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Strengthening multilevel governance of public goods through democratic and republican constitutionalism*

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Russia's invasions of Ukraine confirm the historical experience that governance of public goods (PGs) demanded by citizens (such as human rights, democratic peace, and the sustainable development goals (SDGs) as universally confirmed by the United Nations General Assembly) depends on defending principles of democratic constitutionalism (such as citizenship, democratic governance, 'mixed government', and courts of justice), republican constitutionalism (such as separation of power, the rule of law, and jus gentium since ancient Rome), and common law constitutionalism (such as parliamentary and judicial protection of fundamental rights and property rights) against abuses of power. The United Nations (UN) and its 2030 Sustainable Development Agenda recommend these constitutional principles also for multilevel governance protecting the SDGs and related PGs. Yet constitutionalism depends on multilevel legislative, administrative and judicial implementing measures transforming the SDGs into concrete duties of governments and corresponding rights and remedies of citizens. The global health, environmental, energy, security, economic and human rights crises reveal the systemic 'market failures', 'governance failures', and 'constitutional implementation deficits' undermining UN and World Trade Organization governance of PGs. Liberal order can only survive as 'militant constitutional demoi-cracy' if citizens defend freedom against tyranny at home and abroad, notably in authoritarian States which, notwithstanding their formal constitutions, suppress democratic constitutionalism.

Keywords: *constitutionalism, democracy, EU, human rights, public goods, rule of law, UN, WTO*

1 FROM UTOPIA TO EUNOMIA THROUGH EVOLUTIONARY CONSTITUTIONALISM?

For millennia, human beings lived and survived in small tribes and kingdoms, whose rulers often invoked 'divine rights' based on 'mandates from heaven'. The ancient Greek philosophers (such as Plato and Aristotle) analysing the emergence of democratic constitutionalism in ancient Greek city republics (such as Athens) explained the social agreements on citizenship and 'mixed' (eg popular, executive and judicial) government institutions by the social, political and reasonable nature of human beings: constitutionalism can enhance the good life and welfare through agreed rules and institutions constituting democratic governance protecting public goods (PGs) such as the rule of law and security. Plato's political writings (eg on the *Republic* and the *Laws*)

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explored ideal constitutions (eg on a fictional island called 'Atlantis'); Aristotle's research (eg on *Politics* and the *Constitution of Athens*) compared the empirical workings of real constitutions ('Eunomia') in a large number of Greek city-States. Yet neither constitutional theories nor constitutional practices prevented the invasion of Greece by foreign (eg Macedonian and Roman) empires ending the political experiments with Greek city republics. Similarly, constitutional republicanism in ancient Rome was replaced by the Roman empire. Legal constitutionalism failed to offer effective safeguards against power politics.

Adoption of formal constitutions has not prevented authoritarian governments (eg in China and Russia) from suppressing human rights (such as freedoms of information and of expression of opinions) and democratic constitutionalism as threats to their authoritarian governance. Even though globalisation transformed most *national* into *transnational PGs*, human knowledge about the political and legal cultures necessary for multilevel governance of *global PGs* remains limited, for instance by the 'rational ignorance' of people prioritising their individual and local life and neglecting global governance problems. This contribution explains why global PGs (such as democratic peace and the universally agreed sustainable development goals (SDGs)) cannot be effectively protected without 'demoi-cratic, militant constitutionalism' defending human and constitutional rights and legal and democratic accountability of governments in multilevel governance of PGs, as illustrated by the current collective sanctions against Russia's suppression of human rights and democratic self-determination inside and beyond Russia. After explaining insufficient protection of PGs in terms of insufficient 'constitutional politics' and restraints of power politics, the contribution focuses on the 'how question': How can multilevel governance of the SDGs (eg in United Nations (UN) and World Trade Organization (WTO) institutions) be rendered more legitimate and more effective, for instance by stronger democratic, parliamentary, judicial and science-based accountability mechanisms?

