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Cosmopolitan Constitutionalism:
Linking local engagement with international
economic law and human rights

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**COSMOPOLITAN CONSTITUTIONALISM:
LINKING LOCAL ENGAGEMENT WITH INTERNATIONAL
ECONOMIC LAW AND HUMAN RIGHTS**

Ernst-Ulrich Petersmann

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Abstract: Democratic and republican constitutionalism emphasize, since ancient times, the need for holding governance of public goods legally and democratically accountable in order to limit abuses of public and private powers and protect public goods through legislation, administration, adjudication, 'public reason' and 'republican virtues'. Globalization continues to transform *national* into *transnational public goods* and requires constituting, limiting, regulating and justifying multilevel governance institutions so as to transform the 'international law in the books' into multilevel legislative, administrative and judicial protection of transnational public goods. Even though all UN member states have accepted human rights obligations, global democracy is likely to remain a utopia for a long time. This contribution discusses the republican and cosmopolitan principles underlying UN and GATT/WTO law. The 'disconnected UN/WTO governance' needs to be limited by stronger republican and cosmopolitan rights to invoke and enforce human rights and economic agreements in domestic jurisdictions in order to strengthen the legal, democratic and judicial accountability of multilevel governance of transnational public goods and 'link local engagement' with mutually beneficial transnational cooperation among citizens. Comparative institutional analyses confirm that 'cosmopolitan international agreements' empowering citizens and decentralized treaty compliance procedures (e.g. in human rights, commercial, trade, investment and criminal law) have been more effective than 'Westphalian agreements' prioritizing foreign policy discretion of governments over rights and remedies of citizens.

Keywords: constitutionalism; cosmopolitanism; democracy; human rights; multilevel governance; public goods; republicanism.

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Introduction and overview

Local markets, commerce and their transnational linkage through trade and law have existed since the beginnings of written history. As explained by economists, linking the rational pursuit of self-interests (e.g. in producing and selling food in local markets) to the collective production of public goods (e.g. PGs like food security) offers strong incentives for improving the efficiency between *means* and *ends* (e.g. promotion of private contracts, property rights, open markets, competition and mutually beneficial exchanges of goods and services as *local means* for enhancing food security). The encounters with foreign cultures promoted reasonable ‘slow thinking’¹ on how to design economic, political and legal cooperation between local and foreign, national and transnational jurisdictions so as to enhance mutual gains. Most areas of international economic law (IEL) evolved through ‘piecemeal social engineering’ (e.g. bilateral trade agreements) and progressive adjustments to changing circumstances. However, already 2500 years ago, the democratic Constitution in ancient Athens and the republican Constitution in ancient Rome also emphasized the need for ‘linking local engagement with law’ on systemic grounds, for instance by linking the exercise of democratic and republican rights of citizens to collective supply of PGs in order to institutionalize ‘public reason’ and hold governments accountable for the proper regulation of ‘market failures’ as well as of ‘governance failures’. Modern legal systems increasingly protect individual access to PGs through constitutional and human rights (like health rights, rights to food) in order to strengthen this linkage of local rights to multilevel governance of PGs. This contribution argues that - the more reasonable individuals acknowledge the limits of human knowledge - the more important becomes legal protection of market mechanisms, modern information technologies and of equal rights of citizens as spontaneous information, coordination and sanctioning mechanisms that can use more local knowledge than any central government authority can ever process. As the economic and social goals of a ‘competitive social market economy’ (cf. Article 3 Treaty on European Union = TEU) must remain embedded in constitutional democracies establishing ‘communities of rights’ and multilevel governance of PGs, linking local rights with IEL and human rights law (HRL) is necessary for constituting, limiting, regulating and justifying multilevel regulation and governance of PGs for the benefit of citizens as ‘democratic principals’ of governance agents whose limited ‘constituted powers’ must remain accountable vis-à-vis citizens as ‘constitutive powers’, ‘agents of justice’, producers, investors, traders and consumers.

Ancient democratic and republican constitutionalism did not prevent imperial *external policies* aimed at conquering foreign cities and countries; the underlying democratic theories (as idealized by Aristotle) and republican theories (as described by Cicero) focused on the pursuit and legal protection of a good life in the *domestic polity*, on the republican virtues of citizens vis-à-vis fellow citizens and foreigners residing there, and on legal obligations vis-à-vis the *polis* rather than a universal *cosmopolis*. *Moral cosmopolitanism* linking local engagement with global humanity emerged in ancient Greek philosophy and continues to influence modern human rights constitutionalism (*section I*). *Legal cosmopolitanism* was part of Roman contract and commercial law (*lex mercatoria*) and continued to influence merchant trade throughout the ‘holy Roman empire’ (e.g. Baltic maritime trade in the Hanseatic League of city republics); it progressively expanded all over the world since the ‘human rights revolutions’ of the 18th and 20th centuries (*section II*). *Economic* and *political cosmopolitanism* offer additional justifications of the international division of labor and for new kinds of ‘international cooperation law’, ‘cosmopolitan law’ (I.Kant) and ‘*cosmopolitics*’ aimed at protecting ‘republican peace’, as reflected in international agreements protecting labor rights, human rights, transnational trade and investments, international criminal and humanitarian law since World Wars I and II (*section III*). Modern constitutional democracies integrate the diverse traditions of

¹ On the difference between ‘fast’ individual rationality and ‘slow reasonableness’ balancing egoist self-interests with the legitimate interests of all others see: D.Kahneman, *Thinking, Fast and Slow*, London: Penguin 2011.

democratic, republican and cosmopolitan constitutionalism at national and regional levels of governance; they progressively transform international law and governance, for instance through transnational civil society cooperation and private-public partnerships in multilevel governance of global PGs and in newly emerging 'global public spheres' (*section IV*). The universal recognition of human rights by all UN member states constitutionally limits the power-oriented, state-centered foundations of the 'international law of coexistence' (notably since 1648) and the 'international law of cooperation' (notably since 1945) through citizen-oriented 'integration law' based on respect for human dignity and equal rights of all human beings in local and transnational jurisdictions as primary sources of the legitimacy of legal systems and democratic governance in the 21st century (*section V*); as stated by the International Criminal Court for the former Yugoslavia in the *Tadic case*:

‘A State sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually, the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.’²

Section VI concludes that rights-based 'cosmopolitan international law' linking the rational self-interests of individuals to multilevel governance of PGs has empirically proven to protect PGs more effectively than 'disconnected' UN/WTO governance dominated by diplomats and rulers that negotiate and ratify - but subsequently often violate - international treaty obligations without effective legal, democratic and judicial accountability vis-à-vis adversely affected citizens. Reducing the 'disconnect' between 'inter-governmental power politics' in UN and WTO institutions and domestic laws and governance requires to legally design multilevel governance of transnational PGs in conformity with democratic, republican, cosmopolitan and 'economic constitutionalism' by recognizing citizens as 'democratic principals' vis-à-vis governance agents with limited, delegated powers, whose legitimate exercise requires democratic inclusion of all citizens and of other 'stakeholders' affected by multilevel regulation. Constitutional rights and limitations of public and private powers, and respect for the constitutional principles of subsidiarity, proportionality and economic efficiency of multilevel regulation, offer the most legitimate and most effective framework for transforming the 'international law in the books' into 'law in action' that effectively protects citizens and their human and constitutional rights.

Moral cosmopolitanism as foundation of human rights

The idea of dual citizenship – in local communities as well as 'citizens of the world' in a 'cosmopolitan community' based on a shared morality of mutual respect for strangers in spite of their different (e.g. religious and political) beliefs – is traced back to Diogenes (ca 412 BC), the founder of the Cynic movement in ancient Greece; when asked where he came from, he answered: 'I am a citizen of the world' (*kosmopolitês*).³ Ancient and modern cosmopolitanism (e.g. based on Kantian moral theory) emphasize that human beings – as they 'are born free and equal in dignity and rights' and are endowed with 'reason and conscience' (cf. Article 1 of the Universal Declaration of Human Rights = UDHR) – must justify their conduct by 'universalizable' principles (Kant's 'moral imperative') that respect human dignity (e.g. in the sense of equal autonomy rights) and reconcile individual, legitimate self-interests with those of all others in different social contexts of human cooperation (e.g. families, states, humanity).⁴ Peaceful cooperation for protecting PGs demanded by citizens across national borders must be based on 'cosmopolitan rights' of individuals and peoples as proclaimed in the 1776 US Declaration of Independence, the 1789 French Declaration of the Rights of Man and the Citizen,

² *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

³ Diogenes Laertius, *Lives of the Eminent Philosophers* (translated by R.D.Hicks), Vol. 2, Harvard UP, 1925, at 63.

⁴ Cf. P.Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*, CUP 2012; J.Bohman/M.Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, Cambridge: MIT Press, 1997.

and in the UDHR of 1948. Just as individuals must reasonably limit the exercise of their individual freedoms by respecting the equal freedoms of all others, so must democracies, states and international organizations respect the equal democratic rights of foreign peoples and jurisdictions as emphasized in UN human rights conventions, for instance in the UN legal guarantees of the rights of all *peoples* to self-determination (cf. the common Article 1:1 of the 1966 UN Covenants on civil, political, economic, social and cultural rights) and the human right of every *citizen* (e.g. pursuant to Article 25 ICESCR, Article 21 UDHR) to

- ‘take part in the conduct of public affairs, directly or through freely chosen representatives;
- to vote and to be elected at genuine, periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors;
- to have access, on general terms of equality, to public service in his country.’

