any rate the case in those states where universities are still (mainly) public ones (such as is the case in both Italy and Spain). The economic asymmetries between Member States amplified

[23]L Mardikian, 'Refraiming EU citizenship as stakeholder constituency, or . . . why the Court of Justice got it right on economically inactive EU citizens' in Skordas et al. (n 1) 183.

[24]K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

[25]C Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antimonies of Democracy' 45 (2018) Journal of Law and Society 73.

[26]Case C-419/16 *Simma Federspiel v. Provincia Autonoma di Bolzano*, ECLI:EU:C:2017:997.

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during the economic crisis result in a systemic impoverishment of *human capital* in certain states and regions to the benefit of other states and regions. How can the model of free circulation of economically active citizens within autonomous social subsystems, as endorsed by societal constitutionalism, help us face such drawbacks of European integration?

8. Defending economic global constitutionalism from the populist threat

Part III of the book is devoted to global institutions and phenomena, and it is opened by the contribution of Petersmann which contains a critical analysis of the ongoing crisis of the WTO.[27] The quasi-judicial enforcement of the WTO system has been seriously affected by the exponential growth of unilateral invocations of security exceptions by some of its Member States. This has led to the US denying the WTO jurisdiction for reviewing the legality of such invocations, which came hand in hand with the blocking of all appointment procedures to WTO Appellate Bodies. The author claims this can be characterised as the 'populist resistance against the domestic adjustment pressures resulting from democratically agreed integration rules', and the transit from a '"win-win paradigm" of mutually beneficial trade' to 'mercantilist "zero-sum beliefs"'. Restoring a functioning global trade regime would be necessary to guarantee citizens the public goods that globalisation has transformed from national to *transnational aggregate public goods*. According to the Author, putting into question the 'constitutionalisation' of intergovernmental trade policies entails the weakening of the multilevel governance of related, transnational public goods, like climate change mitigation. To address these joint challenges, it is necessary to resort to the concept of economic constitutionalism. Or what is the same, to invoke – following the EU's ordoliberal model – a constitutional foundation of global economic governance. Alternative solutions, such as international private law, public international law, Law and economics, Global administrative law, do not have the same coherence and strength in facing the necessity to integrate in international economic law also human rights protection and transnational public goods, such as the fight against climate change. 'Both territorially limited national governments and functionally limited transnational governance must be reconstituted, limited, regulated and justified more coherently in terms of the constitutional rights of citizens and of their democratic self-governance'. The model should be that of the CJEU, the EFTA Court, and the ECtHR in Europe, in their capacity to construe trade and competition rules as forms of a 'transnational rule of law', with a view to respecting the legitimate diversity of constitutional democracies. International economic law should be used for complementing 'incomplete national Constitutions' and limiting 'government failures'. A clear example of the latter could be found in the functioning of the EU legal order. Under it, citizens are empowered to invoke and enforce EU economic freedoms before national courts. Explicitly adhering to the varieties-of-capitalism paradigm, Petersmann contrasts US neo-liberalism and totalitarian Chinese state capitalism with EU 'multilevel ordo-constitutionalism', as both the EU and the WTO have been influenced by the basic constitutional, competition and social policy principles of ordo-liberalism. We are told that only an ordo-liberal approach to trade and economic rules – interpreted not only as rights among States, but also as duties vis-à-vis citizens inside States – can secure the necessary social and democratic support from citizens. In this way, citizens would become 'democratic principals' of transnational governance agents, such as the WTO and the UN institutions.

The Author's strenuous defence of the WTO rests on the invocation of a very broad concept of constitutionalism, which combines not only ancient Athenian democracy with Roman republicanism, but also 'diverse modes of *democratic constitutionalism* enhancing the input-legitimacy of governments, *republican constitutionalism* promoting the output-legitimacy of governance, and *cosmopolitan constitutionalism* protecting equal human rights and multilevel

[27] EU Petersmann, 'Can multilevel economic constitutionalism restrain trade protectionism and power politics?' in Skordas et al. (n 1) 222–49.