The codification of Roman law, its teaching at universities throughout Europe, and the canon law of the Roman church promoted civil and canon law cultures throughout continental Europe during centuries that differed from the judicial common law traditions of the three Royal Courts of Justice in England, their administration by guildsmen of the Inns of Court in London, and their practical focus on disputes involving noble landholders and the property and contractual rights of the dominant merchant class. Similarly, the evolutionary constitutionalism and parliamentary revolution in seventeenth-century monarchical England differed from the constitutional constructivism in the democratic revolutions in eighteenth-century America and France, ushering in the adoption of written constitutions and comprehensive bills of rights. World War II and decolonisation entailed that all 193 UN member states now have (un)written national constitutions constituting territorial States, national citizenship, and governments with legislative, administrative and judicial powers. The UN Charter, the UN treaties establishing 15 UN Specialized Agencies (some of which were called 'constitutions' [sic], for instance, those constituting the International Labor Organization (ILO), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), and the UN Educational, Scientific and Cultural Organization (UNESCO)) and UN human rights conventions supplemented national constitutionalism by functionally limited 'treaty constitutions' among States constituting, regulating and justifying multilevel governance of transnational PGs (such as labour rights, health rights, rights to food and education, and related PGs). The post-1945 creation of more than 20 permanent international courts and hundreds of ad hoc arbitral tribunals, dispute settlement panels, and other (quasi-)judicial bodies entailed new 'constitutional challenges' such as the

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relationships between administrative, intergovernmental and judicial branches of international organisations. The power politics among UN member states and the progressive construction of European constitutional law since the 1950s[1] confirmed the Kantian insight that international treaties cannot 'constitutionalise' and 'civilise' intergovernmental power politics unless policy discretion is limited also by cosmopolitan rights and judicial remedies protecting the rule of law and human rights beyond national frontiers. Russia's violent undermining of Europe's legal and economic order and peace forces adversely affected countries to collectively defend democracy and PGs through 'militant constitutionalism' and legal, political and defence alliances such as the North Atlantic Treaty Organization (NATO).

At the 70th anniversary of the UN in 2015, a summit meeting with the heads of government of some 150 UN Member States adopted the '2030 Agenda for Sustainable Development' (SDA) aimed at 'Transforming our World' in order to 'realize the human rights of all', 'to end poverty and hunger everywhere', and to implement 17 SDGs agreed over the next 15 years with 'the participation of all countries, all stakeholders and all people'.[2] The UNGA Resolution explicitly recognised that 'democracy, good governance and the rule of law … are essential for sustainable development'.[3] The universal agreement on this ambitious 'Global Partnership for Sustainable Development' was rendered possible by the fact that (notwithstanding the agreement on SDGs and 169 specific policy targets) the legally non-binding UNGA Resolution neither prescribes precise rights and obligations nor specifies the legal instruments (such as carbon taxes) and legal changes necessary for implementing the SDGs. Similarly, the 2015 Paris Agreement on climate-change mitigation, ratified by 190 countries (2021), relies on 'nationally determined contributions' (NDCs) and science-based governance indicators without prescribing the precise content of NDCs; the policy instruments (such as carbon taxes and the phasing out of coal subsidies) need to be progressively clarified.[4] Also, the UN negotiations on a 'Global Pact for the Environment'[5] follow the path-dependent prioritisation of state sovereignty of UN member states without effective empowerment of citizens and civil societies. The global health pandemics since 2020, climate change, biodiversity losses, plastic pollution, and the economic, food and geopolitical crises (such as the China–US trade wars and Russia's invasions of Ukraine) illustrate how UN and WTO laws fail to protect citizens and societies against many human disasters. The prospect of 150 million climate-change refugees by 2050 suggests that 'evolutionary constitutionalism' risks responding too late to the ubiquity of market failures (such as environmental pollution and social injustices), governance failures (eg to provide vaccines to all humanity) and 'constitutional failures' (such as insufficient protection of human rights, democratic self-determination, and the rule of law) undermining the SDGs.[6]

1. Yves Mény and Giorgio Mocavini, 'Resisting European Integration: The Variegated Forms of Anti-EU Protest' in Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin (eds), *The History of the European Union: Constructing Utopia* (Hart Publishing, London 2019) 429.
2. UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1 preamble.
3. Ibid para 9.
4. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156.
5. UNGA Res 72/277 (14 May 2018) UN Doc A/RES/72/277.
6. The relationship between market competition and State regulation remained highly contested at the Walter Lippmann colloquium in Paris in 1938, where Alexander Rüstow coined the term 'neoliberalism' as an alternative to 'market anarchy' and economic dictatorship.

