

Introduction to Economic Constitutionalism in a Turbulent World

Achilles Skordas, Lisa Mardikian, Gábor Halmai

1. Context and Objectives of the Book

The world is going through a period of strong economic and political turbulence culminating with the Russian invasion in Ukraine on 24 February 2022. Distrust and opposition to globalization is not a new phenomenon and has been a common theme of protest movements from Seattle (1999)¹ all the way to the yellow vests in France (2018/2019).² Since 2016, diverse reactions to globalization have intensified, among which Brexit and the election of Donald Trump as President of the United States stand out. These two events also mark the beginning of a process of disengagement of major economies from transnational and international institutions (i.e., the UK's exit from the EU and the institutional weakening of the WTO) and the intensified struggle between the United States and China for economic and political supremacy.³

Since 2020, new pressures have emerged. The dual threats to global health by the pandemic and to the international peace and security by the war in Ukraine have brought about a different kind of turbulence and reinforced the pressures on global economy. Now, it is less about political developments as the consequence of popular movements or electoral processes, but rather about unpredictable shocks to the international order leading to unexpected power shifts and to sudden and deep structural change. The measures taken to manage the pandemic, including by decelerating the economy and other social systems,⁴ and, in the case of the war against Ukraine, the partial exclusion of Russia from the global economic system by sanctions,⁵ will have long-term economic, geoeconomic and geopolitical consequences.⁶ Furthermore, Russia and China are striving for a fundamental change in the balance of power and consider that the moment is ripe for a transition from the rules-based liberal international order to an authoritarian global governance system.⁷ Whilst the risks of a global crisis arising either in the

¹ Alan V Deardorff/Robert M. Stern, 'What You Should Know About Globalization and the World Trade Organization' (2002) 10 *Review of International Economics* 404.

² Patrick Chamorel, 'Macron versus the Yellow Vests' (2019) 30 *Journal of Democracy* 448.

³ See for example, Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 *Journal of International Economic Law* 655; Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford University Press 2022).

⁴ Rudolf Stichweh, 'Simplifikation des Sozialen' *Frankfurter Allgemeine Zeitung* 07 April 2020, 9 available at <<https://zeitung.faz.net/faz/feuilleton/2020-04-07/simplifikation-des-sozialen/446149.html>> accessed 11 April 2022.

⁵ See, for instance, the announcement of the EU, the United States, Australia, Canada, Japan, Korea and other states that they suspend, among others, 'most-favoured-nation treatment to products and services of the Russian Federation' in a Joint Statement to the WTO: 'Joint Statement on Aggression by the Russian Federation against Ukraine with the Support of Belarus' WT/GC/244 (15 March 2022).

⁶ The term 'economic consequences' here means the change of economic indicators in specific countries, regions, or globally in a positive or negative direction; 'geoeconomics' implies the capacity of states to use their economic resources to support their foreign policy objectives; and 'geopolitics' means their capacity to project power outside their own territory, in a political and security context.

⁷ In their Joint Statement of 23 March 2021 on 'Certain Aspects of Global Governance in Modern Conditions', the two Powers formulated a set of ideas for the new order, developing further their Declaration of 25 June 2016 'on the Promotion of International Law'. On the relevant discussion, see Achilles Skordas, 'Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021' (2021) 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 293; Malcolm Jorgensen, 'The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but not Binding under International Law' (2021) 22 *Melbourne Journal of International Law* 1 (advance copy).

Korean Peninsula or in the context of the China-Taiwan relationship have unsettled decision-makers for many years, the risks of a European war had been grossly underestimated and the invasion of Ukraine by Russia took the world by surprise. Deeper reasons for the invasion can arguably be found in the structural weaknesses of Russia and the Eurasian space it seeks to dominate, to America's post-Afghanistan moment and to the turn of Russia towards an aggressive authoritarian system.⁸ The immediate response of the international institutions, including the UN General Assembly, the International Court of Justice, the Council of Europe and the EU,⁹ demonstrate the intensity of the confrontation within the international system.

We can therefore detect three different factors affecting the evolution of the global economic system, which has also faced the challenge of the major financial and economic crisis of 2008: (i) anti-globalization movements, (ii) electoral preferences and economic nationalism (e.g. UK and United States) that should be viewed within a global context shaped by broader developments, including the geoeconomic and geopolitical confrontation of the United States and the EU with China, and (iii) unpredictable developments of global significance, such as the pandemic and Russia's aggressiveness in Europe. As the pendulum is moving from globalization to regionalization, the key question is how deep the fracture in the global economy will be in the next decades.

The present volume includes contributions from the conference on 'Economic Constitutionalism: Mapping its Contours in European and Global Governance', held at the European University Institute in June 2018. By that time, Russia had annexed Crimea and had brought parts of Donbass under its control, Brexit had been decided by the British people and Donald Trump had won the Presidency of the United States. These were already visible signs of a changing world society, but the depth and breadth of such changes are still difficult to appraise. The turbulence has affected the foundations of the European and global economic systems and seems to put into question the very notion of 'economic constitutionalism'.