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accountability of governance institutions'. This historical perspective enables the assimilation of the WTO with the EU. In the process, fundamental genetic and structural differences between the two are simply ignored. This line of reasoning runs the risk of conceiving globalisation as a natural, de-politicised phenomenon. In fact, globalization can be better conceptualized as the result of political choices made by the – once – global hegemon, the US.[28] One could also question the benign character of ordo-liberalism, and the possible connection of the latter with the export-led model of growth which, after the euro crisis, characterised the EU as a whole, with all its destabilising effects in the global balance of payments.[29]

In the third to last contribution of the book, Carola Glinski[30] critically analyses the Comprehensive Economic Trade Agreement (CETA) signed by the EU and Canada. CETA entered provisionally into force in 2017. Its negotiation and even more its ratification highlighted the legitimacy issues intrinsic to mixed agreements, touching upon exclusive competences of both the EU and the Member States. CETA affected in particular the protection of health, safety, environmental and consumer protection standards. From a procedural point of view, the various joint committees set up by CETA – and in particular the CETA Joint Committee with powers to amend the Agreement – do not provide for the participation of representatives of the Member States. Moreover, the involvement of the European Parliament also appears to be insufficiently guaranteed. In addition, and from a substantive point of view, the failure to codify the precautionary principle of EU law while the principle of mutual recognition is entrenched creates a high risk of a flattening of regulatory standards protective of fundamental public goods, not least on what concerns public health and the environment. Mutual recognition may trigger regulatory dumping, as Europeans have experienced since the *Dassonville* (1974) and *Cassis de Dijon* (1979) rulings of the Court of Justice. The Author stigmatises CETA as suffering from a 'free trade bias, which requires protection standards to be justified'. If this will be the guiding principle of the regulatory committees, the composition of the latter (no representatives of the Member States) and the insufficient protection of the prerogatives of the European Parliament are clearly inadequate. These procedural shortcomings were partially compensated by a Council Decision[31] which, probably under the influence of the 2016 ruling of the German Constitutional Court, established that the decisions of the CETA Joint Committee falling within the competence of the Member States were subject to unanimity vote. The involvement of the Member States in the decisions on regulatory standards tries to prevent that 'the centralisation of risk assessment [leads] to disregard (. . .) the relevant data held in the Responsible national institutions of the Member States. As exemplified by the practice of the European Food Safety Authority, centralisation of risk assessment has an inherent risk of reducing the plurality of scientific approaches and of the chances for recognition of counter-expertise'. These shortcomings in CETA deliberative procedures do not seem to be open to be counterbalanced by the involvement of civil society, given that CETA only provides for the possibility and not the duty for committees to consult NGOs.

Following the insightful analysis of Glinski, CETA seems to represent an emblematic case of how the doctrines on deliberative democracy, as a functional substitute for representative democracy in transnational decision-making procedures, clash with harsh realities that often contradict their optimistic assumptions.

[28]G Arrighi, *The Long Twentieth Century. Money, Power and the Origins of Our Times* (Verso 1994).

[29]L Baccaro, M Blyth and J Pontusson (eds), *Diminishing Returns: The New Politics of Growth and Stagnation* (Oxford University Press 2022).

[30]C Glinski, 'Market freedoms and democratically sound re-embedding of markets?: the example of CETA' in Skordas et al. (n 1) 250.

[31]Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, of 14.1.2017, 1.

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The contribution of Berman[32] is devoted to unveiling the fallacies of theories on the antidemocratic nature of transnational economic constitutionalism, to which most forms of (right-wing) populism are prone. Those theories are based on the reduction of democracy to majoritarianism. Berman starts from Dworkin's richer notion of democracy as a duty to treat all members of the community (as individuals) with equal concern and respect. He adds to that the further notion of democracy as participation, taken from Arendt. When considered from that standpoint, the accusation against transnational economic constitutionalism as antidemocratic necessarily fails. Indeed, counter-majoritarian institutions play a role that does not debase but enriches democracy, if conceived as equality and participation, and transnational economic constitutionalism institutions are equivalent to counter-majoritarian institutions within a polity. In particular, 'a transnational body [offers] a different perspective or port of entry or [provides] a forum for greater dialogue among different communities'. Moreover, delegating decisions to bureaucrats outside the nation-state would make it possible to solve the problem of the capture of the national regulator by powerful industry players and the like. It follows that the rule-making process outside the polity may promote equality and provide greater voice than is possible within it. A cosmopolitan pluralist conception of transnational economic governance, therefore, would be able to strengthen democracy, ensuring greater participation in decision-making processes and greater diversity in the composition of decision-makers. What we need, then, are 'institutions, procedures, and discursive practices that encourage participation from multiple norm-generating communities and that foster dialogue among those communities', in a way that 'actually mirrors much of the design of the European Union', assumed 'as a model for democratic participation and dialogue'. The example put forward by Berman to support this last suggestion is that, hypothetically, an EU regulation has the power to force 'Germany to update its labour laws in order to provide greater worker rights'.