Even though UN human rights conventions are ratified by governments representing UN member states, national (big C) Constitutions and HRL recognize citizens as ‘constituent powers’ and ‘*democratic principals*’ who delegate only limited ‘constituted powers’ to *government agents* subject to constitutional restraints like ‘inalienable’ human rights, including rights of access to justice and judicial remedies.⁵ Citizens agree on national Constitutions as the supreme law of the land and are responsible for ‘constitutionalizing’ legal systems by transforming the constitutional ‘law in the books’ into democratic legislation, administration, adjudication and institutionalized ‘public reason’ in order to protect PGs like human rights, rule of law and democratic governance by free and equal citizens. By recognizing civil, political, economic, social and cultural rights that must be ‘balanced’ and reconciled’ through democratic, administrative and judicial procedures on the basis of agreed ‘constitutional principles of justice’ (like conferral, subsidiarity and proportionality of powers), HRL constitutes communities of individuals with equal rights and constitutional duties to protect equal rights and individual and democratic self-development. Also the UN Charter was concluded on behalf of ‘We the peoples of the United Nations’ (Preamble). European Union (EU) law recognizes that the ‘peoples of Europe, in creating an ever closer Union among them’, founded this Union ‘on the indivisible, universal values of human dignity, freedom, equality and solidarity’, ‘the principles of democracy and the rule of law’ (Preamble EU Charter of Fundamental Rights). Cosmopolitan rights may be justified not only by ‘primary allegiance to the world community of human beings’⁶; the derivative nature of EU citizenship from EU member state citizenship (cf. Article 20 Treaty on the Functioning of the EU = TFEU) reflects additional interrelationships between local, national and regional polities, for instance in individual and democratic, multilevel governance of transnational ‘aggregate PGs’ inside, between and across diverse political communities that accept moral principles of protecting all citizens whose interests are affected, who are subjected to law and governance, or who have a legitimate stake in membership in political communities.⁷

State-centered international lawyers often continue to neglect that the ‘international legal community’ consists today also of citizens, peoples, non-governmental and international organizations rather than only of states. The legitimacy of modern international law derives ‘bottom-up’ from the mutual recognition among citizens of human rights and from the consent by citizens, peoples and representative governments to international rules and governance institutions. ‘Constitutional contract’

⁵ Examples include Article 8 UDHR, Article 13 European Convention on Human Rights, Art.47 EU Charter of Fundamental Rights, Arts. 3 and 7 African Charter of Human and People’s Rights, Arts. 8 and 25 Inter-American Charter of Human Rights; cf. F.Francioni (ed), *Access to Justice as a Human Right*, OUP 2007.

⁶ Cf. M.Nussbaum, Patriotism and Cosmopolitanism, in: J.Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Boston : Beacon Press, 1996, at 4.

⁷ On these three spheres of domestic, transnational and international justice and diverse ‘inclusion principles’ justifying inclusive citizenship rights see, e.g.: S.Benhabib, *The Rights of Others*, CUP 2004; R.Bauböck, Global Justice, Freedom of Movement and Democratic Citizenship, in: *European Journal of Sociology* 50 (2009), 1-31.

justifications of democratic legal systems are preceded by mutual recognition of human rights and other ‘principles of justice’ among citizens as precondition for inclusive, democratic discourse and lawmaking.⁸ The constitutional principles of limited delegation of powers, subsidiarity and proportionality (cf. Article 5 TEU) reflect the human rights requirements of limiting restrictions and of ‘balancing’ of human rights to what is necessary for protection of other human rights (cf. Article 29:2 UDHR); they confirm that the limited authority of international law and institutions must remain justifiable in terms of constitutional rights of citizens and related principles of justice. As already explained by Kantian legal theory, the moral principles and today universal legal recognition of respect for human dignity, responsibility and ‘hospitality’ vis-à-vis strangers in social interactions ‘finally bring the human race ever closer to a cosmopolitan constitution’⁹; they are of foundational importance for transnational PGs like human rights, rule of law and other ‘general principles of law recognized by civilized nations’ (Article 38 ICJ Statute) as justifications of modern international law. Modern theories of justice - for instance, by grounding the legitimacy of national and international legal systems in the human right to justification¹⁰ - emphasize that, regardless of liberal or communitarian conceptions of law and governance, the legitimacy and effectiveness of modern, national and international legal systems derives from democratic consent and support by citizens.

Cosmopolitan principles as integral parts of modern constitutional and international law

Many of the *moral principles* and transnational responsibilities underlying cosmopolitanism have become universally recognized as integral parts of modern *positive law* in hundreds of human rights treaties, IEL treaties, environmental, criminal, humanitarian, consular law and other treaties ratified by UN member states and incorporated into domestic law. The more globalization transforms *national* into *transnational PGs* that no single state can unilaterally protect without international law and institutions, the more national Constitutions reveal themselves as ‘partial Constitutions’ that increasingly depend on multilevel governance of transnational PGs through international law and institutions that protect human rights across national frontiers, including the cosmopolitan right of ‘everybody ...to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’ (Article 28 UDHR). The universal recognition of human rights ‘to recognition everywhere as a person before the law’ (Articles 6, 12 UDHR), ‘to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’ (Articles 8, 10 UDHR), ‘to leave any country, including his own, and to return to his country’ (Article 13 USHR), ‘to seek and to enjoy in other countries asylum from persecution’ (Article 14 UDHR), to ‘freedom of thought, conscience and religion’ (Article 18 UDHR), ‘freedom of opinion and expression’ (Article 19 UDHR), and to democratic participation in governance¹¹ illustrate

⁸ On discourse theory, and the implicit, moral respect of discourse partners as having reasonable autonomy and dignity, as justification of human rights ‘without metaphysics’ see : R.Alexy, *Menschenrechte ohne Metaphysik?* in : *Deutsche Zeitschrift für Philosophie* 52 (2004), 15-24. For a comparison of Kant’s moral and Rawls’ contractual justifications of principles of justice, human rights and hypothetical ‘social contracts’, and for their criticism from communitarian perspectives, see, e.g.: M.J.Sandel, *Justice. What’s the Right Thing to Do?* New York: Farrar/Strauss/Giroux, 2009, chapters 5 and 6. Similar to Kant’s justification of his cosmopolitan ‘right of hospitality’ on moral grounds, the legal interpretation of EU ‘market freedoms’ as ‘fundamental rights’ can be justified on moral rather than only utilitarian grounds (e.g., as representing ‘generalizable human interests’ of all EU citizens). Also the derivation of individual investor rights and judicial remedies from international investment treaties, like the derivation of labor rights from ILO conventions, can be justified on human rights principles rather than only on utilitarian grounds.

⁹ I.Kant, *Perpetual Peace*, in : *I.Kant’s Political Writings* (ed. by H.Reiss), Cambridge UP, 1991, at 106.

¹⁰ On the human right to justification see R.Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice*, New York: Columbia UP 2012.

¹¹ See, e.g., Article 21(3) UDHR: ‘The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures’. The UDHR guarantees of freedom of expression (Article 19), freedom of

how positive HRL in the 21st century goes far beyond the Kantian claims of cosmopolitan ‘rights to hospitality’ and recognition as ‘citizens of the world’. Hundreds of UN and GATT/WTO agreements protect individual access to foreign goods and services, international communications, prevention of ‘crimes against humanity’ and of climate change, and other international PGs. As human rights also protect individual and democratic diversity, modern ‘cosmopolitan international law’ – e.g. international commercial, trade, investment and intellectual property law and arbitration, international consular, criminal and humanitarian law, HRL, internet law, air and maritime transportation law – protects governmental as well as individual rights, respect for diverse states, cultures, minorities and ‘indigenous peoples’, and national sovereignty to decide autonomously which international agreements a country wishes to ratify. Sociological evidence confirms the increasing importance of non-governmental ‘global citizen movements’ in mobilizing civil society support for international ‘PGs treaties’ like the Rome Statute for the International Criminal Court, international trade and environmental treaties.¹²

From ‘human rights constitutionalism’ to transnational citizenship rights

The term ‘constitutionalism’ tends to be used for both

1. the *normative proposition* that law and governance – in order to be accepted by citizens as legitimate and voluntarily complied with - need to be justified vis-à-vis citizens through agreed ‘principles of justice’ and rules of a higher legal rank that must be transformed into constitutional and democratic legislation, administration, adjudication, international ‘PGs treaties’ and ‘public reason’ so as to induce citizens to peacefully cooperate in collective supply of PGs; as well as for
2. the *empirical ‘six-stage constitutionalisation processes’* of law and governance by transformation of (1) agreed ‘principles of justice’ (e.g. in the US Declaration of Independence of 1776, the Universal Declaration of Human Rights of 1948) into (2) constitutional, (3) legislative, (4) administrative, (5) judicial and (6) international rules and institutions that protect equal rights of citizens and promote ‘constitutional mind-sets’ limiting rational egoism and ‘constitutionalizing’ law and governance.¹³

The universal recognition of human and constitutional rights (including also freedom of contract, private property and private arbitration as foundations of international commercial law) in modern ‘positive law’ requires ‘normative bottom-up review’ of state-centered rules and institutions from the point of view of reasonable citizens and their individual and democratic rights, for instance as ‘agents of justice’, ‘constituent powers’ and ‘democratic principals’ of governance agents with limited ‘constituted powers’ that must protect and promote equal rights of citizens as the main economic and ‘republican actors’ in the global division of labor. Human rights, rule of law, democracy, sovereignty and other ‘principles of justice’ referred to in UN law and EU law (like non-discrimination, equality, necessity, proportionality, ‘fair and equitable treatment’) remain indeterminate concepts. Their legal clarification may legitimately differ depending on democratic value preferences, legal methodologies and legal contexts for implementing international rules in domestic legal systems. Compared with path-dependent authoritarian governance and ‘legal fragmentation’, HRL and constitutional democracies provide for more comprehensive frameworks of individual and democratic self-

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assembly (Article 20) and democratic participation (Article 21) are confirmed in many UN and regional human rights conventions and national constitutions and render non-democratic governance powers illegitimate.