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2 REGULATORY COMPETITION REQUIRES CONSTITUTIONAL CONSTRUCTIVISM

The American and French human rights revolutions of the eighteenth century responded to the failures of evolutionary constitutionalism by initiating 'constitutional constructivism', leading to the progressive adoption of (un)written national constitutions by (today) all 193 UN member states. National constitutions differ from country to country depending on the path-dependent histories and democratic struggles of their citizens. The UN and WTO laws reflect the need for coherent treaty systems coordinating regulatory competition and multilevel governance of transnational PGs (such as human rights and a mutually beneficial world trading system). The 38 industrialised OECD Member States all embraced democratic constitutionalism. But more than half of the 100 governments invited by United States (US) President Biden to his 'Summit for Democracy' in December 2021 refrained from participating in the collective sanctions against Russia responding to President Putin's war and violations of UN law. The commitments of many UN member states (eg in human rights law (HRL) and in the 2015 UN SDA) to respect human rights, democracy, and the rule of law are often not implemented through democratic legislation, administration and judicial remedies, notably in States (such as China, Russia and other formerly communist countries) suppressing human and democratic rights. The 'interdependence of social orders' (such as moral, political, legal and economic rules) prompted diverse governments (such as China's totalitarian political party monopoly or Russia's authoritarian oligarchy and liberal democracies) to advocate for diverse interpretations of human rights and related UN principles (such as democratic governance and the rule of law). The political disagreements reinforce regulatory competition and limit the 'constitutional functions' of UN 'world order treaties' (eg on humanitarian law, UN regulatory agencies, and UN dispute settlement systems); the Inter-Parliamentary Union and parliamentary meetings in worldwide institutions (like the WTO under Director-General Pascal Lamy) could not 'constitutionalise' international law and governance.[7]

2.1 Constitutional failures

The 'constitutional governance model' recommended by some UN institutions failed to limit intergovernmental power politics through constitutional reforms except in a few policy areas (such as compulsory WTO and investment adjudication).[8] Proposals for

Today, European constitutional law and 'constitutional economics' share a broad consensus on 'market failures', 'governance failures' and 'constitutional failures' as agreed benchmarks for economic regulation and governance of PGs: see Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP, Oxford 2022) chs 1–5.

7. My publications (eg Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Westview Press, Boulder 1991)) emphasise the 'constitutional functions' of certain international rules and institutions (such as courts of justice) to extend the protection of national constitutional principles (such as equal freedoms and rule of law) to international relations by increasing legal, democratic and judicial accountability and control over transnational policy discretion in multilevel governance of PGs, thereby re-enforcing and compensating for the erosion of such control within domestic constitutional orders.

8. Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart Publishing, London 2017) 300–304; Giuliana Ziccardi Capaldo, 'Facing the Crisis of Global Governance: GCYILJ's Twentieth Anniversary at the Intersection of Continuity and

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reforming the UN security and rule of law systems were blocked by the veto power provided for in the UN Charter. The evolution from 'horizontal' international cooperation law among States to vertically integrated community law for individuals and peoples remained essentially confined to some regional legal systems among democracies institutionalising:

- protection of human and constitutional rights based on democratic self-determination by the people as constituent power;
- democratic sovereignty with a limited delegation of powers subject to the proportionality of their exercise and the rule of law;
- separation of and checks and balances among multilevel legislative, executive and judicial power;
- access to justice and judicial remedies based on multilevel 'judicial comity' and 'subsidiarity'; and
- legal accountability of independent regulatory agencies and of multilevel governance institutions.

Multilevel democratic and judicial protection of human, constitutional, economic and social rights in regional common markets remains most developed, albeit far from perfect (eg as regards the treatment of refugees and foreign migrants), in European Union (EU) and European Economic Area (EEA) law. The UN SDA and its ambitious goal of 'realising the human rights of all' reflect constitutional ideals of 'circular economies and democracies' protecting sustainable development through citizen-driven governance of the SDGs. Yet 'UN constitutionalism' without effective democratic and judicial remedies of citizens, parliamentary institutions and governments remains a *utopia* as long as the reality of UN and WTO politics remains characterised by governance failures (eg to limit 'market failures' through UN and WTO rules and institutions) and 'constitutional failures' (eg to protect UN HRL and the transnational rule of law through more effective democratic and judicial remedies).