It is perhaps pertinent to start from the very last point raised by Berman. In that regard, we must observe that, during the Eurozone fiscal crisis, what we could observe was just the opposite. Deflationary policies heavily penalising workers and contradicting workers' rights became part of the austerity recipe inflicted upon (debtor) Member States. It is probable that the refined theoretical construction of the Author is conducted at a level of abstraction that is too general to account for these degenerative phenomena. Berman himself, moreover, supports the thesis of cosmopolitan pluralist constitutionalism in order *to reform* transnational institutions and *not to legitimise* the existing framework. Still, the direction of this reform movement needs to be clarified. If this can be deduced from the premises of the whole argument, then some doubts arise about its ability to re-legitimise global institutions. In fact, it seems that according to the Author the causes of the populist reaction to transnational or international law systems lie in the loss of collective historical memory, which result in 'losing sight of the core values that were forged out of the ashes of World War II and its unimaginable horrors'. For the Author 'the period since 1945 has seen rises in health, longevity, prosperity, and peace that are perhaps unparalleled in human history'. This irenic view on the continuity in history from 1945 to the present, seems to be much more imaginary than real, as it forgets the unilateral revocation of Bretton Woods decided by US to keep their economic hegemony alive through extreme financialisation.[33] The initial rise in prosperity has been followed by the so called great stagnation and a huge rise in personal wealth and income inequalities.[34] Indeed, Berman points to the need of transnational cooperation to face problems of transnational dimensions, such as 'nuclear proliferation, data protection, finance and tax

[32]P Schiff Berman, 'Why cosmopolitan pluralist governance need not subvert democracy' in Skordas et al. (n 1) 282.

[33]Y Varoufakis, *The Global Minotaur: America, Europe and the Future of the Global Economy* (Zed Books 2015).

[34]T Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014); D Rodrik, 'What Do Trade Agreements Really Do?' 32 (2) (2018) Journal of Economic Perspectives 73.

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regimes'.[35] And yet, even at the Economic conference in London of 1933 representatives of 66 Nations expected from Franklin Delano Roosevelt the same awareness on the eve of the collapse of the gold standard. To their great disappointment, Roosevelt preferred to focus on his own country. As is well-known, he prioritised the refoundation of American capitalism on a new cooperative and democratic basis, before coming to the rescue of the (Western) world and restoring international cooperation under a different philosophy and a new hegemony.[36] The question is not so much whether the iteration of such a traumatic event as the transition of hegemony in the capitalist system is desirable today, but how it is realistically possible to get out of the recurrent hegemonic cycles with which globalised capitalism has reproduced itself at least since the 17th century.[37]

The book ends with a rich and detailed contribution by Skordas on the ICJ case Whaling in the Antarctic of 2014,[38] in which Australia challenged the Japanese scientific programme of whaling. In the chapter, a formally inter-state dispute is reconstructed in terms of a conflict between social systems. This is said to illustrate the move from economic constitutionalism to the "constitution of science". After the moratorium of 1986, whaling was only admitted under Article VIII of the International Convention for the Regulation of Whaling (ICRW) of 1946. Or what is the same, only whaling for the 'purpose of' scientific research was possible. The rationale of the ruling of the ICJ pivoted around the Article VIII ICRW objective, which was said to prevent the instrumentalisation of scientific research by economic and political actors. The case-study in question illustrates that '[i]n legal disputes reflecting differences of opinion on the function and operation of social systems, it would be a distortion to emphasise the role of states as actors in control of the dispute and ignore the dynamic role of the social systems that wield the real power'. After the judgment was delivered, Japan left the ICRW and resumed commercial whaling within its own areas of maritime jurisdiction. More than the correctness of the ICJ's interpretation of the ICRW, the interest of the case lies in the role that the ICJ has assumed in regulating conflicts between social systems, developing elements of the constitution of science, at the expense of economic constitutionalism. Given the increasing role that science is likely to play in the next future, international or domestic courts will be called to tackle 'the necessity of a democratic organisation of the scientific system as a guarantee of its methodological integrity', and '(c)ollisions between democracy and science will create hard cases for the international and domestic courts and tribunals'.

