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Constitutionalism’ in a Multipolar World of  
‘Permacrises’**

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## **Abstract**

Europe's multilevel democratic, republican and cosmopolitan constitutionalism links (e.g. in Arts 3, 21 TEU) internal and external EU governance responses to the 'polycrises' and geopolitical rivalries among democracies and authoritarian power monopolies (e.g. in China, Iran and Russia). The realities of climate change and power politics entail 'permacrises' weakening European competitiveness vis-à-vis 'under-regulated', neoliberal competitors and subsidized state enterprises. Both neoliberal US deregulation prioritizing libertarian 'negative freedoms' for business-driven market regulation, and authoritarian aggression and state-capitalism risk undermining the EU 'homogeneity commitments' to a 'competitive social market economy', 'sustainable development' and protection of human rights in a rules-based 'European society' (Article 2 TEU). EU law and its 'ordoliberal DNA' require limiting market failures, governance failures and 'constitutional failures'; they justify interpreting EU regulatory powers (e.g. in Arts 114, 352 TFEU) and emergency powers (e.g. in Article 122 TFEU) as enabling 'ordoliberal EU policy responses' to financial, health, competitiveness, energy, environmental, social and security crises. The financial agreements complementing the limited budgetary powers of the EU for the Next Generation EU pandemic recovery program, like the EU financial and military assistance for Ukraine against Russian aggression, offer precedents for future EU emergency governance. EU treaty amendments facilitating common EU financing of public goods (like 'de-risking' of supply chains avoiding their 'weaponization' by authoritarian governments, enhancing European security, responding to climate change and the 'ICT revolution' by greening and digitalizing the European economy) remain democratically preferable; but their lengthy procedures and uncertain outcomes must not impede existential crises governance inside and beyond the EU.

## **Keywords**

constitutionalism; emergency powers; EU; ordoliberalism; UN; WTO

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## 1. Introduction

UN, WTO, European and national governance of public goods (PGs) are challenged by geopolitical rivalries leading to systemic 'polycrises' like abuses of veto powers and military aggression undermining the UN security system; increasing suppression of human and democratic rights by authoritarian governments; failures of UN health and environmental treaties to prevent global health pandemics, climate change, biodiversity loss and pollution harming our planet; and illegal US trade protectionism disrupting the WTO legal and dispute settlement systems. The more the largest emitters of greenhouse gases (China, Russia, India and the USA) disregard the Paris Agreement goal of decarbonizing economies by 2050 and other sustainable development goals (SDGs), the more EU regulatory responses to the 'permacrises' risk undermining EU 'competitiveness' and 'strategic autonomy' in the new 'geoeconomic security order' prioritizing security interests and de-risking of supply chains.

EU constitutionalism differs from constitutional nationalism outside Europe by its acknowledgment that – just as globalization transforms national into transnational PGs that cannot be protected without international law and institutions – state-centered 'constitutionalism 1.0' needs to be transformed into multilevel constitutionalism limiting abuses of national policy powers undermining multilateral governance of transnational PGs. This contribution explains why the EU's internal and external 'crises governance' cannot be separated. The EU responses to the financial and monetary crises of 2008-2012, Russia's aggression against Ukraine since 2014, continuing environmental and migration crises, and the Covid-19 health pandemic of 2020 revealed the need for 'constitutional politics' strengthening EU emergency governance through constructive interpretations of EU law without formal amendments of the Lisbon Treaty. The 2024 Draghi Report identifies 'existential challenges' resulting from the productivity and investment gaps between Europe, North America and China, and the 'need for Europe to radically change' to reignite economic growth by promoting innovation through advanced technologies, decarbonization, greater competitiveness and stronger European defense capacities.<sup>1</sup> Even though EU emergency governance since 2009 could avoid treaty amendments, the latter remain democratically desirable for reforming the 1992 'Maastricht compromise' limiting the EU's Economic and Monetary Union (EMU) and promoting a stronger EU budget and EU defense union.

Contrary to Anglo-Saxon neoliberalism perceiving self-regulatory markets and government regulation as opposites, Europe's multilevel democratic, republican and cosmopolitan constitutionalism is committed to limiting market failures (e.g. by competition, environmental and social law and institutions), governance failures (e.g. to protect PGs like Europe's common market, rule-of-law) and constitutional failures (e.g. by the 1950 European Convention on Human Rights (ECHR) and EU treaties limiting national policy discretion); non-discriminatory market competition and its information, coordination and welfare-enhancing functions are perceived as legal constructs rather than as gifts of nature and of business-driven (self)regulation. Section 2 explains why – in the geopolitical rivalries with both authoritarian countries and business-driven neoliberalism neglecting human and democratic rights - Europe's unique 'ordoliberal constitutionalism' requires 'constitutional politics' explaining to EU citizens the need for 'constitutionalizing' EU emergency governance (e.g. based on Article 122 TFEU and intergovernmental agreements supplementing the EU budget by issuance of common EU debt for financing agreed EU emergency policies). Section 3 recalls why – the more the UN security system, UN human rights law, and other UN and WTO agreements and international adjudication are undermined by hegemonic power politics – EU policies defending UN and WTO law assume existential importance for protecting human and democratic rights

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<sup>1</sup> The Future of European Competitiveness, EU Commission September 2024.

inside and outside Europe. The geopolitical 'permacrises' require adjusting EU law and EU politics by transforming intergovernmental EU emergency governance into democratically and constitutionally better controlled forms of EU crises governance.

## **2. Next Generation EU Governance in a Multipolar World of Polycrises**

All human beings and societies are confronted with the 'constitutional challenge' of reconciling our human passions and desires with what human reason and morality require. Constitutional democracy and republican constitutionalism remain Europe's most important 'political inventions' - initiated some 2500 years ago in ancient Athens and Rome – for responding to governance crises by strengthening democratic input-legitimacy and republican output-legitimacy through stronger involvement of citizens in protecting PGs (like citizen rights to participate in democratic governance, citizen duties of military service, judicial remedies). During centuries, constitutionalism tolerated 'market failures' (like slave trade, exploitation of labor) and related 'governance failures' (like gender discrimination, colonialism, genocide of indigenous tribes); its social and democratic support by 'the people' remained weak until the emergence of communitarian city republics in Europe with more inclusive, social and constitutional contracts protecting religious tolerance (e.g. by separating secular from religious governance powers) and constitutional rights of citizens. Outside Europe, many UN member states remain governed by authoritarian rulers without effective constitutional guarantees of human and democratic rights; most democracies continue prioritizing constitutional nationalism and business-driven, neoliberal policies rejecting Europe's multilevel (over)regulation limiting abuses of public and private power.

### **2.1 EU law requires defending 'ordoliberal' rather than 'neoliberal constitutionalism'**

England's 'democratic revolution' in the 17<sup>th</sup> century led to civil war introducing 'parliamentary sovereignty' and 'representative democracy' (with the Monarch, the Lords and the Commons representing the people); yet the 'Hobbesian social contract' justified monarchical powers, and the parliamentary reforms maintained exploitative feudal and colonial governance systems. France's 'democratic revolution' in the 18<sup>th</sup> century aimed at more ambitious human rights protection and more inclusive democratic reforms; but it remained short-lived due to revolutionary 'political terror' and feudal counterrevolutions. The libertarian 'Lockean foundations' of America's 'democratic revolution' contributed to common market regulations without effective limitations of 'market failures' (like restraints of competition) and 'governance failures' (like racial discrimination and neoliberal exploitation). The Swiss constitutional reforms of 1874 complemented a communitarian, federal democracy (inspired by Rousseau's social contract theory) by a common market based on judicial protection of rule-of-law among the cantons. Europe's most important economic and 'constitutional revolution' was initiated only after World War II with the ECHR and the European community treaties transforming constitutional nationalism into multilevel democratic and republican governance of transnational PGs (like Europe's common market, European institutions protecting human rights and transnational rule-of-law). This merging of democratic and republican constitutionalism with transnational cosmopolitan constitutionalism remains Europe's most important 'political innovation' in the 20<sup>th</sup> century.<sup>2</sup> The current geopolitical rivalries and

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<sup>2</sup> Cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (2017); *idem*, Neoliberalism, Ordoliberalism and the Future of Economic Governance, in: *JIEL* 26 (2023), 836-842. For comparative analyses of American, European and Asian common market regulations see E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic*



'permacrises' reveal, however, insufficient social, democratic and constitutional support for EU governance protecting transnational PGs and rule-of-law in EU responses to authoritarian aggression, UN and WTO governance failures.