In this light, 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. More specifically, this book is devoted to bringing an explicitly constitutional approach to the study of international and European economic law. It is guided by the core idea that this has an intrinsic heuristic value that helps explain the direction in which world society is evolving.

There are two primary objectives in this collection of essays. The first is to provide a sustained and comprehensive analysis of the concept of economic constitutionalism both as a descriptive

⁸ Achilles Skordas, 'Russia's Eurasian Großraum and its Consequences' *Verfassungsblog* (31 March 2022) <<https://verfassungsblog.de/russias-eurasian-groraum-and-its-consequences/>> accessed on 04 April 2022. The 2022 Nations in Transit Report asserts that '[w]ith autocrats assailing the liberal international order and unscrupulous elected leaders turning to corrupt and illiberal forms of governance, the primacy of democracy in the *Nations in Transit* region is giving way to violence and misrule.' Mike Smeltzer and Noah Buyon, 'From Democratic Decline to Authoritarian Aggression' Nations in Transit 2022, Freedom House, 1 <https://freedomhouse.org/sites/default/files/2022-04/NIT_2022_final_digital.pdf> accessed 21 April 2022.

⁹ UNGA Res ES-11/1 'Aggression against Ukraine' (2 March 2022) UN Doc A/RES/ES-11/1; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order of 16 March 2022; Council of Europe, Committee of Ministers, Resolution CM/Res(2022)2 of 16 March 2022 on the cessation of the membership of the Russian Federation to the Council of Europe; on EU measures, see 'EU Sanctions against Russia Following the Invasion of Ukraine' <https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine_en> accessed 18 April 2022.

and a normative framework referring to the 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. As a focal analytical concept, economic constitutionalism has been remarkably influential in structuring the parameters of integration in Europe - deepening economic relations, managing economic problems, and expanding individual economic freedoms and public goods - but also in sectorial economic areas beyond Europe such as global trade under the WTO. In this sense, the above-mentioned ongoing developments offer powerful reasons why it is still necessary to analyse the relevance and evolving parameters of the concept of economic constitution. The second objective 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. In this light, the analysis in this book provides a thorough assessment of the deep-seated elements and concerns regarding economic constitutionalism.

Overall, economic constitutionalism, itself, designates its co-existence with other types of constitutionalism, such as legal, political and societal, and a common presumption in most contributions is that it is necessary to explore the various interrelationships in order to provide a more in-depth understanding of the links or conflicts between them. Thus, the book aims to take a broad approach to economic constitutionalism which is reflected in the variety of legal and theoretical perspectives which contributors offer in order to analyse the topic. For this reason, we consider it appropriate not to provide a comprehensive definition of the term 'economic constitution' in this introduction that would inevitably limit the enquiry to a single conceptual viewpoint. To better reflect the plurality of approaches, each contributor draws on salient theoretical points with a view to examining the EU and global 'optimal' constitutional structures under conditions of uncertainty and change in market and societal relations. In particular, the chapters collected in this book are designed to offer a variety of different analytical perspectives and bring together scholars with public and private law expertise in international and European law. They provide a detailed exploration of the legal issues raised by economic constitutionalism, are informed by specific case studies to which the theoretical frameworks are applied and put into test key criticisms towards the viability or desirability of economic constitutionalism in the global realm.

2. Structure of the Book

The book is divided into three thematic sections. The first Part begins by addressing the conceptual parameters of economic constitutionalism and situates them within broader theoretical enquiries of constitutional thought and sociology of law. In the opening chapter, Neil Walker starts off by exploring the relationship between state constitutions and the economy, pointing out the complex - and often contrasting - dynamics of this relationship under different accounts of constitutionalism. He observes that the economic dimension of domestic constitutionalism is largely derivative because of the low visibility of economic matters in constitutions of states with a market economy. A strong case is presented as to why this should not be the case at the EU supranational level, and different conceptual models – constitutive, sectoral, constructed, prior or supplantive – of the place of economics in constitutional paradigms are reviewed. Walker explains that the multiple economic and political crises clearly illustrate that the economic dimension, a central element of governance in the EU, has to be the revisable product of procedurally governed political dialogue and argues for an adaptation of a fuller political constitutionalism to the EU.

Jiří Přibáň reflects on the EU's economic constitution as an imaginary of the spontaneously self-evolving imperium of prosperity and peace promoted by market collaborations and competition. It is shown that this imaginary, which evolves as structural coupling between the European economy, politics and law, operates as a background power of EU economic constitutionalism in both its microeconomic and macroeconomic dimensions. Přibáň revisits the theoretical contributions of the German school of ordoliberalism and Hayek. In so doing, he demonstrates that the integration of the common market and generation of wealth were meant to inspire the constitution of a supranational polity legitimised by the economic value of prosperity as well as by the shared political values of democracy, freedom, rights and the peaceful coexistence of the multitude of European peoples. In light of the economic asymmetries and political crises in the EU however, it is argued that this imaginary highlights not only the EU's legitimation but also its legitimacy deficits.