¹² Cf. R.Pierik/W.Werner (eds), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory*, CUP 2010.

¹³ Both propositions (a+b) are based on interpretations of the *positive law* of constitutional democracies (like the USA and EU member states) and of transnational ‘treaty constitutions’. The additional claim of constitutionalism that modern constitutional democracies have a historical record of protecting PGs for the benefit of their citizens more effectively than non-democracies, is a different empirical claim.

governance and constitutional ‘checks and balances’ for clarifying indeterminate rules and reconciling fragmented legal regimes (e.g. specific national laws, UN and WTO agreements) with the civil, political, economic, social and cultural rights of all citizens.¹⁴

The multilevel protection of human rights through national, regional and worldwide legal guarantees and judicial remedies has limited governance powers by ‘human rights constitutionalism’ and increasing ‘judicial comity’ among national, regional and worldwide courts in interpreting, clarifying and protecting human rights for the benefit of citizens. For instance, in the 2010 and 2012 judgments in the *Diallo Case (Guinea v Congo)*, the International Court of Justice (ICJ) assessed breaches of human rights treaty obligations by referring to the jurisprudence of UN and regional human rights bodies.¹⁵ The European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR) interpret EU law and the European Convention on Human Rights (ECHR) as ‘constitutional instruments’. The protection by worldwide, regional and national courts of local, transnational and international rule of law contributes to the ‘constitutionalisation’ of multilevel governance of PGs for the benefit of citizens.¹⁶ While judicial protection of individual rights and remedies is crucial for the effectiveness of national and international law, HRL requires legal and judicial respect for national and local ‘margins of appreciation’ and ‘policy space’ in implementing international treaty obligations in diverse local contexts with different democratic preferences and resources. Following the legal protection of ‘EU citizenship’ rights (cf. Articles 18 ff TFEU) aimed at promoting collective supply of transnational PGs, diverse forms of ‘cosmopolitan citizenship’ (e.g. based on common passports, free movement rights, transnational labor rights) are promoted also in a number of regional economic unions beyond the EU, notably in Latin America (like MERCOSUR, the Andean Common Market, the Central American Common Market) and Africa (like the West, East and Southern African Economic Unions).¹⁷

Access to justice, constitutional treaty interpretations and local remedies

In constitutional democracies, the human rights guarantees of individual access to justice and to democratic and judicial justification of governmental restrictions of equal freedoms of citizens justify ‘constitutional interpretations’ of law that progressively extend democratic, republican and cosmopolitan rights so as to protect PGs more effectively. Equal rights and judicial remedies empower citizens to assume responsibility not only for their private spheres of individual autonomy, but also for their democratic autonomy and ‘republican responsibility’ for collective protection of PGs. The jurisprudence of international courts confirms the task of ‘constitutionalizing’ multilevel governance of *transnational PGs* by justifying ‘constitutional interpretations’ of international treaties as constituting not only rights of governments, but also of citizens (e.g. to consular protection, investment protection, ‘consistent interpretations’ of national and international obligations of governments to protect PGs). Justifications of national legal systems as deriving their democratic legitimacy from ‘constitutional contracts’ among citizens increasingly challenge ‘Westphalian claims’ by government executives to be ‘masters of international treaties’, for instance by insisting on ‘constitutional interpretations’ of international agreements (e.g. in the *Kadi*-jurisprudence of the CJEU) ‘in

¹⁴ Cf. E.U.Petersmann, Justifying 'Fragmentation' and Constitutional Reforms of International Law in Terms of Justice, Human Rights and 'Cosmopolitan Constitutionalism', in: A.Jakubowski/ K.Wierczynska (eds), *Fragmentation vs the Constitutionalisation of International Law. A Practical Inquiry*, London: Routledge, 2016, at 163-182.

¹⁵ For a discussion of these ICJ judgments (awarding damages as reparation for the violation of the human rights of *Diallo*) see: A.Vermeer-Künzli, *Diallo: Between Diplomatic Protection and Human Rights*, in: *Journal of Int'l Dispute Settlement* 4 (2013), 487-500.

¹⁶ Cf. G. De Baere/J.Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, Cheltenham : Elgar 2015.

¹⁷ C.Closa/D.Vintila, *Supranational citizenship rights in regional integration organizations*, European University Institute Working Paper: Florence 2015.

conformity with principles of justice’ and the ‘human rights and fundamental freedoms for all’, as prescribed by the customary rules of treaty interpretation and codified in the Vienna Convention on the Law of Treaties (cf. the Preamble and Article 31 VCLT).¹⁸ As democratic parliaments enact international treaties for the benefit of their citizens, courts of justice – in interpreting the ‘principles of justice’ underlying international agreements and the human rights obligations of UN member states – increasingly construe treaties no longer only in terms of reciprocal rights and obligations among states and their governments; treaties should also protect rights of citizens vis-à-vis multilevel governance institutions that must remain constitutionally restrained by corresponding legal obligations to protect equal rights of citizens.

Such ‘constitutional interpretations’ are particularly warranted for international agreements that are ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Article 2 TEU), including ‘strict observance of international law’ (Article 3 TEU), without conferring powers on international institutions (like the EU) to violate international treaties approved by parliaments for the benefit of citizens. ‘Constitutional interpretation’ of international agreements – as constituting multiple legal layers of reciprocal obligations among states, governments, peoples and citizens – recognize citizens and their equal human rights and constitutional rights – rather than states – as ultimate sources of legal legitimacy in modern international law. They limit ‘Hegelian prioritization’ of the state as having moral, communitarian autonomy and organic unity, as well as purely utilitarian justifications of state power (e.g. as being necessary for protecting collective security). Respect for legitimate ‘constitutional pluralism’ and national ‘margins of appreciation’ protect ‘reasonable disagreements’ among diverse peoples, for instance on whether constitutional contracts should be justified by Kantian ideals of morality as protecting equal freedoms under the rule of law, or whether citizens and democratic people justify their national Constitutions on communitarian grounds that may be less tolerant vis-à-vis foreigners with different beliefs. Due to the transformation of national into transnational PGs, republican governance requires to complement ‘state citizenship’ by ‘cosmopolitan citizenship rights’ in order to hold multilevel governance institutions more accountable for protecting *transnational PGs* demanded by citizens. Just as national citizenship laws differ among countries, the scope and justification of EU citizenship rights and of similar rights in other regional integration systems remain contested.¹⁹ Neither in democratic national Constitutions nor in EU law and UN law are human rights and other cosmopolitan rights conferred top-down by the rulers, even if cosmopolitan rights are reciprocally recognized in international commercial, investment, intellectual property, labor and human rights treaties among states. From the constitutional perspective of citizens with ‘inalienable human rights’, including their democratic rights as holders of constituent power, such treaties must be interpreted as being concluded on behalf of citizens mutually recognizing and protecting individual rights vis-à-vis abuses of public and private power. If citizens do not confer on international institutions (like the EU) powers to violate treaties that were approved by parliaments for the benefit of citizens, then constitutional guarantees of individual rights to effective remedies and to a fair trial – as in Article 47 EU Charter of Fundamental

¹⁸ In its *Kadi*-jurisprudence, the CJEU declared EU regulations implementing ‘smart sanctions’ by the UN Security Council to be inconsistent with human rights and illegal; cf. joined cases C-402/05P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the European Communities* (judgment of 3 September 2008, ECR 2008 I-6351), e.g. para. 284: ‘It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00, *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).’

¹⁹ On justification of citizenship rights for all stakeholders whose interests are affected and who are subject to legal coercion, see note 7 above. On the practical difficulties of protecting transnational citizenship rights see: M. La Torre (ed), *European Citizenship. An Institutional Challenge*, The Hague : Kluwer 1998; H. Van Eijken, *Citizenship and the Constitutionalisation of the EU*, Europa Publishing 2016.

Rights (EUCFR)²⁰ – must include individual ‘access to justice’ for those adversely affected by arbitrary treaty violations (e.g. in the case of persistent EU violations of WTO dispute settlement rulings to the detriment of EU citizens).²¹ Recognition of additional ‘cosmopolitan rights’ (e.g. in international trade, investment, environmental, criminal and human rights law) tends to strengthen the constitutional foundations of multilevel governance of transnational PGs for the benefit of citizens and the corresponding legal accountability and constitutional duties of multilevel governance institutions. Even if ‘states’ are valued (e.g. by ‘realist theories’ of international law and Rawls’ ‘society of states’ approach to international law) independently from ideals of ‘cosmopolitan justice’, cosmopolitan rights are necessary for *strengthening* domestic rights of citizens, democratic peoples and multilevel governance of global PGs vis-à-vis abuses of public and private power with adverse ‘external effects’.