Ordo-liberalism emerged as an economic, political and social project in Germany in response to the ubiquity of market failures, governance failures and constitutional failures revealed by World War I and by the economic, political and social crises in Germany's Weimar Republic (1919-1933). Following World War II, ordoliberal scholars in the 'Freiburg school of law and economics' (like the economist W.Eucken and the lawyer F.Böhm) and in the 'Cologne school of social market economy' (notably Müller-Armack) successfully influenced the German government (especially under economy minister and later chancellor L.Ehrhard) to design a 'social market economy' embedded into constitutional protection of equal liberties and democratic rights, legal protection of non-discriminatory conditions of competition, equal opportunities, labor rights and social rights, and a 'private law society' protected by a rule-of-law state with strong judicial remedies and commitments to promote European and worldwide economic integration.<sup>3</sup> German ordoliberals actively influenced the negotiations and institutions of the 1957 Treaty establishing the European Economic Community (EEC). Yet the EEC practices avoided references to the diverse, national varieties of market economies, for instance because many national discussions (e.g. about ordoliberalism in the 1950s) remained contested. For example, German ordoliberals were influenced by Germany's particular national context (like constitutional guarantees of a 'social State'); they disagreed on questions of European and worldwide market integration (like the association of overseas territories of EEC member states with the common market, the interventionist EU agricultural policies).<sup>4</sup> The EU founding fathers agreed that the success of the European integration project

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*Foreign Trade Law and Policy in the United States, the European Community and Switzerland* (1991; reprinted 2019 and 2020); M.Hilf/E.U.Petersmann (eds.), *National Constitutions and International Economic Law* (1993); E.U.Petersmann/A.Steinbach (eds), *Constitutionalism and Transnational Governance Failures* (2024).

<sup>3</sup> The Austrian and German ordoliberals advocated interdisciplinary 'Smithian', rather than merely economic 'Ricardian justifications' of non-discriminatory conditions of competition, rule-of-law and economic, monetary, social and legal, national and international rules and institutions establishing a 'market order' aimed at reconciling private and public interests. Their emphasis on the 'constitutional functions' of international guarantees of equal freedoms, non-discriminatory treatment, rule-of-law and judicial remedies as a 'second line of constitutional entrenchment' (provided citizens can enforce such guarantees in domestic courts as inside the EU) distinguishes EU ordoliberalism from Anglo-Saxon neoliberalism. The 74 annual volumes of the *ORDO Jahrbuch für die Ordnung von Gesellschaft und Wirtschaft* edited (since 1948) by leading members of the 'Freiburg school of law and economics' (like Eucken, Böhm, Hayek) document the historical evolution of this school inside and beyond Germany. On current discussions of ordoliberalism and 'Ordnungspolitik' (in the sense of 'constitutional economics' justifying 'economic governance rules') from the diverse, national economic and legal perspectives in EU member states see the books edited by G.Grégoire/X.Miny, *The Idea of Economic Constitution in Europe* (2022); T.Biebricher, W.Bonefeld and P.Nedergaard, *The Oxford Handbook of Ordoliberalism* (2022); A.Skordas/G.Halmi/L.Mardikian, *Economic Constitutionalism in a Turbulent World* (2023).

<sup>4</sup> At the 1938 Walter Lippmann conference in Paris, the economist W.Rüstow coined the term 'neoliberalism' in a broad sense (including ordoliberalism) for exploring the normative foundations of a humane, liberal economic order that would avoid the past governance failures of laissez-faire liberalism; totalitarian central planning in communist and socialist countries; the 'social disembedding' and poverty in Germany during the 1920s; and the global financial and economic crises and mutually harmful protectionism during the 1930s. But 'neoliberalism' is usually defined narrowly (e.g. by US President Reagan and British Prime-Minister Thatcher based on 'Chicago school' beliefs in self-regulatory markets) as prioritization of liberalization, deregulation, privatization, financialization of economies and business-driven regulation. W.Eucken emphasized the categorical differences of his conception of ordoliberalism from neoliberalism and state-capitalism. Recent descriptions of 'Bidenomics' as 'post-neoliberal' neglect the utilitarian 'cost-benefit justifications' of business-driven US economic regulations due to the very incomplete limitations of market and governance failures in the US Constitution.

depended on a common market increasing the economic and social welfare of European citizens. Yet, as explained in the 2024 Draghi report<sup>5</sup>, Europe's high social, labor and energy costs, green and digital transition, and – compared with nation states prioritizing neoliberal or state-capitalist nationalism - multilevel (over)regulation stifle economic growth and technological innovation undermining the competitiveness of the EU in the current 'multipolar rivalries' with competitors benefitting from lower energy and manufacturing costs and less ambitious economic, environmental, internet, social and legal regulation.

## 2.2 Adjusting European constitutionalism to neoliberal and autocratic rivalries?

The 1957 EEC Treaty, and notably its common market and competition rules, were progressively interpreted by the EEC institutions as being embedded into common market freedoms and other civil, political, economic and social fundamental rights that must be 'balanced' and reconciled through legislation, administration and adjudication. Just as the German Constitutional Court avoided economic dogmas in protecting the economic policy discretion of German government institutions, the European Court of Justice (CJEU) protected the economic policy discretion of EU institutions (e.g. in developing a more 'economic approach' in EC competition policies) without referring to economic ideologies (e.g. about neoliberalism or ordoliberalism, or how 'consumer welfare standards' guiding competition policies should be reconciled with protecting 'total welfare standards' and the competitive process itself). The EU's constitutional, parliamentary and representative, democratic governance and 'provisions on democratic principles' (Articles 9-12 TEU) emphasize rights of citizens 'to participate in the democratic life of the Union', where 'decisions shall be taken as openly and as closely as possible to the citizen' (Article 10.3 TEU); participatory and deliberative democracy and 'active EU citizenship' are promoted through various rights (e.g. to launch citizen initiatives, to elect - and petition to - the European Parliament, or to the EU Ombudsman) and EU programs (e.g. for promoting citizen assemblies).

Yet, as EU law and policies avoid references to the 'ordoliberal DNA' of EU common market regulation, EU citizens and public discourse often confuse EU policies with neoliberalism. For instance, academic claims that the German Constitutional Court's insistence on democratic, parliamentary control of financial assistance to over-indebted EU member state governments was based on 'neoliberal austerity conditionality'<sup>6</sup>, or that Britain's 'Brexit' was justified by the EU's neoliberalism<sup>7</sup>, or that EU leadership for compulsory WTO adjudication protecting

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<sup>5</sup> Cf note 1 (explaining why the EU's extensive and stringent regulatory environment may, as a side effect, restrain innovation and face EU companies with higher restructuring costs compared to their US peers).

<sup>6</sup> For example, E.Luce Scali, in her book on *Sovereign Debt and Socio-Economic Rights Beyond Crisis* (2022), attributes the 'austerity-conditionality' of the EU's financial assistance in response to Greece's sovereign debt crises to an 'anti-humanist Hayekian neo-liberalism'; this appears unjustified in view of the emphasis on 'democratic constitutionalism' (e.g. requiring parliamentary control of fiscal and debt policies) in the relevant jurisprudence by the German Constitutional Court. The economic justification of fiscal and public debt disciplines (e.g. as agreed upon in the Lisbon Treaty and in the German Basic Law) for reconciling monetary and financial stability with economic growth, and of the conditionality of EU/IMF financial assistance for indebted EU member countries like Greece, remains contested; it requires democratic legitimation avoiding economic dogmas.