9. Conclusions

The book as a whole seems to concur with the view that the current crisis of global legal institutions and of capitalism cannot be tackled by means of 'going back' to Nation States. Such an assumption seems to be inspired by systems theory, and in particular by *societal constitutionalism* à la Luhmann and Teubner. Similar conclusions are also reached by prominent scholars with very different conceptions of law and society, in the Habermasian[39] or Foucauldian 'camps'.[40] In contrast to post-World War II European constitutionalism, which hinges on the dichotomy between constituent and constituted power, and on the tension between democracy and fundamental rights,[41] societal constitutionalism assigns a central role to independent institutions,

[35]Berman (n 32) 283.

[36]K Patel, *The New Deal. A Global History* (Princeton University Press 2016).

[37]G Arrighi (n 28); Id., *Adam Smith in Beijing: Lineages of the Twenty-First Century* (Verso Books 2009).

[38]A Skordas, 'International judicial authority, social systems and geoeconomics: the ICJ *Whaling in the Antarctic* case (2014)' in Skordas et al. (n 1), 299.

[39]A Von Bogdandy, *Structurwandel des öffentlichen Rechts* (Suhrkamp 2022).

[40]P Dardot and C Laval, *Dominer: Enquête sur la souveraineté de l'état en Occident* (La Découverte 2020).

[41]D Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 3.

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whose main function is to avoid any hegemony and/or control of one social sub-system over another, in particular of politics over economics (and science, arts, etc.). The role of law is to support each sub-system of reference with legal normativity, while ensuring the effectiveness of self-produced social rules. The role of constitutional law appears to be that of guaranteeing functional pluralism, ie the balance between the various sub-systems, and curbing the colonising propensity of one system over the others, which would result in de-differentiation.

The EU is the embodiment of such a conceptual framework, and many of the contributions in the book aim to extend the EU model to global institutions. Systems theory applied to constitutionalism, in this way, undoubtedly plays into the hands of the advocates of globalisation. The theory seems, indeed, to elegantly circumvent Rodrik's trilemma, according to which there can be no coexistence of sovereignty, democracy and globalisation, and the only way to embrace globalisation without suppressing democracy is to advocate for a democratic government of the world. If politics is nothing more than one social sub-system among others, and if an autopoietic legality is theoretically capable of guaranteeing the coexistence of social systems, including the economic one, what is needed is not a democratic government of the world, but simply a global Constitutional Court. Given that we already have an International Court of Justice, what is actually needed is only strengthening the institution, and in particular better training its judges in systems theory and societal constitutionalism. Indeed, it is perhaps not by chance that the book ends with a contribution – by far the longest – on the ICJ *Whaling in the Antarctic* case.

As I have tried to highlight above, when commenting on some of the contributions, the book confirms that what remains unresolved in the constitutional theory of systems theory is from where legality, once divorced from (political) power, can derive its legitimacy resources.[42] The aporia of a (constitutional) law that is de-politicised and reduced to a sub-system among others, while charged with fundamental functions of *coupling* and *framing* the other sub-systems,[43] seems to produce self-defeating practical outcomes, at least when we consider the EU as a case study. The 'progressive' parties – traditionally most in favour of supranational integration and cosmopolitanism – are the ones that are most affected by the growing abstentionism of their electorates. Such a phenomenon, it should be noticed, is consistent with the declaration of impotence of national politics subscribed by those same parties from the 1980s onwards. Still, electoral and party politics at the national level are crucial for any revision of the EU Treaties. Indeed, the power to amend the Treaties still rests in the hands of European national governments, which in turn are more and more controlled or at least conditioned by 'conservative' parties.