Economic and political cosmopolitanism as ‘drivers’ for cosmopolitan international law

Private goods tend to be produced, financed and distributed spontaneously in local markets and communities in response to supply and demand by citizens and to their coordination by price mechanisms and other economic incentives. Private goods remain scarce in relation to consumer demand because private producers use their property rights for excluding consumers unless there is voluntary agreement on selling (or renting) private goods and services and transferring related property rights in exchange for payment of the agreed price. *PGs* are not provided in private, commercial markets; they must be provided collectively because their consumption is open to all (‘non-excludable’) and/or does not reduce their availability to others (‘non-rival’). Moral and legal cosmopolitanism say little about how multilevel governance institutions must be legally designed in order to protect *PGs* demanded by citizens more effectively. Democratic and republican constitutionalism emerged in ancient Greece and Italy in order to limit abuses of government powers and collectively supply *PGs* demanded by citizens more effectively on the basis of rules and institutions that were justified by ‘principles of justice’ rather than merely by power politics.

Based on multilevel legal protection of freedom of contract, private property and peaceful dispute settlement (e.g. through arbitration), also international commercial law has promoted peaceful, transnational cooperation among producers, investors, traders and consumers from diverse jurisdictions since ancient times. Since the 18th century, economists and political philosophers have argued that - following the example of the progressive creation of common markets among confederated states (e.g. in North-America in the 18th century, in Europe during the 19th century) and their later transformation into federal states (e.g. the USA, the Swiss and German Federations) - mutually beneficial international trade and *economic cooperation* among citizens across national frontiers can reinforce also mutually beneficial *political* and *legal integration*. The 1919 Constitution establishing the International Labor Organization (ILO) and the more than 180 ILO conventions are based on cosmopolitan principles protecting labor rights and social justice. Following World War II, multilevel judicial protection of individual rights and of transnational rule of law has contributed to ‘civilizing’, de-politicizing and ‘constitutionalizing’ ever more fields of international law for the benefit of citizens, for instance through

- cooperation between national courts and arbitral tribunals in the recognition, surveillance and enforcement of arbitral awards (e.g. deciding on contractual commercial rights, property rights

²⁰ Article 47 EUCFR states: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

²¹ On the unjustified denial by EU courts of such remedies see : A.Thies, *International Trade Disputes and EU Liability*, Oxford UP 2013.

and judicial remedies) pursuant to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards;

- cooperation among national and regional economic and human rights courts that protect individual rights and transnational rule of law for the benefit of citizens in free trade areas (FTAs) and customs unions, for instance by enlarging individual rights beyond national frontiers through EU law, the law of the European Economic Area (EEA), the ECHR and by multilevel judicial protection of such rights in domestic and regional courts;
- the arbitration, annulment and enforcement procedures of the International Centre for the Settlement of Investment Disputes (ICSID) in cooperation with national courts that enforce ICSID awards on protection of investor rights and obligations under bilateral and multilateral investment treaties;
- or the more than half a dozen of international criminal courts complementing national criminal jurisdictions and protecting individual rights and legal accountability through multilevel judicial cooperation.

Multilevel economic constitutionalism protects local empowerment and competition

The constitutional principles of limited delegation of powers, subsidiarity and proportionality underlying federal democracies and European integration law (cf. Article 5 TEU) protect local and national communities against abuses of federal and supranational powers; they also underlie the arguments against a world state and ‘global governance’ that risk to become despotic without multilevel ‘constitutional checks and balances’. International trade law (e.g. Article XXIV GATT, Article V GATS) promotes hundreds of FTAs and customs unions (like the EU) that often protect not only rights of governments, but also rights of citizens (e.g. to transnational movements of goods, services, persons, capital and related payments). Similarly, international investment law dynamically evolves through more than 3000 bilateral investment treaties (BITs) that protect investor rights and complement regional and worldwide investment rules (e.g. in the 1965 World Bank Convention establishing the ICSID). EU and EEA law illustrate how multilevel legal and judicial protection of common market freedoms, social rights and other constitutional rights can contribute to progressive ‘constitutionalisation’ of IEL by empowering citizens to enforce their equal rights against abuses of public and private powers. The increasing, local engagement with IEL and human rights is also illustrated by the ‘UN Global Compact’ (UNGC), which was launched in 1999 as a joint initiative of five UN agencies (the UN Development Program, ILO, the UN Industrial Development Organization, the UN Environmental Program and the UN Office on Drugs and Crimes) and the UN High Commissioner of Human Rights, in cooperation with now more than 6000 companies, 2000 non-business NGOs (like the International Federation of Football Associations) and local UNGC networks based in more than 135 countries.²² Its ten principles concerning the protection of human rights, core labor standards, the fight against corruption, the protection of the environment and of sustainable development aim at ‘local mainstreaming’ of ‘cosmopolitan principles of justice’ into global business activities that may ‘catalyze’ business support of UN goals through private-public partnerships between business and UN agencies, civil society and governments, and other ‘corporate social responsibility’ activities.²³ The recognition of individuals, peoples, non-governmental and supra-national organizations as legal subjects of modern international law and the increasing ‘private-public partnerships’ in multilevel governance of transnational PGs constitute ‘new global public domains’ that help to transform the ‘law in the books’ into ‘international law in action’, for instance by judicial enforcement of state-centered international law rules and of their underlying ‘principles of justice’ for

²² Cf. the annual UN Global Compact Reviews published by the UN.

²³ Cf. E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford: Hart 2012, at 226 ff.

the benefit of citizens as subjects of democratic law who are entitled to multilevel legal protection of equal freedoms and non-discriminatory conditions of economic competition.

Constitutionally embedded liberalism protects local diversity and social justice

In contrast to the historical periods of *mercantilism* and *laissez-faire liberalism* preceding World War I, the economic liberalism since World War II remains embedded in diverse domestic constitutional systems that – especially in the common market among 31 EEA member states in Europe – are ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Article 2 TEU) and on multilevel protection of constitutional rights (e.g. as codified in the EUCFR). Multilevel constitutionalism limits communitarianism (e.g. by committing the 47 member states of the Council of Europe to freedom of religion, democratic governance and to the other human rights guarantees in the ECHR); but it protects individual and democratic diversity and social justice. Also beyond EU and EEA law, many IEL rules remain characterized by their connection of individual rights and local economic activities (e.g. production, investments, demand for goods and services in different jurisdictions) to private and public, multilevel legal regulation and dispute settlement procedures, for instance by promoting legal security for ‘global supply chains’ enabling ‘international production’ of goods based on components produced in many supplier countries. Due to globalization, multilevel regulation of the three main international ‘policy externalities’ affects ever more citizens in local economies and different jurisdictions:

- *coordination problems* calling for coordinated policy responses to specific policy concerns in order to enhance mutual welfare through ‘positive externalities’ (e.g. by internationally agreed product and production standards reducing transaction costs in the international division of labor);
- *cooperation problems* calling for more efficient, international rules and institutions limiting harmful ‘negative externalities’ (e.g. caused by inadequate national regulation of bankruptcies in the financial sector, harmful tax competition, environmental pollution, or international terrorism); and
- *global PGs* as a special coordination problem if the benefits of regulatory measures are non-rival and non-excludable (e.g. protection of ‘global common resources’ through prevention of over-fishing, of ozone-depleting measures, and of carbon emissions). PGs entail collective action problems such as incentives for ‘free-riding’ and for sub-optimal production of PGs (like prevention of global warming). ‘Public bads’ involve overproduction of ‘negative externalities’ (e.g. pollution) that are not ‘internalized’ (e.g. not reflected in prices).

Apart from IEL and HRL, there are many other fields of international regulation (e.g. of protection of cultural heritage, biodiversity and social justice) where private-public partnerships are essential for protecting transnational PGs. Modern information technologies have contributed to the mergence of transnational ‘public spheres’ and increasing civil society pressures on governments to meet their moral and legal ‘duties of justice’ to establish just governance institutions for transnational legal systems. Cosmopolitan moral and legal principles (like normative individualism, equal respect for all human beings, *erga omnes* obligations to all) increasingly challenge ‘Hobbesian claims’ for authoritarian ‘policy space’ and power politics. Yet, they say little about the necessary legal design of multilevel governance institutions; ‘cosmopolitan justice’ is further impeded by ‘reasonable disagreements’ among citizens, public and private power politics (e.g. due to the lack of effective WTO competition rules), and unequal concern for the basic needs of peoples in many countries.