<sup>7</sup> M.Loughlin's book *Against Constitutionalism* (2022) justifies Brexit by his conception of representative British democracy (as represented by the Monarch, the Lords and the Commons in Parliament) rejecting EU neoliberalism – without acknowledging the ineffective UN/WTO protection of the universally agreed sustainable development goals and offering no strategy for protecting transnational PGs demanded by citizens.

transnational rule-of-law and non-discriminatory conditions of competition is a 'neoliberal policy'<sup>8</sup>, are misleading; they neglect the categorical differences between citizen-driven 'ordoliberal constitutionalism', business-driven 'utilitarian neoliberalism', and constitutionally unbound 'totalitarian state-capitalism'. Discrediting Europe's 'competitive social market economy' (Article 3 TEU) as neoliberal unduly alienates EU citizens.<sup>9</sup>

Democratic responses to geopolitical rivalries and climate change require explaining why neoliberal prioritization of 'negative freedoms' (in the sense of absence of governmental restrictions) privileges the wealthy and the powerful, especially if competition laws and 'polluter pays' principles are not effectively enforced and private corporate financing of political elections is protected as 'free speech' enabling plutocracy (as, arguably, in the USA). Ordoliberal prioritization of equal human and democratic rights in Europe's transnational 'European society' (Article 2 TEU) and 'demoi-cracy' (Arts 9-12 TEU) promotes 'positive freedoms' (like equal access to education and vaccines), equal competitive opportunities and voluntary cooperation among legally equals beyond national frontiers. Stronger citizen support for Europe's 'competitive social market economy' promoting 'sustainable development' inside and outside Europe (as required by Arts 3, 21 TEU) requires helping citizens to understand why neither Anglo-Saxon neoliberalism nor authoritarian power monopolies are consistent with the Lisbon Treaty's recognition of the major 'constituent principles' (like labor and social rights, economic freedoms, property rights, rule-of-law, monetary stability, fiscal and budgetary disciplines) and 'regulative principles' (like competition and social policies, independent central bank policies) which ordoliberals and 'constitutional economists' have advocated long since. The EU's prioritization of comprehensive human and constitutional rights of citizens limiting public and private powers<sup>10</sup> reflects ordoliberal rather than neoliberal EU governance of PGs:

(a) The ordoliberal principle of normative and methodological individualism explains why EU law (like Articles 2, 6 TEU, the EU Charter of Fundamental Rights (EUCFR)) derives values from voluntary, informed individual and democratic consent of citizens in open economic, democratic, social and 'legal markets' protecting non-discriminatory conditions of competition and equal opportunities for individual and democratic self-development (e.g. through economic competition, social contracts, democratic voting, 'regulatory competition' at different levels of governance). Protecting citizen-driven 'consumer welfare' in economic market competition, 'citizen welfare' in democratic governance, human and fundamental rights and 'equal opportunities' in social cooperation (like the 'European society' as legally defined in Article 2 TEU), and rule-of-law leaves broad economic policy discretion and scope for diverse 'social', 'constitutional', economic and 'democratic contracts' among citizens with often diverse preferences. EU Commission President von der Leyen, in her speech in the European Parliament before the parliamentary approval of her re-appointment in July 2024, described 'social dialogue' as 'the hallmark of our social market economy'.

(b) EU law implements the ordoliberal insight that constituting, limiting, regulating and justifying multilevel governance of PGs requires limiting market failures, governance failures and constitutional failures across the interdependent social, economic, democratic and legal,

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<sup>8</sup> Q.Slobodian's book on *Globalists: The End of Empire and the Birth of Neoliberalism* (2018) discredits WTO law as neoliberal without acknowledging ordoliberal WTO principles (e.g. on compulsory WTO adjudication protecting rule-of-law, WTO jurisprudence interpreting WTO rules as protecting non-discriminatory conditions of competition) and the ordoliberal advocacy of 'WTO globalists' for interpreting WTO law consistently with the human rights obligations of WTO members, as required by the customary rules of treaty interpretation endorsed in Article 3 of the WTO Dispute Settlement Understanding.

<sup>9</sup> Cf Petersmann/Steinbach (note 2), chapters 2 and 3.

<sup>10</sup> Cf EU Commission, 70 Years of EU Law. A Union for Its Citizens (2023).

national and transnational orders. This is reflected, *inter alia*, in the EU Treaty provisions for a 'competitive social market economy' and 'sustainable development' (e.g. in Article 3 TEU) as integral parts of a European 'society, in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail', and which is characterized by 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' (Article 2 TEU). The ordoliberal emphasis on the 'interdependence of orders' is reflected also in many other EU requirements, e.g. to 'offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured' (Article 3.2 TEU), and to base the EU's external relations law on the same constitutional principles as internal EU law (Arts 3.5, 21 TEU). The common EU responses to the financial and monetary crises since 2008, to climate change and other environmental crises, the Covid-19 health pandemic, Russian military aggression and weaponization of energy supplies illustrate 'constructive crises responses' to market failures (like pollution and climate change, insufficient supply of vaccines), governance failures (like illegal immigration) and constitutional failures (like illegal military aggression, illegal annexation of territories and suppression of human rights by Russia in Ukraine). This EU focus on the interactions between citizen-driven economic, political, social and constitutional, transnational orders distinguishes EU ordoliberalism from neoliberal constitutional nationalism and authoritarianism. Voluntary EU citizen support for mutual agreements on EU crises responses - and their democratic approval - enhance the legitimacy and efficiency of EU responses to citizen concerns, similar to presumptions that voluntary, lawful private agreements among market participants respond 'efficiently' to individual preferences.

(c) The EU's multilevel democratic, republican and cosmopolitan constitutionalism protecting democratic input-legitimacy, republican output-legitimacy and cosmopolitan, transnational rule-of-law for the benefit of citizens responds to the ordoliberal call for constitutional limitations of market failures, governance failures and constitutional failures. The EU's unique 'EMU' with only limited EU economic and social policy powers has raised constitutional controversies (e.g. about the powers of the European Central Bank, ECB); their political and judicial settlement focused on protecting democratic governance principles rather than economic dogmas. EMU remains a constitutional experiment requiring further legislative clarifications and political compromises (e.g. regarding EU 'own resources', fiscal deficits, excessive public debt, issuing of common EU bonds). The 2024 appointments of new EU Commissioners for new regulatory challenges (like EU security, the housing crises inside several EU member states) illustrate this crisis-driven evolution of many EU law and policies.

(d) The explicit commitment to a 'competitive social market economy' acknowledges that competition among diverse economies and democracies creates winners and losers; to remain socially and democratically supported, the EU must respond to changing social, environmental and political circumstances and crises. The EU mandate for a 'social' market economy protecting human rights and 'cohesion' is increasingly used (e.g. for post-Covid 19 recovery projects financed through common EU borrowing in capital markets) to stabilize social support for EU governance in Europe's transnational society, economy and democratic polity. EU law clarifies - e.g. in the EUCFR and in the 2024 EU Corporate Sustainability Due Diligence Directive - that the EU legal conceptions of 'social market economy' and 'sustainable development' exclude neoliberal, business-driven (self)regulation neglecting human and environmental rights and judicial remedies. Authoritarian conceptions of a 'socialist market economy' (e.g. in China) with communist 'social surveillance' and censorship are even more inconsistent with EU law. The EU Commission proposals for a 'new Clean Industrial Deal', a 'European Savings and Investments Union', and a 'European Affordable Housing Plan', as announced by the President of the EU Commission in July 2024, illustrate this development of EU law and policies responding to economic, environmental, social and security crises in conformity with 'ordoliberal principles' rejecting business-driven self-regulation neglecting human rights. Past neoliberal criticism of the term 'social' as a 'weasel-word' (F.A.Hayek)

lacking precise meaning is refuted by the EU law guarantees of civil, political, economic, social and cultural rights offering justiciable, legal definitions of 'social welfare' and of related legal and political remedies, notwithstanding the inevitable uncertainties of outcome-oriented macro-economic policies and of governmental 'outcome corrections' promoting social justice (like the preferential treatment of southern EU democracies in the financial assistance offered by the 2020 Next Generation EU recovery program).