Placing one's trust in the EU, and in transnational organisations in general, because of the possibility that the latter afford civil society to act outside the worn-out schemes of party politics risks neglecting the balance of power within civil society itself. The number of industrial and financial lobbies registered in Brussels and their economic power are incomparably greater than that of trade unions, NGOs and citizens' associations. As far as global institutions (especially economic ones) are concerned, they can be seen as a vehicle of cultural hegemony (*Washington consensus*) rather than the guarantee of pluralism. Not least because of the constant practice of what we may label as institutional *pantouflage*. Ministers in charge of economic portfolios are not infrequently former members of such institutions, or they become so after their term in office comes to an end.[44]

Many of the contributions in the book seem to converge on the idea that (both right-and left-wing) populism expresses the will of the social sub-system of politics to re-colonise the other sub-systems. In fact, far from the re-idealisation of politics, populism may be nothing more than

[42]A Supiot, (n 15) 176–8; J Van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (de Gruyter 2014).

[43]K Tuori (n 24) 22–8.

[44]J Carrick Hagenbarth and G Epstein, 'Revolving Doors: Affiliations, Policy Space and Ethics' (2011) 53 Economic & Political Weekly 39.

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the continuation of neoliberalism by other means, given the substantial anti-political inspiration of the various populist movements, especially the right-wing ones.[45]

The contribution of Arato and Halmai is one of the most revealing, as it expressly address the issue of ideology, but only to rapidly observe that it deserves being distrusted, together with ideological parties.[46] This affirmation is, for the constitutionalism that emerged after World War II, somewhat paradoxical, given that it was precisely the opposition between ideologies and their – limited – legitimacy that provided the impetus for the balanced structure of Western capitalism.[47] Indeed, it is the delegitimisation of the very concept of ideology, in combination with the collapse of the Soviet Union,[48] that allowed neoliberalism to overcome all resistance coming from potentially opposing political and social forces. This is, after all, the real limit of 'societal constitutionalism' *à la* Teubner: to assume that the economic sub-system has its own rationality that the political-constitutional system can only *irritate*, taking for granted that the paradigm of that rationality is the one established after 1989 (namely, the dogma of scarcity and the logic of profit, independent central banking in charge of fighting inflation, and so on).[49] All that means implicitly adhering to the neo-ordoliberal vision, legitimising its absolute immanentism (*TINA*).[50]

Constitutional democracy, in order not to be reduced to a pure allusive expression, postulates that the social subsystem of the economy can be a field of contestation between even radically different political and economic paradigms. The latter are in turn produced only within overall utopian visions of society.[51] The affirmation of the neoliberal paradigm since the 1970s is not the result of a spontaneous self-regulation of the economic subsystem, but of political choices triggered by a counter-revolution of capital, originating in the United States.[52] The internal politicisation of the economic system (and of every social subsystem) as the only remedy postulated by Teubner's societal constitutionalism[53] does not amount to true politicisation. This is so given that the reflexivity of the economic system is oriented by the code of profit, so that any internal politicisation will always be bent to the logic of price. It is therefore necessary to postulate that law and economics, as well as other systems, can be politicised from the outside, that is, that their reflexivities are not totally autonomous.[54] The political dimension of constitutionalism must be conceived as the possibility of questioning, in a reflexive way, the very assumptions of the sub-systems, overcoming the limits of *internal politicisation*.[55] Advocating the independence of the constitutional order of social fragments from the political power and ideologies of political parties implies accepting subordination to the powers established within those fragments and a new dependence on the constellation of powers and interests within those global fragments.[56]

[45]C Galli, *Ideologia* (Il Mulino 2023) 154–8.

[46]Arato and Halmai (n 11) 105.

[47]M Dani, 'The Democratic and Social Constitutional State as the Paradigm of the Post-World War II European Constitutional Experience' in M Dani, M Goldoni and A Menéndez, *The Legitimacy of European Constitutional Orders* (Elgar 2023) 19.

[48]G Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford University Press 2022).