From *democratic and republican* to *cosmopolitan constitutionalism* in governance of public goods

According to the moral and legal cosmopolitanism underlying HRL and constitutional democracies, democratic consent and human and constitutional rights of citizens constitute the legitimacy of national and international legal systems. As rights of states and their foreign policy powers have only derivative, instrumental value for protecting the human and constitutional rights of citizens:

- How must UN, WTO and regional law be interpreted, designed and developed in order to protect human rights and other PGs demanded by citizens more effectively?²⁴ Are democratic and judicial clarifications of indeterminate human rights principles equally legitimate?
- Which legal and institutional governance structures at local, national, regional and worldwide levels of governance of transnational PGs offer the most effective and legitimate ‘checks and balances’ so as to limit abuses of power and protect human and other cosmopolitan rights of citizens?
- How should international law and institutions reconcile the moral unity of cosmopolitan values (e.g. arguing for egalitarian liberalism so as to promote global distributive justice) with the need for protecting legitimate individual, democratic and legal diversity of local, national and transnational governance institutions (e.g. respect for national ‘margins of appreciation’ and immigration restrictions if they are justified on national and communitarian grounds as being necessary for maximizing democratic preferences and national interests)?²⁵
- Has the incorporation of human rights and other ‘principles of justice’ into the law of some UN Specialized Agencies (like the ILO, WHO, UNESCO) made their multilevel governance of transnational PGs more effective than that of GATT/WTO law, which does not mention human rights? Do ‘law and economics’ also reflect human rights values?
- Is it legitimate if legal and judicial UN and WTO institutions reconcile their ‘state-centered’ and ‘person-centered principles of justice’ in different and potentially conflicting ways (e.g. in case of conflicts between intellectual property rights and human rights)?
- Why are some international investment tribunals, criminal courts and regional economic courts explicitly balancing public and private interests in terms of human rights and other ‘principles of justice’ that are hardly ever mentioned by WTO dispute settlement bodies in spite of the cosmopolitan objectives of liberal trade regimes?
- Why have national and international commercial, investment and criminal courts, like regional economic and human rights courts, engaged in more coherent, multilevel judicial cooperation (e.g. in terms of mutually ‘consistent interpretations’ and ‘judicial comity’) than national, regional and WTO dispute settlement bodies adjudicating trade disputes?

²⁴ For criticism of global institutions from a cosmopolitan perspective see : C.Barry/T.Pogge, *Global Institutions and Responsibilities : Achieving Global Justice*, Oxford : Blackwell 2005. On the different conception by J.Rawls of global society being constituted by five types of ‘peoples’ (i.e. liberal peoples protecting individual rights; non-liberal but ‘decent peoples’; aggressive ‘outlaw states’; societies burdened by unfavourable conditions ; and benevolent absolutism), on the acceptance of principles of international justice only by liberal and decent peoples, and on Rawls’ rejection of cosmopolitanism on the ground that it would be ‘intolerant to non-liberal societies’, see : J.Rawls, *The Law of Peoples*, Cambridge: Harvard UP 1999, at 3-4.

²⁵ Cf. T.Broude, The WTO/GATS Mode 4, international labour migration regimes and global justice, in: Pierik/Werner (note 12), 75-105 (criticizing the GATS mode 4 model of regulation of international labour migration for not protecting the rights and welfare of individual labour migrants, and discussing nationalism, realism and ‘society of states’-approaches to global justice as alternatives to ‘cosmopolitan justice approaches’).

- How to reconcile nationalist and ‘realist approaches’ to IEL with competing constitutional, cosmopolitan or ‘global administrative law’ (GAL) approaches?²⁶
- How to respond to protectionist interest group pressures (e.g. by powerful tobacco industries prioritizing their intellectual property rights over health rights of consumers of toxic tobacco products) that oppose interpreting WTO law in conformity with the human rights obligations of WTO members?

Treaty interpretation and adjudication ‘in conformity with principles of justice’

Answers to such questions regarding the possible role of cosmopolitanism in IEL and in related adjudication may differ depending on the specific context and regulatory problems of different jurisdictions. Due to different democratic preferences, local people often apply the customary law requirement of treaty interpretation and adjudication ‘in conformity with principles of justice’ in diverse ways. For instance, European courts have interpreted FTA and common market rules of the EU Treaty as conferring fundamental rights on individuals. Governmental limitations of such ‘market freedoms’ – e.g. in case of imported laser games that simulate killing of peoples and were prohibited in the German town of Bonn as offending ‘human dignity’ and public order – were accepted by the CJEU as legally justifiable and ‘proportionate’ even if other towns in Germany and other EU member states did not adopt similar prohibitions due to their different conceptions of ‘human dignity’.²⁷ The four ‘Kadi judgments’ of the General Court and CJEU since 2005 can be understood in conformity with the ‘*solange*-jurisprudence’ of the German Constitutional Court and of the ECtHR to the effect that ‘as long as’ (which means *solange* in German language) the higher level of law (*i.e.* UN law in the *Kadi* cases, EU law in the *solange*-jurisprudence of the German Constitutional Court) does not guarantee equivalent protection of fundamental rights, the courts at lower levels of multilevel legal and judicial systems must guarantee such fundamental rights in domestic jurisdictions. The German Constitutional Court and the ECtHR refrain from exercising their jurisdiction ‘as long as’ the CJEU protects fundamental rights in ways equivalent to the constitutional protection under German constitutional law and the ECHR respectively. The CJEU may, similarly, limit its judicial review of EU measures implementing UN Security Council sanctions once UN law offers equivalent procedural and substantive legal protection of individual rights of the defense, property rights and effective judicial protection. Both the *Kadi*- and the ‘*solange*-jurisprudence’ suggest that, as UN and regional human rights conventions leave states ‘margins of appreciation’ for implementing and protecting higher standards of human rights in their national legal systems, multilevel legal regulation and judicial protection of civil, political, economic, social and cultural rights must be based on mutually consistent interpretations and ‘judicial comity’ (e.g. regarding the local remedies rule in HRL), ‘subsidiarity’ and ‘loyal cooperation’ among the different levels of governance, with due respect for the sovereign rights of states to guarantee higher levels of constitutional protection in domestic and local jurisdictions than at international levels of governance.²⁸

²⁶ On competing narratives, conceptions and justifications of IEL see : E.U.Petersmann, Narrating ‘International Economic Law’ : Methodological Pluralism and its Constitutional Limits, in: *Heidelberg Journal of International Law* (ZaöRV) 74 (2014), 763-819.

²⁷ Cf. the *Omega* case C-36/02 [2004] ECR I-9609.

²⁸ Cf. note 18 above. On the increasing impact of HRL on MERCOSUR and Andean common market law and adjudication see: S.S.Schneider, *Access to Justice in Multilevel Trade Regulation: Brazil, MERCOSUR and the WTO*, EUI doctoral thesis 2014, chapter IV. Due to the 2011 ‘human rights amendment’ of Article 1 of the Constitution of Mexico, human rights treaties have become incorporated also into Mexican law and increasingly influence adjudication and arbitration inside Mexico. Yet, as neither Canada nor the USA have ratified the Inter-American Convention on Human Rights, international HRL seems to have only marginally influenced the interpretation of NAFTA law (e.g. NAFTA investment arbitration referring to the rights of indigenous peoples).

UN and WTO governance institutions remain dominated by government executives who prioritize rights of governments over rights of citizens and pursue self-interests in limiting their legal, democratic and judicial accountability vis-à-vis adversely affected citizens (notably if citizens remain ‘rationally ignorant’ towards complex, international treaty negotiations among governments). For instance, as government executives have limited the WTO rules on state responsibility and on individual judicial remedies in domestic courts, disregard for WTO legal obligations by local governments remains frequent; political pressure for stronger protection of transnational rule of law is more likely to come from civil society institutions, democratic parliaments and courts of justice than from WTO diplomats. The task of transforming moral, legal, political and economic cosmopolitan principles into coherent legal rights, democratic legislation and institutional protection of rights of citizens requires taking into account, *inter alia*

- the lessons from comparative institutional analyses of multilevel governance of transnational PGs (*below 2*);
- the historical lessons from democratic (*below 3*) and republican constitutionalism for limiting abuses of power by ‘constitutionalizing’ policy-making (*below 4*); and
- the lessons from cosmopolitan constitutionalism for constituting, limiting, regulating and justifying multilevel governance of transnational ‘aggregate PGs’ for the benefit of citizens by linking the ‘constitutional functions’ of treaty guarantees of equal freedoms and transnational rule of law to cosmopolitan rights of citizens (*section V*).

Learning from comparative institutional analyses

Moral, legal, political and economic cosmopolitanism have neglected the task of designing multilevel governance institutions for protecting international PGs for the benefit of citizens and their constitutional rights rather than for the benefit of rulers. Comparative constitutional and institutional analyses emphasize that the respective advantages of economic markets, political decision-making, constitutional, legislative, administrative, judicial and intergovernmental processes depend on which institution is in a better position to protect the constitutional values inherent in the relevant rules and arbitrate competing legal claims.²⁹ For instance, due to the collective action problems (like ‘free-riding’) in the collective supply of transnational ‘pure PGs’ whose consumption benefits are non-excludable and non-rival, transformation of ‘pure PGs’ (like an open and undistorted global trading system) into ‘club goods’ (like the WTO and FTAs) can set incentives for cooperation and avoid free-riding (e.g. by making membership conditional on reciprocal trade liberalization). Democratic governance of such ‘club goods’ can be strengthened by linking the treaty rules concerned to corresponding cosmopolitan rights that enable decentralized enforcement of rules by self-interested citizens.

Arguably, ‘globalization’ and its transformation of many *national* into *transnational PGs* require embedding ‘democratic constitutionalism’ into multilevel republican and ‘cosmopolitan constitutionalism’ in order to constitute, limit, regulate and justify multilevel governance institutions more effectively for the benefit of citizens, their human and constitutional rights and transnational rule of law.³⁰ Historically, democratic constitutionalism (since the ancient Constitution of Athens),

²⁹ Cf. the interdisciplinary constitutional, legal, economic and ‘public choice’ analyses of multilevel economic regulation in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law*, The Hague: Kluwer, 1993. On participation-oriented ‘comparative institutional analysis’ of alternative decision-making processes like markets, political processes and judicial procedures see: N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Choice*, Chicago UP 1994; *idem*, *Law’s Limit: The Role of Courts, the Rule of Law and the Supply and Demand of Rights*, Chicago UP 2001; G.Shaffer/J.Trachtman, *Interpretation and Institutional Choice at the WTO*, in: *Virginia Journal of International Law* 52 (2011), 1-52.