### **2.3 'Strategic autonomy' requires interpreting EU Law as a 'living constitution'**

The transformation of economic partners into potential adversaries (like Russia) have prompted the EU Commission to call for 'EU strategic autonomy' de-risking economic dependencies (e.g. on Russian energy supplies, Chinese supply of rare earths and technologies) that risk being 'weaponized'. The 27 democratic EU member states remain characterized by diverse national Constitutions and only limited conferral of EU competences in conformity with the 'subsidiarity principle' (Article 5 TEU) and Europe's decentralized development throughout centuries. As EU decisions regarding the EU budget and other revenues (e.g. financed through issuance of common EU debt) require unanimity and approval by all member states (Article 311 TEU), EU financial decisions (e.g. on financial assistance for Ukraine) have been repeatedly vetoed for political reasons (e.g. by Hungary); this uncertain EU capacity to agree on urgent fiscal responses to unforeseen events limits the EU's 'strategic autonomy'. Diverse national responses to European crises – as in the financial and sovereign debt crises since 2008, in the migration crisis of 2015, or in the current security crisis caused by Russian aggression – risk undermining European integration, for instance by national border closures, increasing sovereign bond spreads, national referenda (like 'Brexit') or political vetoes rejecting EU initiatives. As EU law protects individual and democratic autonomy and only limited EU competences for protecting transnational PGs, EU crises governance requires interpreting and developing EU law as a citizen-driven 'living constitution' different from national Constitutions based on state sovereignty. The more the geopolitical rivalries and diverse value priorities of European constitutionalism, Anglo-Saxon neoliberalism, authoritarian state-capitalism and 'third world development policies' become permanent facts, the more EU law and practices must adjust to the new geopolitical and geoeconomic challenges caused by international legal policy competition and 'lawfare' disrupting the UN and WTO legal systems.<sup>11</sup>

### **3. From Exceptional EU Crisis Governance to Transforming EU Constitutionalism**

As explained in section 2, Europe's successful integration law can be explained by its unique merging and extension of republican, democratic and cosmopolitan constitutionalism to multilevel governance of PGs. The EU's multilevel constitutionalism differs from neoliberalism by its 'ordoliberal' acknowledgment that the proper functioning of economic, democratic and social, citizen-driven 'markets' (as decentralized information, coordination and sanctioning mechanisms) depends on multilevel legal limitations of market failures, governance and constitutional failures. The 1992 'Maastricht compromise' for the EU's EMU provided for centralized EU monetary policy conducted by the ECB and decentralized, national economic policies (including fiscal and debt policies) subject to national parliamentary control, national

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<sup>11</sup> Cf E.U.Petersmann, Transforming UN and WTO Legal Systems through International Legal Policy Competition and 'Lawfare', in: *EUI Law Working Papers* 2024-16.

financial responsibility, EU policy coordination, EU fiscal and debt disciplines, prohibitions of monetary financing (Article 123 TFEU), a no-bail-out clause (Article 125 TFEU), and EU emergency and solidarity safeguards (e.g. in Arts 120ff TFEU). According to Article 311 TFEU, the EU budget 'shall be financed wholly from own resources' without prejudice to other revenue; the 'Union shall provide itself with the means necessary to attain its objectives and carry through its policies'. As the Lisbon Treaty does not confer powers on the EU to issue common bonds for financing the EU budget, the transformation of the initially nationalist responses (like border controls) to the Covid-19 global health pandemic in 2020 by the common Next Generation EU (NGEU) recovery program - distributing grants and loans to EU member states worth up to €750 billion based on Arts 122, 175 TFEU from 2021 to 2026, and financed through common debt issued by the EU in conformity with Article 311 TFEU - required ratification of the EU Council decision by all national parliaments in EU member states.<sup>12</sup> This 'NGEU governance model' - distributing emergency loans and grants based on Arts 122, 175 TFEU and financing them on the basis of Article 311 TFEU through a Council Decision approved by national parliaments, thereby effectively doubling the EU's annual budget without changing the EU Treaties - also inspired the EU financial and military assistance for Ukraine in response to Russia's full-scale invasion of Ukraine in 2022.<sup>13</sup> In view of the political difficulties and uncertainties of EU treaty amendments, the 2024 Draghi report on a 'competitiveness strategy for Europe' referred, again, to the NGEU governance as a model for promoting and financing needed EU reforms responding to the 'emergency context' of geopolitical rivalries.

### **3.1 Exceptional and discretionary nature of NGEU Crisis Governance**

Germany's constitutional court, in its judgment approving the NGEU recovery and resilience program of December 2020, emphasized the temporary, exceptional nature of EU emergency governance based on Article 122 TFEU and financed through issuance of common EU debt.<sup>14</sup> The Court insisted that constitutional democracy in Germany requires that the overall financial burden imposed on German citizens must be decided by the German Parliament. Also the type and level of public spending, and German financial liability for decisions of other states or international institutions, cannot be decided only at the supranational level. Without a treaty amendment, it is legally not possible to recognize common borrowing as a permanent source of EU financing; yet the Court accepted the EU Council Decision 2020/2053 of December 2020 on the EU system of own resources as a sufficient legal authorization to borrow on the capital markets 'other resources' provided the borrowing is limited in time and amounts, and is spent for the specific purposes justified under Article 122 TFEU. Considering the diverse emergencies and recovery projects inside member states, the Court accepted a wide margin of appreciation of the Council and Commission under Article 122 TFEU without insisting that each national recovery project was linked to the pandemic.

The 'ordoliberal principles' underlying Europe's multilevel constitutionalism confirm this EU policy discretion for responding to the unique European context. For instance, interpreting EU

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<sup>12</sup> Cf B. de Witte, The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift, in *CMLRev* 58 (2021) 635.

<sup>13</sup> Cf F. Fabbrini, From the Pandemic to the War: the EU Fiscal Response to Russia's Aggression of Ukraine, the Legacy of NGEU, and the Challenge to 'Promote the General Welfare', in *AJIL Unbound* 118 (2024), 177.

<sup>14</sup> BVerfG, 2 BvR 547/21 (Interim Decision of 15 April 2021), 2 BvR 798/21 (Judgment of 6 December 2022).

law as protecting equal dignity rights (Title 1 EUCFR), liberty rights (Title 2 EUCFR), equality rights (Title 3 EUCFR), solidarity rights and principles (Title 4 EUCFR), citizen rights (Title 5 EUCFR) and 'justice rights' (Title 6 EUCFR) may justify diverse 'balancing' of democratic, economic and social policy priorities (e.g. for promoting 'cohesion' and equal opportunities like gender equality).<sup>15</sup> The NGEU resilience and recovery project also used the EU cohesion policy rules (Arts 174ff TFEU) for justifying preferential treatment of (e.g. southern) EU member states in the allocation of EU grants and loans. EU promotion of a 'competitive social market economy' differs fundamentally from utilitarian prioritization of 'libertarian freedom' and mere 'Kaldor-Hicks-efficiency' in the US common market, or of authoritarian market distortions in autocracies.<sup>16</sup>

'Ordoliberal interpretations' of EU law – for instance, for justifying common market regulations promoting EU competitiveness based on the 'commerce clause' in Article 114 TFEU, and EU emergency assistance based on the emergency clause (Article 122 TFEU) in combination with TFEU provisions for cohesion policy outside of regular funds (Article 175) and EU agreements supplementing the EU budget (Article 311) – facilitate EU crises governance. The creation of the NGEU recovery program, and its approval by national legislatures, showed how dynamic interpretation of EU Treaty provisions – without changing the EU fiscal and budgetary constitution – can enable effective EU crisis governance.

Reconciling individual and democratic autonomy (as protected by human and constitutional rights) with 'state sovereignty' and the quest for EU 'strategic autonomy' inevitably differs from conceptions of sovereignty in nation states outside Europe. The EU Treaties remain embedded into other worldwide (e.g. UN, GATT, WTO) and regional treaty obligations of EU member states (like the ECHR) as integral parts of European integration. The geopolitical changes – caused by authoritarian power politics, climate change, the digital revolution and the emergence of a multipolar world with 'permacrises' challenging the EU's multilevel governance - require EU crisis responses that remain consistent with both European and international law (as prescribed in Arts 3, 21 TEU) in responding to the increasing disintegration of the UN and WTO systems. So far, EU responses to the changing geopolitics (like adjustments of EU trade and industrial policies, competition and state aid policies, internet governance and data protection laws, common foreign security and defense policies (CFSP/CSDP)) avoided treaty changes. Whether the limited fiscal and budgetary EU competences - and the dangerously insufficient EU security system - can be adequately complemented through *ad hoc* agreements among EU member states without changing the Lisbon Treaties remains, however, contested.