2.2 Governance failures and market failures

The political disagreements and diverse interpretations of 'constitutional principles' are also reflected in diverse neoliberal, authoritarian and ordoliberal conceptions of economic regulation. Economists emphasise the importance of markets and prices as spontaneous information, coordination and sanctioning mechanisms for utility-maximising producer and consumer decisions on the allocation of scarce resources, and supply and demand of goods and services. They acknowledge 'market failures' distorting the efficiency of private ordering as well as 'governance failures' in public regulation aimed at maximising social welfare and minimising social costs (such as

Dynamic Progress' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2020* (OUP, Oxford 2021) 5, 10–11. Ziccardi Capaldo defines the global community as a 'universal human society' based on 'global constitutional principles' (such as the rule of law, protection of human rights, democracy, separation of powers, checks and balances, and judicial review) providing the constitutional framework for an integrated system of global governance. The 20 volumes of *The Global Community Yearbook of International Law and Jurisprudence* edited by Ziccardi Capaldo since 2001 document the empirical evolution of UN/WTO law-making, law-enforcement and law-adjudication for this global governance system aimed at protecting global PGs. The UN 'legal implementation deficits' undermine the effectiveness of the UN global governance model.

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public error and decision costs in governmental cost–benefit analyses). Both common-law countries (eg relying on judge-made common-law rules of torts, property, contracts and criminality) and civil-law countries admit the dependence of their 'private ordering ideals' on legal and constitutional infrastructures (such as equal freedoms protecting individual and democratic self-determination, institutional protection of non-discriminatory markets, the rule of law, and monetary stability). The lack of such legal infrastructures (such as insufficient protection of constitutional freedoms, property rights, human rights and social justice) and systemic corruption (like money-laundering by oligarchs and financial institutions) reveal 'constitutional failures'. The diverse kinds of 'market failures' (such as externalities, 'non-excludable' and/or 'non-rivalrous' PGs, market power and information asymmetries) invite different kinds of legal and institutional responses, on whose design and prioritisation governments often disagree.[9] Designing governmental remedies is confronted with knowledge problems, public choice problems, administrative and agency costs (eg if citizens as 'principals' do not prevent 'agents' from abusing delegated powers). Hence governance failures may cause more social harm than market failures. The 'public choices' (eg among private and public ordering alternatives) are also influenced by the distribution of power (eg private lobbying; authoritarian rulers suppressing private rights), 'moral hazards' (such as rent-seeking and corruption), transparency rules (eg prescribing social impact assessments), and path-dependent beliefs (eg in neoliberal self-regulation rather than ordoliberal, legal construction of markets; alleged 'sovereignty costs' of EU law as a justification of 'Brexit').[10]

2.3 Knowledge problems and geopolitical rivalries

The knowledge problems and cognitive limitations of rational responses to market failures, governance failures and 'constitutional failures' multiply in transnational relations among the 193 UN Member States: correct information becomes more costly, 'good decisions' are more uncertain, and 'bounded rationality' (like nationalist biases limiting will-power, 'fast thinking' with limited self-control rather than 'slow reasoning') is more likely. Paternalist 'command and control approaches' are more difficult to implement (eg vis-à-vis market failures in foreign jurisdictions); libertarian hands-off approaches (eg neglecting foreign abuses of power) entail more risks (such as transnational criminality); and abuses of policy discretion (eg favouring special

9. Eg 'Pigouvian' taxes/subsidies; promotion of markets through the redefinition of property rights and liability rules; transformation of PGs into excludable 'club goods' or rivalrous 'common goods'; competition and environmental and social laws limiting market failures. Governmental interventions should correct 'market distortions' directly (eg through the prohibition of private monopolies and cartel agreements) without causing 'by-product distortions' (eg by import tariffs and quantitative restrictions). For details see Thomas A Lambert, *How to Regulate: A Guide for Policymakers* (CUP, Cambridge UK 2017) 23.

10. Mainstream 'law and economics' scholars tend to focus on result-oriented maximisation of some kind of 'social welfare function'. Public choice scholars challenge assumptions of 'benevolent, welfare-maximising governments'; their empirical analyses of political choices reveal rational pursuit of self-interests by elected politicians and their supporters (eg industry lobbies seeking 'protection rents' in exchange for political support). Constitutional economists focus on rules, their legitimation by consent, and their welfare-enhancing economic effects, including constitutional agreements (behind a 'veil of uncertainty') limiting abuses of policy discretion and enabling redistribution promoting social cohesion and agreed 'social justice' standards. For details see Stefan Voigt, *Constitutional Economics: A Primer* (CUP, Cambridge UK 2020) 19.

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interests like Russia's oligarchs) are more difficult to discover if diplomats, lobbyists, and authoritarian rulers politicise decision-making and promote public disinformation.