³⁰ Cf. E.U.Petersmann, *Why Multilevel Governance of Global Public Goods Requires ‘Constitutionalisation’ – Methodology Problems in International and European Law* (Oxford: Hart, 2016).

republican constitutionalism (since the ancient Roman, Florentine and Venitian republics), and cosmopolitanism prioritized different values (e.g. democratic participation of male property owners in the ancient Athenian democracy, aristocratic protection of public goods for the benefit of Roman citizens, protection of ‘inalienable human rights’). Each of these different approaches to ‘constitutionalism’ (e.g. in the sense of legal prioritization of agreed ‘principles of justice’ and their collective transformation into legislation, administration, adjudication and multilevel governance) entailed different forms of regulating private and public goods (e.g. through the unique system of Roman private law and its progressive transformation into a *jus commune* in Europe). Following the return to humanism in the *renaissance* and in ‘enlightenment philosophies’ of man (as illustrated by the focus on the dignity of man founded on man’s freedom and reasonableness in the renaissance philosophy of Pico della Mirandola and the enlightenment philosophy of I.Kant)³¹, the recognition of human rights helped to establish ever more ‘constitutional democracies’ that protect human and constitutional rights, rule of law and other PGs in more integrated and more effective ways than in non-democratic governance regimes. Yet, extending ‘constitutional democracy’ beyond states to multilevel governance of transnational PGs has proven difficult, for instance in view of the lack of a ‘transnational *demos*’, the inadequate constitutional restraints of many multilevel governance institutions, and the reality of intergovernmental power politics in UN and WTO institutions that resist citizen-oriented proposals for multilevel *demosi-cracy*. Also the multilevel ‘human rights constitutionalism’ based on national, regional and UN human rights conventions and on functionally limited, international ‘treaty constitutions’ - like the 1919 Constitution (*sic*) establishing the International Labor Organization (ILO) - has failed to effectively protect human and labor rights in many countries, notably in Africa and Asia.³² Can the ‘implementation deficits’ in power-oriented and often ‘dis-connected’ UN/WTO governance be reduced for the benefit of citizens?

Lessons from democratic constitutionalism

The more *parliamentary democracies* fail to effectively guide and control UN/WTO governance of global PGs in an antagonistic world without ‘global democracy’ and without a single *demos*, the more must *constitutional, participatory and deliberative democracy* be extended ‘bottom-up’ beyond state borders in order to hold intergovernmental power politics more accountable, yet with due respect for the reality of constitutional pluralism. Empirical evidence confirms that *multilevel constitutionalism* – by empowering citizens through civil, political, economic, social and cultural rights and remedies to hold multilevel governance institutions legally, democratically and judicially accountable – has protected PGs more effectively (e.g. in European economic, constitutional and human rights law, international commercial and investment law and arbitration, international criminal law) than path-dependent forms of intergovernmental power politics.

As ‘global democracy’ is likely to remain a utopia for a long time and HRL protects individual and democratic diversity, the diverse social preferences for prioritizing and reconciling human, constitutional and economic rights of citizens in legitimately different ways must be accepted as a permanent fact. Most national and international parliamentary assemblies fail to effectively participate in – and control – multilevel UN, WTO and regional governance of transnational PGs. Such ‘parliamentary democracy deficits’ need to be compensated by stronger multilevel rights and remedies of citizens aimed at promoting more inclusive and more representative governance of PGs through transnational rights of citizens and stronger legal, democratic and judicial accountability of multilevel

³¹ Cf. E.Cassirer et al., *The Renaissance Philosophy of Man*, Chicago University Press 1956.

³² For instance, the ‘Arab Charter on Human Rights’ (2008) and the ASEAN Human Rights Declaration (2012) have been criticized for protecting human rights only selectively without providing for effective judicial remedies and for systemic monitoring of national implementing legislation. Also the African Court for Human and Peoples Rights – which was established by a Protocol to the African Charter on Human and Peoples Rights (in effect since 1986) – came into being only in 2004 and delivered its first judgment on the merits only in 2009.

governance institutions, for instance based on cosmopolitan principles of protecting all affected interests and all stakeholders subject to legal coercion.³³ Multilevel *deliberative democracy* requires multilevel duties to promote transparency of intergovernmental decision-making and of its public justification vis-à-vis all affected citizens. As democratic citizens are the ‘constituent powers’, also the constitutional principles of conferral, subsidiarity and proportionality (cf. Article 5 TEU) serve ‘democratic functions’ aimed at limiting delegation of powers and abuses of the ‘constituted powers’ by multilevel governance institutions so as to protect individual and democratic freedoms of citizens. Democracy has become an indispensable source of legitimacy also of *international law*; yet, it does not require to constitute, limit, regulate and justify *international institutions* in the same way as *national democratic institutions*. Multilevel ‘*demoi-cracy*’ needs to be justified and constrained also on republican and cosmopolitan grounds. The supranational EU constitutionalism - and the more deferential forms of transnational, democratic cooperation in the EEA and in the EU relations with Switzerland - illustrate how multilevel governance of transnational PGs can be ‘constitutionalized’ in legitimately diverse forms.

Lessons from republican constitutionalism

The provision of PGs (*res publica*) is the main justification of states and of international organizations. Hence, legal and political republicanism is much older than the economic distinction between *private* and *public goods* in Adam Smith’s *The Wealth of Nations* (1776). According to Benjamin Constant’s famous essay on ‘The Liberty of the Ancient and the Liberty of the Moderns’ (1819), the ‘ancient liberties’ in the Greek and Roman republics protected democratic participation in the rule of the public sphere rather than individual rights and freedoms in the private and social sphere (like ‘negative liberties’ left to the rule of the private will).³⁴ Whereas the ancient Greeks emphasized democracy and the need for legal philosophy justifying law and governance (e.g. based on Aristotelian ‘principles of justice’ and ‘virtue politics’), the republican tradition is often said to be more of Roman character and to have focused more on PGs like the Roman legal system, its – compared with Greek constitutionalism – more complex ‘constitutional checks and balances’, and its development and codification by professional jurists.³⁵ Modern economic and political PGs theories emphasize that - apart from ‘*intermediate PGs*’ like human rights and rule of law - non-excludable and non-rival ‘pure PGs’ (like sunshine) remain rare. Most PGs are ‘impure’ in the sense that their consumption is either non-rival but exclusive (e.g. patented knowledge whose industrial use is limited to patent holders) or non-exclusive but rival (e.g. common pool resources like fish in the High Seas). Transformation of ‘pure PGs’ (like the world trading system) into ‘club goods’ (like the WTO and regional trading, legal and dispute settlement systems with limited membership) reduces collective action problems like free riding. Similarly, states often exclude foreigners from *national PGs* (e.g. national market freedoms, democracy, social security systems) and agree to *transnational PGs regimes* only on condition of reciprocity (e.g. common markets among EU and EEA member states). Democratic and republican constitutionalism focus on democratic and republican rights and communitarian cooperation of citizens as the most important incentives for collective supply of national PGs and for holding governments accountable through ‘principal-agent relationships’. Economic theories offer additional justifications of legal and political republicanism (e.g. of its claim that citizens are the legitimate owners of the republic) by explaining why linking rational self-interests of citizens to their collective

³³ See note 7 above.

³⁴ Cf. P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford: Clarendon Press 1997, at 18. Pettit argues for a ‘communitarian character of freedom as non-domination’ recognizing that ‘the freedom of a community is as basic a notion as the freedom of individuals’ (at p. 275).

³⁵ Pettit (note 34), at 283 ff. On the Roman republic as common property of the public see: Cicero, *The Republic and the Laws*, OUP 1998, at 19.

supply of PGs can render governance more efficient, more legitimate and more effective than naïve reliance on benevolence and altruism of the rulers.

The diverse structures of the UN Specialized Agencies for collective supply of international PGs confirm that – depending on their diverse contexts and ‘collective action problems’ – different PGs regimes may require different legal structures and ‘production strategies’. For instance,

- some ‘single best efforts PGs’ may be supplied locally through private-public partnerships and the support by a single state, as illustrated by the development of polio vaccines in the USA;
- the collective production of ‘weakest link PGs’ may focus on the local problems in a few ‘risk states’ even if the latter contribute the least (like eradication of smallpox through WHO-sponsored programs in poor African countries like Somalia);
- also collective supply of global ‘aggregate PGs’ can be facilitated through mutually beneficial, burden-sharing arrangements with financial support for local support financed by international institutions and the most developed countries.³⁶

The ILO’s tripartite membership structures (governments, employers, employees) were justified by the nature of labor rights and by the political power of trade unions following World War I. The treaty-‘constitutions’ (*sic*) establishing the WHO, FAO and UNESCO likewise define their republican tasks of protecting public health, food security and public education by references to corresponding rights of citizens; yet, WHO law, FAO and UNESCO law remain dominated by government executives without effective legal and judicial protection of individual rights and remedies in UN governance practices. Without ‘constitutionalisation’ and ‘socialization’ of democratic governance systems transforming fundamental rights and other agreed ‘principles of justice’ into democratic legislation, administration and adjudication that protect rule of law for the benefit of citizens, multilevel governance of transnational PG cannot build on the ‘intermediate PGs’ that constitute transnational ‘aggregate PGs’ as legal foundations at local, national and regional levels of governance and regulation.