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<sup>15</sup> My 2012 textbook on *International Economic Law in the 21<sup>st</sup> Century* discusses dozens of relevant CJEU judgments (e.g. on balancing economic freedoms with dignity rights, social and labor rights inside the EU's rights-based common market); it explains the philosophical foundations of focusing on non-discriminatory conditions of competition and equal opportunities for the benefit of citizens, rather than only on libertarian freedom and autonomy. Competition among individuals with unequal capacities and scarce resources is seen as a pervasive social fact creating social injustices unless human rights and equal opportunities are protected. Economic efficiency standards must be complemented by agreed social justice principles and judicial remedies against abuses of policy discretion. Governmental 'social engineering' must remain limited and justifiable by agreed constitutional rules and procedures reconciling individual and democratic self-determination. For a similar approach see: P.Lamy, *The Geneva Consensus. Making Trade Work for All* (2013).

<sup>16</sup> A.Applebaum, *Autocracy, Inc: The Dictators Who Want to Run the World* (2024) describes the common characteristics of modern autocracies (like Belorussia, China, Cuba, Iran, North Korea, Russia, Venezuela) as being based on oppressive, (para)military security services; kleptocratic networks; corrupt financial structures; technological experts providing surveillance, propaganda and disinformation; and internal and external power politics suppressing human and democratic rights (e.g. in Ukrainian territories occupied by Russia as confirmed by European and international courts of justice). For a similar diagnosis see: I.Williams, *Vampire State: The Rise and Fall of the Chinese Economy* (2024).

### 3.2 Democratically legitimate, alternative forms of EU crises governance

Do the global 'permacrises' (like climate change), and the undermining of the UN security and WTO trade systems by geopolitical power struggles, justify interpreting EU emergency governance (e.g. based on Article 122 TFEU) as a permanent NGEU governance model? Even if repeated invocations of Article 122 in 'permacrises' are justifiable, Article 122 does not prescribe participation of the European Parliament in EU emergency governance; this makes other treaty provisions for common EU actions with the consent of the European Parliament (like Arts 175, 352 TFEU) democratically preferable. Amendments of Article 122 TFEU may be pragmatically avoided by agreements among the EU institutions ensuring participation of the European Parliament in EU emergency governance. Treaty amendments conferring EU powers to issue common debts without approval by national parliaments remain contested, however, at least in view of Germany's requirements of national parliamentary budget responsibility subject to a 'debt brake' (Arts 109, 115 German Basic Law). NGEU emergency governance and cohesion policies (Article 175) offer lawful policy options for circumventing this national 'debt brake' if proposals for amending the Basic Law lack sufficient democratic support.

The succession of financial crises (like bankruptcies threatening financial stability), sovereign debt crises (like sovereign debts threatening the monetary Euro-system), illegal migration, 'Brexit' and rule-of-law crises, health pandemics, military security, competitiveness and environmental crises since 2009 forced the EU institutions to design crises responses through evolutionary treaty interpretations<sup>17</sup> without EU treaty amendments and EU treaty provisions specifically foreseeing such legal adaptations to crisis needs:

(a) EU Treaty provisions conferring legislative powers (like Article 114 TFEU for approximation of national laws for the functioning of the EU internal market) have been used extensively, for instance in the banking crisis for establishing a banking union with central supervision of banks, and for responding to the 'digital revolution' by regulating services providers through the Digital Services, Digital Markets and the Artificial Intelligence Acts. While Article 114 shall be applied by the European Parliament and the Council in accordance with the ordinary legislative procedure, some other treaty provisions enable only unanimous Council actions 'on a proposal from the Commission and after obtaining the consent of the European Parliament', for instance if 'the Treaties have not provided the necessary powers' for attaining treaty objectives 'within the framework of the policies defined in the Treaties' (Article 352 TFEU).

(b) Emergency powers (notably under Article 122 TFEU) have been frequently used in the debt, pandemic, energy and security crises since 2009; they do not provide for parliamentary consent and are subject to the constitutional principles of necessity, proportionality and only temporary use. Even though the NGEU recovery program was adopted as an exceptional emergency measure, its legal and political governance methods have been followed in the financial and military EU assistance for Ukraine which - in addition to national financial and military assistance by EU member states - was financed by common debt raised on the financial markets.<sup>18</sup> It remains to be clarified - by the CJEU or by democratic agreements - to what extent the current pluricrises can justify regular invocations of the NGEU governance model for responding to permacrises like climate change and systemic EU competitiveness challenges in a multipolar world where authoritarian and neoliberal competitors avoid many

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<sup>17</sup> Cf A. de Gregorio Merino, *The EU Treaties as a Living Constitution of the Union in Times of Crisis*, in *AJIL Unbound* 118 (2024) 162.

<sup>18</sup> Cf note 13.



regulatory costs (like those of complying with higher environmental, human rights and labor standards) and, thereby, undermine Europe's social model and 'ordoliberal DNA'.<sup>19</sup>

(c) EU emergency responses have often been agreed through international agreements among EU member states, for instance if EU treaty provisions (like the lengthy treaty amendment procedures) and/or EU budgetary resources were deemed insufficient, or the needed consensus was blocked by one or a few states. Examples include the 2012 'Fiscal Compact' on Stability, Convergence and Growth as well as the European Stability Mechanism created in response to the Euro-crisis with the possibility of mobilizing up to €500 billion in loan assistance to an overindebted Eurozone member country (like Greece at the time), or for financing EU assistance for migrants in Mediterranean countries like Turkey. These treaties often confer additional competences on EU institutions (like the EU Commission and the CJEU) to ensure their coherence with EU law. Control of these treaties by EU member states and their national parliaments ensures democratic legitimacy. Yet, as the preponderant role of the European Council in crisis governance avoids the normal EU co-legislative procedures involving the Commission, the European Parliament and the Council of Ministers, there are deliberate efforts at involving the EU Commission for initiating and implementing EU crisis measures (like the European Peace Facility for supplying munitions to Ukraine, and for NGEU borrowing in financial markets and controlling the spending of loans and grants in EU member states).

(d) Arguably, even if the NGEU governance model risks circumventing the European Parliament, the consent from member states (Article 122 TFEU), ratification by national parliaments (Article 311 TFEU), and judicial approval by national constitutional courts maintained the democratic legitimacy of its innovative policy tools (like national recovery projects, performance-based supervision, redistributive 'cohesion policy', common EU borrowing, rapid macroeconomic stabilization, rule-of-law conditionalities, diversification of energy supplies through REPowerEU projects). Crisis measures adopted by 'republican EU institutions' (like the ECB), and the protection of the rule-of-law by the CJEU, illustrate how multilevel 'demoi-cracy' bridging the national and European democratic decision-making procedures can be complemented and 'stabilized' by republican and cosmopolitan EU constitutionalism limiting democratic discretion by constitutional constraints protecting public reason against volatile, populist emotions. Republican institutions have democratically agreed mandates for institutionalizing public reason. EU constitutionalism recognizes judicial clarifications of indeterminate legal rules (like judgments on environmental policy inaction violating human rights to climate change mitigation) as an indispensable part of constitutional democracy. Withholding NGEU funds vis-à-vis member states with illiberal governments undermining rule-of-law (e.g. in Hungary and Poland) set effective financial incentives for national legal and democratic reforms. Europe's constitutional demoi-cracy rejects claims that democratic discretion should include power to abolish democracy, human rights, or governmental duties to protect PGs. Cosmopolitan constitutionalism protecting human rights and rule-of-law across national frontiers, and republican constitutionalism protecting agreed PGs (including 'rule-of-law conditionalities'), distinguish Europe's multilevel 'ordoliberal constitutionalism' from constitutionally less restrained nationalism outside Europe.

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<sup>19</sup> Cf P.Lindseth/P. Leino-Sandberg, *Democratizing Draghi: Why the "Competitiveness Report" Demands Treaty Reform*, *VerfBlog*, 2024/9/12, <https://verfassungsblog.de/draghi-report-investment-eu-competition-treaty-reform/>, DOI: [10.59704/36728ff8ed7b538d](https://doi.org/10.59704/36728ff8ed7b538d).