[49]G Teubner, 'A Constitutional Moment? The Logics of *Hitting the Bottom*' in P Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 9.

[50]G Preterossi, *Teologia politica e diritto* (Laterza 2022).

[51]R Schiattarella, *I valori in economia: dall'esclusione alla riscoperta* (Carocci 2022); J Komárek, 'European Constitutional Imaginaries. Utopias, Ideologies, and the Other' in Id. (ed.) *European constitutional imaginaries. Between Ideology and Utopia* (Oxford University Press 2023) 3.

[52]M D'Eramo, *Masters: The Invisible War of the Powerful Against Their Subjects* (Polity 2023).

[53]G Teubner (n 49) 17–21.

[54]M Goldoni, 'I limiti materiali e riflessivi della sociologia costituzionale' 36 (2016) Quaderni costituzionali 559.

[55]Ibid., 561.

[56]G Azzariti, *Il costituzionalismo moderno può sopravvivere?* (Laterza 2013) 45. See also E Christodoulidis, 'A Default Constitutionalism? A Disquieting Note on Europe's Many Constitutions' in K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010) 31–48.

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Coming to the political economy assumed by the book, it can be observed that most of the contributions conceive of globalisation as an engine for the increase of global prosperity. This confidence rests, implicitly but sometimes explicitly (Berman), in the Ricardian theory of comparative advantage. However, the latter is valid only under condition of restrictions on the movement of capital.[57] It is striking, in this regard, that none of the contributions – with the laudable exception of that of Arato and Halmai – puts the spotlight on the hyper-liberalisation of capital in the seventies and its effects on the structure of the EU legal system, and more generally on the disconcerting growth of global inequality and capital concentration.[58] That populism may be a symptom of the malaise caused by those inequalities and not the cause of the multiple institutional and political crisis does not seem a plausible hypothesis for most of the contributions to this book addressing populism. Another assumption that seems to be shared by several contributions is the *theory of the variety of capitalisms* (Dermine, Varju and Papp, Petersmann, Berman), according to which individual models of capitalism tend to stabilise around certain production regimes whose key actors are large firms and business associations.[59] The German ordo-liberal model to which the EU is said to have adhered (Petersmann, Berman) should be the ultimate form of *capitalism with a human face*, the capitalism of the coordinated market economy, where large companies have an interest in defending the institutions of the labor market, social security, corporate governance, etc. This reassuring view, based on the equilibrium paradigm of game theory, implicitly denies the tendency of the capitalist class to free itself from constraints aimed at supporting the working class. According to an alternative, neo-Kaleckian paradigm,[60] there is no natural convergence of the actors of the economic system towards a mutually beneficial institutional set-up, and the precarious balance is given simply by the fact that none of those actors is (yet) strong enough to change the centre of gravity of the system.[61] This is a more competitive view than the traditional one, which is less sympathetic with societal constitutionalism as it postulates that growth models are deeply entangled in party politics. This different paradigm seems to better fit with the empirical evidence we have cumulated in the last 40 years. Both in the Anglo-Saxon neoliberal model and in the German coordinated market economy there has been a constant weakening of the trade unions and of the position of workers. Moreover, it is quite unlikely that, without the external intervention of politics (as happened during the New Deal), the economic system can return to balance by itself, especially in the institutional architecture of the EU.[62]

Competing interests. The author has no conflicts of interest to declare.

[57]S Parrinello, 'On Some "New" Interpretations of Ricardo's Principle of Comparative Advantages' (2022) *Centro Sraffa Working Papers* 60, 1.

[58]Piketty (n 34); E Brancaccio and Others, 'Centralization of Capital and Financial Crisis: A Global Network Analysis of Corporate Control' 45 (2018) Structural Change and Economic Dynamics 94–104.

[59]PA Hall and D Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001).

[60]M Kalecki, 'Political Aspects of Full Employment' 14 (4) (1943) The Political Quarterly 322.

[61]L Baccaro and C Howell, 'A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism' 39 (2011) Politics & Society 521. L Baccaro, 'Modelli di capitalismo e redistribuzione' LXI (5) (2012) il Mulino 858.

[62]Ibid., 866.

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