Why is it that human rights, rule of law, democracy, monetary stability and open markets – even though they are ‘pure PGs’ whose supply offers non-excludable and non-exhaustible benefits to all citizens protected by such rules and institutions – remain under-supplied in so many UN member countries? Arguably, the lack of local and national ‘component PGs’ inside so many UN member states (notably in Africa and Asia) undermine multilevel governance of transnational ‘aggregate PGs’. Democratic, republican and cosmopolitan constitutionalism explain such policy challenges in terms of lack of ‘constitutional virtues’ and ‘constitutional contracts’ among citizens constituting, limiting, regulating and justifying governance powers coherently in terms of constitutional rights, remedies and communitarian cooperation of citizens as ‘constituent powers’, ‘democratic principals’ and main ‘republican’ and economic actors in national and transnational polities, who must hold the limited ‘constituted powers’ of multilevel governance agents legally, democratically and judicially more accountable. History offers numerous examples of ‘republican Constitutions’ (like the German ‘Weimar Constitution’ of 1919) that failed to prevent arbitrary abuses of power inside republican democracies as well as in their external relations due to inadequate resistance by citizens against abuses of power so as to defend ‘republican virtues’ and transform constitutional rights into democratic legislation, administration, adjudication and international law and institutions. Globalization and its transformation of national into transnational ‘aggregate PGs’ call for multilevel ‘republican conceptions’ of international law and institutions committed to protecting transnational PGs for the benefit of citizens. Unless citizens, democratic institutions and courts of justice locally succeed in constituting, limiting, regulating and justifying multilevel governance powers in terms of democratic, republican and cosmopolitan rights and remedies of citizens, the existing ‘implementation deficits’ of ‘disconnected’ UN and WTO law in many UN member states – and the unnecessary

³⁶ On the different kinds of PGs and their diverse ‘production technologies’ see: S.Barret, *Why Cooperate? The Incentive to Supply Global Public Goods*, OUP 2007.

poverty of more than 1 billion of poor people without effective access to human rights - are likely to continue. Even in the transatlantic FTA negotiations among constitutional democracies, the Comprehensive Economic and Trade Agreement (CETA) among Canada and the EU – by excluding private rights and judicial remedies in domestic courts to invoke CETA rules (cf. Article 30.6) and by privileging one-sidedly *foreign investors* to challenge government regulations through international investor-state adjudication (cf. Article 8.23 CETA) – disempowers and discriminates domestic citizens in order to prevent them from holding governments accountable for violations of FTAs.³⁷

Lessons from cosmopolitan constitutionalism for multilevel governance of public goods

Cosmopolitan constitutionalism – as illustrated by the multilevel legal and judicial protection of human and fundamental rights of citizens in European law (e.g. EU and EEA law, the ECHR) – limits the flaws of national, single-polity perspectives by protecting transnational PGs more effectively than *nationalist*, democratic and republican constitutionalism if the latter focuses on local and state polities and national boundaries without adequate protection for externally affected interests of non-residents and for common, reasonable interests of transnational legal communities. *Cosmopolitan citizenship* should be understood not only as a bundle of rights and duties but also as a status of membership in ‘overlapping’, self-governing local, national and transnational polities responsible for multilevel protection of transnational PGs that are necessary conditions for human autonomy and well-being. Multilevel regulation of global PGs must distinguish between the national *demos* composed of citizens having the franchise and a broader ‘*cosmopolitan citizenry*’ including all who have a stake in being members of transnational polities responsible for protecting transnational PGs. Due to the transformation of national into transnational PGs, democratic, republican and cosmopolitan constitutionalism complement each other by offering synergies that – as in the story of the blind men describing an elephant depending on the different body parts they touched – enable a more coherent understanding and regulation of the collective action problems in multilevel governance of transnational ‘aggregate PGs’, for instance based on inclusive representation of all interests that are actually affected by democratic regulation, and of the rights of all who are subject to the jurisdiction of government decisions and whose individual autonomy depends on participation in collective self-government. Transnational legal communities (e.g. citizens and peoples cooperating in transnational common markets) must constitute themselves as legitimate, self-governing polities and multilevel *demosi-cracies*; they must resist arbitrary domination by path-dependent, intergovernmental power politics without legal, democratic and judicial accountability of government executives vis-à-vis domestic citizens.³⁸

Rights-based ‘cosmopolitan international law’ is comparatively more effective

Cosmopolitan legal principles have become universally recognized as integral parts of modern positive law in hundreds of human rights treaties, IEL treaties, environmental law, criminal law, humanitarian law and other treaties ratified by UN member states. The more national Constitutions depend on international law and multilevel governance institutions for protecting human rights and other transnational PGs, the stronger becomes the need for recognizing economic, social and other cosmopolitan rights of citizens and promoting decentralized enforcement of international rules, as it is already done in

³⁷ Cf. E.U. Petersmann, Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens? in: *JIEL* 18 (2015), 579-608.

³⁸ Cf. note 37 and the ‘public consultation’ of EU citizens by the EU Commission in 2015 which politically forced the EU institutions to renegotiate the CETA rules on investor-state arbitration.

- HRL and international criminal law;
- international contract, commercial and corporate law and related agreements on the recognition and enforcement of arbitral awards;
- international investment law and arbitration;
- international intellectual property law and arbitration;
- international labor rights and other social rights (e.g. regarding free movement of workers and protection of their families under EU and EEA law);
- international trading rights and related judicial remedies (e.g. under WTO law and regional FTAs in Europe); and
- international internet regulation and related human rights guarantees (e.g. on privacy rights).

UN human rights bodies and Specialized Agencies (like the ILO, WHO and WIPO) increasingly cooperate with international economic organizations (like the World Bank and the WTO) in clarifying and coordinating the interrelationships between HRL (e.g. health rights and ‘corporate social responsibilities’) and IEL, for instance by adopting

- the 2003 WHO Framework Convention on Tobacco Control (FCTC) which has been ratified by 178 states and regulates the interrelationships between health rights, trading rights (e.g. to sell toxic tobacco products) and intellectual property rights (like trademarks of tobacco companies);
- the UN ‘Respect, Protect and Remedy’ Framework and Guiding Principles for business and human rights, adopted by the UN Human Rights Council in 2008, and
- the additional ‘Guiding Principles on Business and Human Rights: Implementing the UN Respect, Protect and Remedy Framework’ that were endorsed by the UN Human Right Council in June 2011 and increasingly influence human rights, business and arbitration practices.

Civil society support for international ‘PGs treaties’ becomes ever more important for intergovernmental conclusion and parliamentary approval of international economic, environmental, criminal law and human rights agreements. Legal practice confirms that – in conformity with the constitutional premise that the effectiveness of constitutional rules and ‘principles of justice’ depends on their transformation into democratic legislation, administration and judicial protection of individual rights – multilevel judicial protection of cosmopolitan rights enhances the effectiveness of – and civil society support for – international agreements, for instance if regional economic and human rights courts, investment and commercial tribunals protect human, economic and social rights that can be subsequently enforced through national courts. Also the ‘dispute settlement system of the WTO’ (Article 3 DSU) prescribes and protects judicial remedies for individuals and non-governmental actors in domestic legal systems, for instance in the field of GATT (Article X), the WTO Antidumping Agreement (Article 13), the WTO Agreement on Customs Valuation (Article 11), the Agreement on Pre-shipment Inspection (Article 4), the Agreement on Subsidies and Countervailing Measures (Article 23), the General Agreement on Trade in Services (Article VI GATS), the Agreement on Trade-Related Intellectual Property Rights (Articles 41-50, 59 TRIPS) and the Agreement on Government Procurement (Article XX). Yet, as many WTO member governments prevent domestic citizens from invoking GATT/WTO rules in domestic jurisdictions, GATT/WTO legal obligations continue to be frequently disregarded by governments in domestic legal practices of WTO members.

Democratic, republican and economic constitutionalism justify cosmopolitan rights

Commercial law (*lex mercatoria*) has promoted long since – e.g. through multilevel legal protection of freedom of contract, private property and peaceful dispute settlement (e.g. through arbitration) - international cooperation among producers, investors, traders and consumers from diverse jurisdictions. ‘Law and economics’ theories on maximizing general consumer welfare through open markets, competition, contract law and property rights (e.g. as incentives for investments and

innovation), and on limiting governance failures through constitutional changes of the law ('constitutional economics'), offer additional justifications of protecting individual rights (like common market freedoms, private property and investor rights, corporate and tort law, labor and social rights) as legal incentives for pursuing rational self-interests in multilevel protection of PGs. If the democratic legitimacy of governments and states depends on protecting *national PGs* and corresponding rights of citizens, efficient governance of *transnational PGs* must likewise be justified, limited and regulated in terms of rights of citizens, as increasingly recognized in regional economic integration law and other commercial, investment, intellectual property, environmental, labor and human rights treaties concluded for the benefit of citizens. Also authoritarian governments in non-democratic (e.g. communist) countries – which often present themselves as 'peoples republics' without protecting citizens through 'republican constitutionalism' against abuses of power - increasingly accept the need for reforming their domestic economies through membership in the Bretton Woods and WTO institutions and domestic legal reforms based on the IEL of the International Monetary Fund, the World Bank and WTO law. China, for instance, uses WTO law and FTAs for recreating a common market among the four Chinese WTO memberships (China, Hong Kong, Macao, Taiwan) and for reforming its domestic legal and judicial system in conformity with WTO legal obligations.