## 4. Conclusions: ‘Systemic Challenges’ for Internal and External EU Crises Governance

There is no other multilateral organization outside Europe with 27 democratic member states, whose courts protect a regional ‘rule-of-law’ system with a transnational ‘constitutional identity’ as defined in Article 2 TEU.<sup>20</sup> Compared with process-based, constitutional nationalism with autocratic or neoliberal policies, the Lisbon Treaties’ commitments to protecting human and constitutional rights, democracy and rule-of-law not only inside and among EU member states, but also in EU external relations (cf Arts 3, 21 TEU) entail ‘multilevel constitutional self-restraints’ which states outside Europe do not accept. Past EU attempts at complementing Europe’s ‘foreign policy constitution’ by a transatlantic free trade agreement (FTA) and compulsory international economic adjudication were rejected by successive US governments.<sup>21</sup> The financial and monetary EU crises since 2009, like the subsequent migration, environmental, health, energy, security and ‘competitiveness crises’ inside the EU were all related to governance crises outside Europe, for instance in the US financial system, emigration from failed states in Africa and Asia, global climate change, biodiversity losses and pollution (e.g. of the oceans), weaponization of energy supplies and military aggression by authoritarian dictatorships, and loss of European competitiveness vis-à-vis third competitors benefitting from lower human rights and environmental standards, production and energy costs. Internal and external EU crises governance interact and cannot be separated. The EU’s multilevel constitutionalism increasingly prompts the EU to assume leadership for promoting sustainable development reforms also beyond the EU (4.1). Yet, the limited conferral and subsidiarity of EU competences, and the political, economic and social diversity inside and among EU member states render democratic support for EU crises governance increasingly difficult (4.2-4).

### 4.1 EU constitutionalism promotes sustainable development reforms beyond the EU

The more authoritarian and neoliberal power politics impede UN and WTO reforms, the more necessary become second-best plurilateral governance reforms which make membership conditional on promoting human rights and rules-based, multilevel private-public partnerships for realizing the universally agreed UN sustainable development goals (SDGs). The geopolitical rivalries and polycrises have induced the EU to resort to new regulations and directives responding to foreign market distortions, environmental pollution, and violations of UN and WTO rules by collective countermeasures. For instance, to protect EU citizens and agreed EU welfare standards, the EU has introduced new regulations for:

- screening foreign investments inside the EU;

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<sup>20</sup> In *Republic of Poland v European Parliament and Council of the EU*, C-157/21, ECLI:EU:C:2022:98 (16 February 2022), the CJEU defined the values in Article 2 TEU as ‘the very identity of the European Union as a common legal order’ (para. 327). On the extension of these constitutional principles to third European states (e.g. through the European Economic Area with EFTA states) see: A.Petti, *EU Neighborhood Law: Wider Europe and the EU’s Extended Legal Space* (2024).

<sup>21</sup> Cf E.U.Petersmann, *The EU’s Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements*, in: *European Foreign Affairs Review* 21 (2016), 449-469; E.U.Petersmann/M.A.Pollack (eds), *Transatlantic Economic Disputes. The EU, the US and the WTO* (2003); Petersmann/Steinbach (note 2).

- limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
- EU ‘anti-coercion measures’ providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
- EU prohibitions of importing ‘conflict minerals’ and products made by forced labor, and EU ‘sustainability sanctions’ in response to foreign violations of labor rights, human rights and sustainable development commitments, including also a 2024 EU corporate sustainability due diligence directive requiring large companies to protect human rights, worker rights and environmental standards in their supply chains;
- EU emergency powers for responding to supply chain problems (as they emerged during the Covid-19 and energy crises);
- stronger EU anti-subsidy and emergency export control regimes;
- unilateral EU carbon border adjustment measures (CBAMs) supplementing the European carbon emission trading system (ETS) by avoiding ‘carbon leakage’ (i.e. relocation of production outside EU borders to countries with lower environmental standards), greening the Union’s supply chains, and mitigating climate change beyond EU borders;
- an EU deforestation regulation compelling exporters of six commodities (like coffee, palm oil and rubber) to prove they were not produced on land that was recently deforested, and imposing mandatory due diligence obligations on firms trading such products in Europe.<sup>22</sup>

The EU emphasizes its commitment to WTO-consistent regulations. Hence, in response to criticism of the EU CBAMs and a 2024 WTO dispute settlement finding of certain legal inconsistencies in the EU ‘tropical deforestation regulations’ affecting Indonesia and Malaysia, the EU confirmed its determination to bring its measures into conformity with WTO law. At the same time, the EU exercises leadership (as prescribed in Arts 3, 21 TEU, 208 TFEU) for promoting sustainable development reforms in third countries, especially in the following four areas:

(a) Since the 2010 EU-Korea FTA, the EU includes provisions on trade and sustainable development (TSD chapters) into all EU FTAs. The TSD-chapters include provisions relating to domestic law (like labor, environmental and sustainable development policies subject to non-regression obligations), international standards and agreements (e.g. referring to ILO conventions, ILO core labor standards, multilateral environmental agreements), FTA institutions with civil society participation, and FTA dispute settlement procedures. Past evidence suggests that the TSD chapters and their institutionalized supervision (e.g. promoting labor law reforms in Vietnam) and enforcement (e.g. in the context of EU-Korea panel procedures concerning Korea’s non-compliance with ILO core labor rights like freedom of association) have rendered the sustainable development obligations of FTAs more effective in conformity with the UN SDA.<sup>23</sup>

(b) The rules-based internal and external EU mandates and judicial remedies pushed the EU to become a leading advocate for compulsory adjudication in international trade law,

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<sup>22</sup> These various EU Regulations and Directives are published in the EU Official Journal and explained on the EU website on EU trade policies: *Making Trade Policy*, EUROPEAN COMMISSION, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy_en).

<sup>23</sup> Cf Velut et al. (2022) Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements, LSE, 02/2022, p. 39, <https://circabc.europa.eu/rest/download/150a55ee-fd11-491d-a9f1-c6347cfe9800?ticket>

investment law, international criminal law and the Law of the Sea. For example, when the WTO Appellate Body (AB) was rendered dysfunctional in 2019 by illegal US vetoes of the consensus-based nominations of AB judges, the EU introduced voluntary Multi-Party-Interim Arbitration agreements (based on Article 25 DSU) providing for compulsory appellate arbitration among WTO Members pending the blockage of the WTO AB, thereby limiting abuses of ‘appeals into the void of a dysfunctional AB’ that prevented adoption of WTO panel reports. The bilateral and UN negotiations on transforming investor-state arbitration into more transparent, and more accountable investment adjudication were promoted by the CJEU ruling that investor-state arbitration was inconsistent with EU constitutional law and had to be reformed in both the EU’s internal and external relations; the EU continues to actively participate in the ongoing negotiations (e.g. in the UN Commission on International Trade Law and in the International Center for the Settlement of Investment Disputes) on reforming investor-state arbitration also in the EU’s external relations.<sup>24</sup>

(c) EU common market regulations often have global ‘Brussels effects’ if access of foreign goods, services and investments to the EU market is made conditional on compliance with EU common market regulations (like EU product and production standards, EU regulations of digital services and artificial intelligence).<sup>25</sup> The EU’s environmental constitutionalism, climate legislation and related climate litigation illustrate how domestic constitutional reforms inside the EU set incentives for governments and non-governmental organizations also outside the EU to increase their environmental and human rights protection standards, for instance by introducing carbon taxes on products and services exported to the EU.<sup>26</sup> The EU’s internal ETS and external CBAMs – aimed at reducing GHG emissions, inducing industries to use greener technologies, and to prevent ‘carbon leakage’ – illustrate the transformative nature of the EU’s environmental constitutionalism inside and beyond the EU, for instance by setting incentives for increasing insufficient ‘nationally determined contributions’ for GHG reductions under the 2015 Paris Agreement on climate change mitigation. The EU remains committed to regulating and implementing its CBAM in conformity with both UN law and WTO law. Even if collecting carbon tariffs at the border as an integral part of the EU ETS could violate GATT Articles II or III, Article XX GATT justifies the EU’s ETS/CBAM system to the extent it is non-discriminatory and necessary for protecting the human right to protection of the environment (Article XX, para. a), human, animal and plant life or health (para. b), non-discriminatory internal product and production standards like ETS systems (para. d), or is related to the conservation of exhaustible natural resources ‘in conjunction with restrictions on domestic production or consumption’ (para. g). The EU Commission initiated bilateral negotiations with third countries (like India, African countries, the USA) on, *inter alia*, defining agreed production standards (e.g. for carbon-intensive ‘dirty steel’), agreed procedures for calculating the carbon content of traded products and services, mutual recognition of diverse climate change mitigation policies in import and export countries (e.g. environmental taxes and subsidies), and ‘common but differentiated responsibilities’.