Karl-Heinz Ladeur offers an in-depth examination of a deep structural problem in domestic economic and social constellations: the high inequality between regions in terms of their knowledge structures and their potential to adapt to industrial intelligence and new technologies. Against this background, he offers an innovative argument on the idea of 'neighbourhood', as a web of interrelationships that would help construct a hybrid combination between older economic structures and new disruptive technologies. This analysis offers an experimental design for the evaluation of highly complex economic questions and the heterarchically distributed cognitive infrastructure of society. Ladeur expands on these observations by bringing forward the concept of transformative constitutionalism that has the potential to support a process of transformation of society where a major part of the population is not included in the modern legal and economic societal systems and their formal operations.

In Part II, the contributions contextualize economic constitutionalism in regard to specific governance challenges in Europe. They elaborate on the extent to which the economic constitution is amenable to the domestic and supranational governance shortcomings and explore whether the difficulty to identify an overarching vision and common solutions threaten the foundations of integration. Andrew Arato and Gábor Halmai explore the interrelationship between economic constitutionalism and social rights in the context of the crisis of populism in Europe. With a special focus on Hungary, they argue that this interrelationship has been particularly tenuous and is an inevitable result of policy choices dating at the start of economic transition in 1989. Through an examination of the more recent adoption of regressive laws and decisions of the Constitutional Court in Hungary, it is observed that domestic political and judicial actors have reversed the development of social protections and misused the principles of human dignity and solidarity at the cost of vulnerable persons in society. In order to tackle the present challenges of populism, Arato and Halmai argue for a vision of economic constitutionalism that is dual in nature, involving protections both for a market economy and its social substratum. This renewed version of economic constitutionalism should be entrenched through constitutional adjudication and inclusive procedures that contribute to producing democratic structures based on social welfare and that are resilient to address the surge of populist movements in Europe and beyond.

Paul Dermine takes up the challenge to evaluate how two core pillars of economic constitutionalism, fundamental rights and judicial review, have been affected by the transformation of the EU governance structures following the sovereign-debt crisis. In this context, the intensification of the EU economic and fiscal policies would call for the Court of Justice of the EU (CJEU) to exercise a rigorous judicial review of measures that affect individual rights and to strengthen legal accountability at the supranational level. Reviewing

the relevant case law however, Dermine diagnoses that changes in the legal and political landscape in the EU were not followed by an equivalent adjustment of the constitutional foundations and that the Court has been reluctant to bring them under the required level of judicial control. He concludes by shedding light on the ‘rationality checks’ that the Court should conduct in order to bring about a more appropriate, yet measured, form of scrutiny.

Csongor István Nagy engages with a central element at the heart of the EU’s economic constitution – the right to private property – and examines the extent to which EU law guarantees a sufficient level of its protection with regard to Member State actions. By framing this enquiry in the context of the CJEU’s *Achmea* judgment, he explains that a comprehensive framework of property rights protection depends not only on the economic freedom guarantees under the rules of the internal market but also on the legal guarantees for the rule of law and judicial independence in Member States, on the provision of effective remedies and on the scope of 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 him to conclude that foreign investors are left with inadequate forms of redress for infringement of their rights under EU law as opposed to investment arbitration.

Márton Varju and Mónika Papp offer a critical assessment of economic constitutionalism within the political economy of the EU. They argue that the varieties of capitalism in Member States present a significant obstacle to the constitutional entrenchment of a common European economic model. Given the institutional heterogeneity and political diversity across Member States, it is necessary to construct a flexible constitutional framework, capable of adjusting to the particular socio-economic interests of individual States, and to the domestic, democratically established political mandates. Varju and Papp provide an analytical lens for conceptualising the current stages of economic integration in the EU where conflicts over its future directions are expected to intensify and further institutional convergence across Europe may lead to ‘clashes’ among national capitalisms. The analysis is deepened by a discussion of working time regulation in the EU. It is demonstrated that legal developments under the EU economic constitution need to closely observe the politically established boundaries of institutional convergence and the safeguards of national institutional diversity in order to maintain their viability in the future.