In constitutional democracies, national legal and economic systems derive their democratic and republican legitimacy from 'constitutional contracts' among citizens and from republican rights of citizens to governmental protection of PGs. Also in multilevel governance of *transnational PGs*, 'Westphalian claims' by government executives to be 'masters of international treaties' are increasingly challenged by civil society and democratic institutions. As in European integration law, the necessary 'constitutionalisation' of discretionary foreign policy powers is increasingly based on 'constitutional interpretations' of international treaties 'in conformity with principles of justice' and 'human rights and fundamental freedoms for all', as prescribed by the customary rules of treaty interpretation and codified in the Vienna Convention on the Law of Treaties (cf. the Preamble and Article 31 VCLT). For instance, Article 3 TEU explicitly requires the EU to contribute in its external relations 'to the protection of its citizens', 'human rights and ... strict observance of international law', without granting powers to the EU to violate international agreements concluded by the EU and approved by parliaments for the benefit of citizens. Courts of justice must construe treaties no longer only in terms of reciprocal rights and obligations among states and their governments, but also as protecting rights of free and equal citizens vis-à-vis multilevel governance institutions that must remain constitutionally restrained by corresponding legal obligations to protect civil, political, economic, social and cultural rights of citizens, as universally recognized in UN HRL. The task of 'constitutionalizing' multilevel governance of *transnational PGs* justifies 'constitutional interpretations' also of many international treaties as protecting rights of citizens, for instance to consular protection, investment protection, and 'consistent interpretations' of national and international obligations of governments to protect PGs.

Conclusion: Global public goods require protection through cosmopolitan constitutionalism

Modern HRL refutes Hobbesian claims that international anarchy and unreasonableness of human beings (*homo homini lupus est*) justify unlimited foreign policy powers of states and their rulers. Modern constitutional democracies increasingly integrate the diverse traditions of democratic, republican and cosmopolitan constitutionalism at national and regional levels of governance of PGs, for instance by cooperating with transnational civil society (e.g. 'stakeholder consultations' in FTA negotiations) and empowering citizens and non-governmental actors to legally challenge abuses of power in multilevel governance of global PGs (e.g. through judicial remedies). While *democratic constitutionalism* emphasizes the need for participatory and deliberative 'democratic input-legitimacy', accountability and 'output-legitimacy' of multilevel governance institutions, *republican*

and *cosmopolitan constitutionalism* explain more specifically the need for justifying, limiting and regulating multilevel governance of transnational PGs in terms of republican and cosmopolitan rights of citizens and related constitutional 'checks and balances' limiting abuses of public and private power. The path-dependent 'constitutional nationalism' inside UN member states needs to be reconciled with the human rights requirements of protecting transnational PGs through functionally limited 'cosmopolitan constitutionalism' so that citizens can hold multilevel governance institutions accountable for transnational protection of PGs.

As illustrated by the opportunities and risks of modern information technologies, globalization entails new governance challenges that affect existential interests of citizens all over the world that can be evaluated more appropriately in the comprehensive context of HRL rather than only in the narrow context of fragmented treaty regimes focusing on particular governance aspects and 'piecemeal engineering' (e.g. of modern information societies).

Multilevel recognition of civil, political, economic, social and cultural rights of citizens (e.g. in HRL, constitutional law, democratic legislation and international agreements) promotes the 'constitutionalisation' of international law and requires reviewing the 'primary rules of conduct' and 'secondary rules of recognition, change and adjudication' of international legal systems. This contribution has argued that the legal commitment of all UN member states to promotion of 'sustainable development' requires limiting 'disconnected UN/WTO governance' by stronger legal, democratic and judicial rights and remedies of citizens to insist on transnational rule of law. Unless multilevel governance institutions cooperate in conformity with international agreements that were approved by democratic institutions for the benefit of citizens, transnational rule of law and equal rights of citizens cannot be effectively protected. IEL illustrates how legal empowerment of citizens and the linkage of their rational self-interests to collective supply of PGs (like undistorted market competition as enforced by competition rules and citizen-driven adjudication) can promote stronger co-operation among national and international courts of justice in protecting transnational rule of law and rights of citizens in international co-operation. As HRL protects individual and democratic diversity and offers only an incomplete framework for designing multilevel protection of transnational PGs, legal and judicial 'balancing' of fragmented, national and international legal regimes will inevitably remain contested.

Constitutionalism explains why the incorporation of human rights and other 'principles of justice' into the law of some UN Specialized Agencies (like the ILO, WHO, UNESCO) has often not rendered protection of PGs more effective than in international institutions (like GATT and the WTO) that hardly ever mention human rights. Yet, due to the wide coverage of civil, political, economic, social and cultural rights and their mutual 'balancing', the increasing references to HRL in the jurisprudence of national and regional tribunals can assist in reconciling fragmented legal regimes by 'constitutionalising social piecemeal engineering'. In worldwide dispute settlement systems (e.g. of the WTO), the deliberate avoidance of references to HRL may be justified in view of the 'reasonable disagreement' among the contracting parties on many indeterminate (e.g. economic and social) human rights obligations. As long as UN and WTO governance institutions remain dominated by government executives that often prioritize rights of governments over rights of citizens and pursue self-interests in limiting their legal, democratic and judicial accountability vis-à-vis adversely affected citizens, cosmopolitan constitutionalism will remain contested in UN and WTO governance institutions. Law and constitutionalism as instruments of social change depend on dialectic changes in legal cultures and 'public reason' enabling to progressively limit the ubiquity of abuses of public and private power. This contribution has argued, *inter alia*, that

- democratic, republican and cosmopolitan constitutionalism call for 'constitutionalizing' multilevel governance of transnational PGs so as to integrate the five competing conceptions of IEL and, thereby, better protect civil, political, economic, social and cultural rights of citizens;
- even if most citizens remain 'rationally ignorant' towards complex UN/WTO negotiations among governments, political pressures for the needed 'constitutional reforms' of IEL are more

likely to come from civil society, democratic parliaments and courts of justice than from UN and WTO diplomats;

- the task of constituting, limiting, regulating and justifying multilevel governance of the international economy in terms of equal rights of citizens must take into account the lessons from comparative institutional analyses of multilevel governance of transnational PGs as well as the historical lessons from democratic, republican and cosmopolitan constitutionalism for limiting abuses of power;
- the ‘constitutional functions’ of republican and cosmopolitan rights for constituting, limiting, regulating and justifying multilevel governance of transnational ‘aggregate PGs’ for the benefit of citizens require ‘struggles for justice’ by citizens and stronger judicial protection of their rights;
- as IEL remains embedded in the reality of diverse national and international institutions, GAL conceptions of IEL (e.g. promoting transparency, accountability, rule of law) require more coherent constitutional justifications and legal methodologies (e.g. clarifying the ‘legal sources’ of GAL principles);
- private law conceptions of IEL must remain consistent with the reality of ‘constitutional pluralism’ and of legitimately diverse approaches in constitutional democracies for regulation of ‘market failures’ (e.g. in self-regulation of the financial sector and of information technologies), ‘governance failures’ and ‘constitutional failures’;
- ‘economic approaches’ to IEL continue to be distorted by power politics (e.g. trade protectionism, exchange rate manipulation, disempowerment of citizens and judicial privileges for foreign investors in many FTAs) and suffer from justice-deficits (e.g. inconsistencies of ‘Kaldor-Hicks efficiency’ with ‘justice as human rights’).

From the perspective of the universal recognition of human rights and cosmopolitan constitutionalism, ‘market citizens’, ‘state citizens’ and ‘cosmopolitan citizens’ should be the legitimate ‘drivers’ of individual and democratic self-government through market economies and ‘principal-agent governance’. The political reality of multilevel economic regulation remains dominated by private and public power politics (e.g. VW engineers manipulating car emissions so as to circumvent multilevel environmental regulations). The history of constitutionalism suggests that abuses of public and private economic regulation can be successfully limited by transforming fundamental rights, rule of law and democracy into legislation, administration, adjudication and international law, thereby progressively institutionalizing ‘public reason’ and ‘constitutionalizing’ the economy. EU and EEA law confirm that also multilevel governance of transnational common markets can be effectively ‘constitutionalized’ for the benefit of citizens, for instance by constitutional and judicial protection of ‘countervailing rights’ of foreign market participants if they are adversely affected by national regulations. The persistent violations of the EU’s ‘monetary constitution’, ‘area of freedoms, security and justice’ (e.g. the Schengen and Dublin rules for immigration) and ‘foreign policy constitution’ (e.g. Article 3, 21 TEU) illustrate the need for permanent ‘Sisyphean struggles’ and ‘republican virtues’³⁹ to ‘constitutionalize’ IEL and the global division of labor. ‘UN/WTO governance’ of the global economy remains dominated by power politics and ‘disconnected’ from citizens as ‘democratic principals’ of multilevel governance agents. The ‘principles of justice’ underlying modern international law (like human rights, democratic self-determination, rule of law) require citizens to struggle for stronger protection of their human and constitutional rights in multilevel regulation of the global economy so that IEL and multilevel governance of PGs are not only rational, but also reasonable and protect right of citizens also in local jurisdictions where citizens live, work and die.-

³⁹ According to Aristotle’s *Nicomachean Ethic*, among the four ‘cardinal virtues’ (prudence, justice, courage and temperance), only prudence requires intelligence rather than will power. The three ‘theological virtues’ (faith, love and hope) likewise do not require particular intelligence; they support human- rather than state-based ‘cosmopolitics’.