(d) EU leadership for democratic and human rights reforms is pursued, *inter alia*, by including references to human rights into all external EU trade and investment agreements and continuing EU accession negotiations aimed at enlarging the EU from now 27 to about 35 member countries by 2030. The inclusion of human and democratic rights guarantees into EU trade and association agreements and related EU enforcement measures go beyond similar

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<sup>24</sup> On the EU initiatives for reforming trade and investment adjudication see Petersmann/Steinbach (note 2), 308-361.

<sup>25</sup> Cf A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020).

<sup>26</sup> Cf J. Delbeke, How CBAM Can Become a Stepping Stone towards Carbon Pricing Globally, European University Institute STG Policy Paper 2023-6.

treaty provisions and judicial remedies in the external FTAs by non-European democracies (like the USA); they render UN human rights law more effective.<sup>27</sup>

#### 4.2 EU multilevel democracy constrains discretionary emergency governance

There is no continent outside Europe with 'democratic principles' as in the Lisbon Treaty (e.g. Arts 9-11 TEU) prescribing multilevel constitutional, parliamentary, participatory and deliberative democratic governance at national and regional levels protected by civil, political, economic, social and cultural rights, multilevel, judicial remedies of EU citizens, and principles of limited conferral of EU powers subject to constitutional restraints like the subsidiarity principle (Article 5 TEU). Similarly, on no continent outside Europe have more than 46 democracies accepted regional treaty systems protecting human rights and multilevel judicial and other republican institutions as comprehensively as in the numerous Council of Europe treaties (like the ECHR). Yet, this dense 'legal integration law' with numerous obligations of solidarity (e.g. in Arts 42.7 TEU, 122, 162, 222 TFEU) has not prevented 'democratic backsliding' inside the EU (e.g. in Hungary, Poland and Slovakia) and among members of the Council of Europe (e.g. leading to the exclusion of Russia). The social, economic, political and legal diversity inside and among EU member states renders democratic majority governance a constant challenge, especially in crises governance as discussed above. The emergence of ordoliberalism responded to Europe's social, economic and political crises following World Wars I and II; it confirmed why - in Europe - democratic and social support for a common market never depended only on protecting market freedoms and economic efficiency (as the prevailing 'neoliberal justifications' of the US common market) but also on transnational social order responding to citizen demand for social security, full employment, diversity and solidarity.

Sections 2 and 3 explained why Europe's 'ordoliberal constitutionalism' protects wide democratic discretion at national and European levels of governance, for instance regarding limitations of market failures, governance failures and constitutional failures. The EU's 2020 post-pandemic Recovery and Resilience Program allocated more grants and loans to southern EU member states based on macroeconomic justifications (like comparatively lower per capita GDP, larger economic harm during the pandemic in these recipient countries); yet, such democratic value decisions remain *ad hoc* compromises.<sup>28</sup> Reducing public debt and annual budget deficits in EU member states (as prescribed by the fiscal and debt disciplines in the TFEU to promote monetary, financial and economic stability, economic growth and competitiveness in the EMU) and rebuilding stronger financial safety nets for financing

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<sup>27</sup> A recent example is the judgment by the CJEU of 4 October 2024 annulling the EU Council Decision approving an EU-Morocco trade and fishery agreement on the ground of violating international law by extending the scope of the agreement to the territory of the Western Sahara without respect for the right to self-determination of the indigenous Sahrawi people which had not consented to the agreement, and whose consent could not be assumed: CJEU Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario (not yet reported). Yet, the judgment has not prevented the subsequent recognition by President Macron of Moroccan sovereignty over Western Sahara.

<sup>28</sup> Macroeconomic data (like national GDP per capita) say little about domestic 'social welfare'; for example, more than 80% of Italian households live in their own house or apartment and are exempt from property taxes on their first house (apartment); in Germany, less than 50% of households live in their own home, which is subject to property taxes aimed at reducing social inequalities. The comparatively lower public and private investments in European technologies and innovation (than in the USA) are partly due to the fact that the EU cohesion funds distribute about a third of the EU budget to reduce social and economic gaps between richer and poorer parts inside the EU, and agricultural subsidies account for more than a quarter of the EU budget.

innovative investments require finding a more sustainable balance between public finances, strong investment and economic growth.<sup>29</sup> The national 'balancing efforts', and the national responses inside the diverse EU 'welfare states' to the financial, health, environmental and security crises since 2008, remain diverse.<sup>30</sup> National parliamentary responsibility for fiscal and debt policies, and proposals for joint financing of common European PGs (e.g. in the 2024 Draghi 'competitiveness report'), have to be reconciled through consensus-based EU decisions which, according to the 'passerelle clause' in Article 48.7 TEU, may legalize qualified majority decisions. Enhanced cooperation among nine or more EU member states (Arts 20 TEU, 326ff TFEU), EU social policies pursuant to Arts 151ff TFEU, EU cohesion policies (Arts 174ff TFEU), the EU treaty commitments (e.g. in Arts 42.7 TEU, 222 TFEU) to collective responses to natural disasters and foreign aggression offer many EU policy instruments for promoting a 'competitive social market economy', solidarity and social justice in European integration.<sup>31</sup>

### 4.3 EU republican constitutionalism 'stabilizes' European democracy

Section 2 explained how the EU 'republican commitments' to protecting rule-of-law and other PGs inside and beyond the EU depoliticize and stabilize EU decision-making. As explained in section 3, EU law offers multiple legal procedures – like the NGEU governance method and more 'enhanced cooperation' among 'coalitions of the willing' - for progressively moving towards more qualified-majority decisions and joined financing of new EU initiatives for promoting technological innovations, digitalization and decarbonization of economies, social and democratic support of EU common market and capital union reforms. As proposals for common EU social policies remain confronted with democratic opposition against transferring discretionary social welfare powers to EU institutions without agreed standards limiting 'moral hazards' in distributing EU funds among 27 member states, consensus-requirements in EU decision-making offer incentives for needed compromises and 'supranational social incrementalism'. Replacing neoliberal 'shareholder strategies' by inclusive stakeholder and environmental, social and governance (ESG) strategies helps aligning company interests with governmental responses to environmental, health and other social crises and private-public partnerships (e.g. for collective EU procurement of 'green technologies', vaccines and military supplies for Ukraine).

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<sup>29</sup> On the difficulties of solving Europe's 'budgetary trilemma' and 'investment gap' of more than 1 trillion € per year see the Draghi report (note 1).

<sup>30</sup> For example, seven EU member countries have recently been put forward for an excessive deficit procedure. A.Hemerijck/M.Matsaganis, *Who's Afraid of the Welfare State Now?* (2024), explain why it is possible to provide inclusive social security, achieve high employment, advance and maintain human capabilities across the life-course, and fight poverty and inequality in national crises responses. Germany's constitutional limitations on public debt are increasingly criticized as impeding investments and economic growth.

<sup>31</sup> The need for such 'supranational social incrementalism' - as increasingly practised (e.g. with the EU's 'Civil Protection Mechanism' since 2001, and the common EU health and defence policy initiatives) – is explained by M.Ferrera, *Politics and Social Visions: Ideology, Conflict and Solidarity in the EU* (2024). It is consistent with ordoliberal advocacy for a 'social market economy' assisting the losers in economic and social competition to maintain decent living standards and adjust to competitive pressures. As climate change has made Europe the world's fastest warming continent with increasing numbers of wildfires and other natural disasters, invocations of the EU's 'Civil Protection Mechanism' continue to increase every year (pooling resources such as planes and firefighters dispatched from other EU member states when a government or EU candidate countries request assistance in case of a natural disaster, and financing 75 per cent of the operational costs).