Lisa Mardikian reconstructs the notion of EU citizenship and its relationship with the EU’s economic constitution. She departs from an understanding of citizenship as a bundle of rights presumed to be conferred to individuals by virtue of their nationality and explains that the dominant discourse on EU citizenship has so far overemphasised its potential to increase social solidarity and to formulate a common social identity at the supranational level. Building on systems theory, she argues that EU citizenship should be viewed as ‘stakeholder constituency’ within the differentiated social systems of the Union. It involves the rights and obligations that enable actors to participate in the functions of social systems and, in particular, within the economic system of the Union. The argument is then tested by revisiting the CJEU’s case law on economically inactive citizens. An interpretation of the post-*Dano* case law is provided in defence of the Court’s reasoning on the basis that it demarcates and clarifies, rather than overturns, the rights of economically inactive persons. That way, the boundaries of EU citizenship become more visible in the context of a heterarchical construction of constitutionalism at the supranational level. Mardikian highlights the entanglement between EU citizenship and the EU’s economic constitution in the current stages of integration, given the stratification of free movement rights and the asymmetry between the rights of economically active and inactive persons.

In Part III, the book expands on economic constitutionalism in the global realm. The chapters seek to provide a unique perspective on whether multi-level economic integration undermines democratic controls or whether it offers desirable solutions for addressing governance failures and protecting public goods. They also explore the impact that political power and civil society may have on shaping global economic operations and reflect on the relationship between trade agreements and public policy space. Ernst-Ulrich Petersmann places the focus on the intergovernmental power politics that have risked disrupting the WTO legal and dispute settlement system and its progressive support for the provision of transnational public goods. He explains that the 'win-win paradigm' of mutually beneficial trade is being replaced by mercantilist 'zero-sum beliefs', as manifested by the increasing antagonism between the US and China, and that this leads to the emergence of a politicised 'economic security order'. In order to address the disruptions to multilevel economic governance and contain WTO power politics, Petersmann presents a strong defence of republican and cosmopolitan constitutionalism for its potential of integrating international economic rights into constitutional values that are democratically supported by citizens. This citizen-oriented constitutional approach to international economic law calls for the construction of transnational public goods and economic freedoms as key elements of the collective exercise of fundamental rights and the participation of citizens in multilevel governance. This approach can offer effective legal limitations on market and governance failures by protecting individual rights, including economic rights and freedoms, and by providing appropriate judicial remedies.

Carola Glinski critically examines the perceived tension between trade agreements, which are aimed at fostering market access, and democratic constitutional requirements that promote the consideration of competing private and public interests and enhance the democratic legitimacy of trade agreements. By assessing the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, she contextualises this tension in the institutional set-up of regulatory committees and their deliberation processes. Particular concern is raised about the lack of codification of the precautionary principle and of procedural safeguards that would guarantee the adequate representation of Member States and the European Parliament. In this light, Glinski elaborates on the essential requirements - representation, deliberation and horizontal legitimacy - that would address the ensuing concerns regarding the reduction of policy space in nation-states and enhance the democratic legitimacy of CETA.

Paul Schiff Berman generalises the above reflections and advances his vision on cosmopolitan constitutional pluralism as a response to criticisms of transnational economic constitutionalism on the grounds that it lacks democratic legitimation. Berman expands on three broad understandings of democracy as majoritarianism, as equality and as participation and concludes that transnational economic arrangements may be problematic only under the first premise, which he nevertheless finds severely limited. He makes the case that a broader, cosmopolitan vision of transnational economic constitutionalism is enhancing democratic governance for at least two reasons. First, because it has the potential of creating jurisgenerative mechanisms that encourage dialogue across difference. Second, because it recognises the heterogeneity of systems which do not need to be homogenized into one universalistic legal order.

Achilles Skordas discusses the rise and downfall of commercial whaling in view of the normative collisions between economy, science and ecology. This is done through the analysis of the 2014 judgment of the International Court of Justice (ICJ) in the *Whaling case* (Australia v. Japan) that shows how the Court navigated its way under the 1946 Whaling Convention in an interstate dispute involving the above three social systems. The chapter examines the

enduring geoeconomic and geopolitical impact of the ‘whaling factor’ in the relations of Japan with the West since the mid-19th century and concludes that, by rejecting the scientific merits of the JARPA II program in the Southern Ocean, the ICJ set a very high bar for lethal whaling under the rules of the Convention. Even though the judgment is too context-dependent to create a precedent, it confirms the authority of the Court to control the reasonableness of scientific methods. It also sheds light over the reliance of economy on science for the legitimation and justification of commercial activities, as far as collisions with environmental goods are concerned. Skordas considers the future role of the ICRW and discusses whether the law of the sea still provides a ‘normatively thick’ protection to lethal whaling activities outside the framework of the Whaling Convention.

Large part of the manuscript had already been prepared before the pandemic and the war in Ukraine broke out and therefore related issues could not be explored in depth. Where relevant, the reflections on economic constitutionalism by the authors provide the necessary tools to disentangle broad issues regarding the future directions of both law and the economy. Thus, this book can be seen as a contribution to the ongoing conversation about a focal concept that is capable of encapsulating legal and economic developments in world society.