Practising 'EU solidarity' inside and beyond the EU in conformity with the 17 universally agreed UN SDGs facilitates reconciling the EU's internal and external legal obligations (like EU commitments to preferential treatment of less-developed countries) and related treaty commitments of the EU (e.g. to comply with the 1994 WTO Agreement and the 2015 Paris Agreement on climate change mitigation). For instance, the EU's financial contributions to the 'Loss and Damage Fund' established in the context of the 2015 Paris Agreement on climate change mitigation for assisting less-developed countries in adjusting to the harmful changes caused by global warming (like rising sea levels, sea temperature changes, increase in ocean acidity caused by the absorption of carbon dioxide from the atmosphere) must take into account the EU legal commitment (e.g. in Article 3 TEU) to promoting 'sustainable development', with due recognition of the historical accountability of industrialized countries for about 80 per cent of greenhouse gas emissions. EU FTAs promoting economic development and job opportunities in Africa and Latin-America may offer effective strategies also for EU policies reducing illegal immigration. The complex interactions between internal and external EU policies must be explained by EU institutions also in the current 'neoliberal challenge' that demand of EU citizens for high EU social standards undermines EU competitiveness vis-à-vis authoritarian and neoliberal competitors.

Third countries increasingly challenge (e.g. in WTO dispute settlement proceedings) what they perceive as 'green imperialism' and 'social protectionism' of the EU. For instance, EU CBAMs aimed at requiring third exporting countries to comply with the higher carbon emission reduction standards inside the EU's common market will be effectively enforced only progressively as of 2026. At the request of third countries, the entry into force of the 2023 Deforestation Regulation was delayed by one year; it aims at greening the Union's supply chains and mitigating climate change beyond its borders by prohibiting imports of major agricultural commodities into the EU market if they have been produced on recently deforested land. Respect for the principle of 'common but differentiated responsibilities and respective capabilities' in EU climate change policies needs to be further specified.<sup>32</sup> Imposing mandatory due diligence obligations on firms in third countries exporting agricultural products from deforested lands to Europe, and EU invocations of 'security exceptions' on grounds of economic and democratic rather than only military security<sup>33</sup>, must be legally and democratically justified.

#### 4.4 Geopolitical rivalries as an existential threat to Europe's integration model

Constitutionalism emerged in response to the bounded rationality of human beings so as to limit domination of politics by power struggles, human passions and rational egoism. Constitutional democracy requires 'active citizenship'. Section 2 described how the emergence of ordoliberalism since World War I, and Europe's multilevel constitutionalism since the 1950s, prioritize values different from autocracies and democracies outside Europe. As emphasized already by Kant in his definition of 'enlightenment' as 'courage to know' ('*aude*

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<sup>32</sup> See G.Marin Duran/J.Scott, *Global EU climate action and the principle of common but differentiated responsibilities and respective capabilities*, in: EUI Law Working Papers 2024/2. In the WTO, the EU emphasizes its commitment to design its trade and environmental policies in compliance with WTO law.

<sup>33</sup> Cf *Robust. Resilient. Sustainable. Integrated Security for Germany: National Security Strategy* (2023), which defines 'integrated security' in three dimensions: 'protection from war and violence'; 'the freedom to be able to shape our lives, our democracy the way we want'; and 'focusing on people's individual security needs', using the rights of women and vulnerable groups as a social barometer.

*sapere*)<sup>34</sup>, 'enlightened citizens' insisting on 'public justification' of the exercise of all public and private power remain a precondition for 'democratization' and 'constitutionalization' of legitimate governance. The history of constitutionalism demonstrates how such citizen-driven 'struggles for justice' aimed at institutionalizing reasonable rules and institutions are resisted by communities and rulers prioritizing human passions (like religious beliefs, gender and racial discrimination) and self-interests in abusing power (e.g. through slavery, feudalism, colonialism, dictatorship and neoliberalism). Most citizens prioritize individual survival and self-development through professional specialization and collaboration in families and local communities; they tend to remain 'rationally ignorant' due to their limited knowledge, for instance about market failures, governance failures and multilevel governance challenges in distant UN and WTO institutions.<sup>35</sup> Authoritarian and populist denial of 'constitutional failures' ignores the historical lessons from Europe's 2500 years of 'constitutional experimentation' with democratic and republican constitutionalism, like the frequent destruction of democracies (e.g. in ancient Athens) and of city republics (e.g. in Rome, Florence and Venice) by intergovernmental power politics. Inducing EU citizens to support Europe's multilevel constitutionalism requires linking 'constitutional politics' and 'constitutional economics' to EU social policies and daily concerns of EU citizens.

Globalization has rendered 'national constitutionalism 1.0' an outdated, incomplete model for governing transnational public goods. UN and WTO models of 'international constitutionalism 2.0' have failed to protect human rights and the SDGs effectively. Europe's 'multilevel constitutionalism 3.0' has proven to be the most effective form of governing PGs like 'democratic peace' and social welfare for the benefit of EU citizens. Neither business-driven, neoliberal constitutional nationalism nor authoritarian 'fake constitutions' without effective limitation of power monopolies - and without constitutional protection of human rights (as in authoritarian states like China, Iran and Russia) - offer legitimate alternatives for empowering individual and democratic self-government protecting the SDGs. Overcoming the 'constitutional failures' to limit the ubiquity of abuses of public and private powers in multilevel governance requires protecting citizens in their 'struggles for justice' by insisting on citizen-driven, democratic and republican accountability and constitutional protection of 'open societies'. Europe's ordoliberal constitutionalism for protecting a 'competitive social market economy' has institutionalized more 'public reason' empowering citizens across national frontiers than other treaty systems, albeit limited to European integration and in need for further protection against the 'polycrises'. Outside Europe, the number of democracies declines because citizen struggles for extending 'constitutional politics' (i.e. transforming agreed social contracts and constitutional principles into democratic legislation, administration and adjudication protecting rule-of-law and human rights) to multilevel governance of PGs remain resisted by vested interests.<sup>36</sup> Similarly, 'constitutional economics' (e.g. protecting non-discriminatory conditions of competition, equal opportunities, monetary stability and social

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<sup>34</sup> Kant defined 'enlightenment' as 'man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's understanding without guidance from another. This immaturity is self-imposed when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without guidance from another'; cf I.Kant, *An Answer to the Question: What is Enlightenment?* (1784).

<sup>35</sup> Most EU citizens participating in EU elections do not know why their democratic support for Europe's 'competitive social market economy' implies support for 'ordoliberalism' rather than for Anglo-Saxon neoliberalism. Without knowledge of the diverse kinds of 'market failures' (like restraints of competition, harmful externalities, social injustices, information asymmetries, public goods) and of related 'governance failures' (like failures to protect human and constitutional rights, limit market failures and protect public goods), citizens cannot evaluate neoliberal faith in self-regulatory market competition ('markets know best').

<sup>36</sup> On constitutional politics see Petersmann/Steinbach (n 2).



justice through rules of a higher legal rank as in EU law and WTO law)<sup>37</sup> is resisted by authoritarian and neoliberal interest group politics. Authoritarian and populist disinformation keep many citizens ignorant vis-à-vis the requirements of multilevel governance of transnational PGs in a globalized world.

'Democratic progress' remains a slow, collective learning process. EU politics must continue emphasizing: *Aude sapere*, dare to assume political responsibility for multilevel governance of transnational PGs demanded by citizens! The EU must resist both autocratic and neoliberal abuses of power, like US practices of refusing international judicial control of 'security exceptions' (e.g. in WTO dispute settlement procedures) by making everything a matter of 'national security' (like climate change, critical minerals, artificial intelligence). Even if US President Trump is expected to repeat his earlier policies of withdrawing from UN agreements and disregarding many SDGs (like climate change mitigation and protection of the environment), EU law (e.g. Article 21 TEU) requires the EU to defend compliance with UN law (notably its *jus cogens* and *erga omnes* obligations such as respect for democratic self-determination of people, prohibition of recognizing the acquisition of foreign territory by force).<sup>38</sup> EU protection of civil, political, economic, social and cultural human rights and the universally agreed SDGs require 'social market economies' supported by citizens with due respect for the diversity of national social contracts. Permacrises like climate change, and the geopolitical rivalries undermining the UN and WTO legal systems, risk becoming the biggest regulatory challenges of EU crises governance in the foreseeable future.-

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<sup>37</sup> On constitutional economics see Petersmann/Steinbach (n 2), chapter 3 and E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (2022), chapters 4 and 5.

<sup>38</sup> On *jus cogen* rules see the [Advisory Opinion](#) by the International Court of Justice of 19 July 2024 on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* by the International Court of Justice.