The 'balancing' of efficiency considerations (such as maximising national economic welfare) with distributive equity, social justice, and political considerations (eg promoting sovereign self-sufficiency rather than dependence on global supply chains) differs from country to country. State-capitalist conceptions of world trade prioritise political interests (such as the communist party monopoly in China) and privilege State-trading enterprises and discretionary government regulation (eg by means of taxes and subsidies). Anglo-Saxon neoliberal preferences for trade liberalisation, privatisation, business-driven self-regulation, and 'financialisation' of economies dominated the Bretton Woods system (using the US dollar as a global reserve currency) and the 1947 General Agreement on Tariffs and Trade (GATT) (eg business interests in discriminatory import protection, agricultural subsidies, safeguard measures, antidumping and countervailing duties, and the imposition of bilateral export quotas for cotton, textiles, steel, etc).[11] The ordoliberal common-market constitution and monetary constitutionalism in Europe are embedded in multilevel protection of fundamental rights, which differ fundamentally from intergovernmental economic regimes in Asia (such as China's bilateral cooperation with 'Belt and Road' governments and the Eurasian Community dominated by Russian power politics) and from neoliberal free trade regimes in North America. Yet the 'old neoliberal Washington consensus' continues to rapidly change under the US Biden administration in favour of economic, environmental and social government interventions. Do the increasing geopolitical conflicts (as illustrated by the US trade wars against China since 2018 and the collective economic sanctions of some 40 democracies against Russia since 2022) render multilevel constitutionalism for multilevel governance of PGs illusionary? Or does functionally limited, multilevel constitutionalism even make sense if national 'security exceptions'[12] (such as GATT Article XXI(b)(iii)) reserve national sovereign rights for 'taking any action which' a contracting party 'considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations'?[13] The increasing invocation of such security exceptions for restricting trade with China and Russia fragments and transforms the world economic order, with potentially far-reaching repercussions for the collective security system (eg if Russia's central-bank reserves blocked by Western democracies would be used for compensating the victims of Russia's aggression in Ukraine and for rebuilding Ukraine's cities destroyed by Russian bombardments).

3 REGULATORY COMPETITION DOES NOT EXCLUDE MULTILEVEL CONSTITUTIONALISM

Human self-ordering (eg through sociality, morality, reasonableness, religiosity or legality) does not eliminate human animal instincts (like power politics) and rational egoism (eg in anti-competitive agreements). Coherent legal limitations of 'market failures', 'governance failures' and 'constitutional failures' in the private and public ordering of societies, economies and polities, and the collective supply of PGs demanded by citizens

11. General Agreement on Tariffs and Trade (adopted 30 October 1947, provisionally applied as of 1 January 1948) 55 UNTS 194.
12. Article XXI(b) GATT.
13. Ibid subparagraph XXI(b)(iii).

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through constitutional rules and institutions of a higher legal rank are central tasks of constitutionalism. In his *Theory of Justice* (1971), the American philosopher John Rawls described constitutionalism as a 'four-stage sequence' as reflected in the history of the US constitution: reasonable citizens, after having agreed (1) on their constitutional 'principles of justice' (eg in the 1776 US Declaration of Independence and Virginia Bill of Rights), (2) elaborate national Constitutions (eg the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions, (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens, and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights, rule of law and rule-compliance by citizens.[14] Globalisation transforms ever more *national* into *transnational PGs* (like human rights, the rule of law and most SDGs) requiring multilevel governance and multilevel constitutional restraints on abuses of power beyond such national 'four-stage sequences'. Yet the universal recognition of human rights, democratic governance and rule of law by UN Member States have not prevented many governments from violating human and democratic rights and the rule of law inside their jurisdictions due to insufficient implementing of legislation, administration and adjudication protecting human rights. Constitutionalism can effectively protect human and constitutional rights only as a dynamic struggle of citizens (*démocratie de tous les jours*) institutionalising public reason and constitutionally protecting respect for constitutional principles (like those recognised in UN law) in multilevel legislation, administration, adjudication and regulatory competition. As emphasised by the UN, the rule of law at national and international levels of governance cannot be effectively protected without democratic and judicial remedies also protecting respect for human rights.[15]

In European integration among constitutional democracies, the demands by EU citizens for regional and global PGs transformed *national* into *multilevel constitutionalism* extending the national 'four-stage sequence' to: (5) international law; (6) multilevel governance institutions; (7) communitarian domestic law effects of EU rules (like legal primacy, direct effects and direct applicability by citizens); and (8) domestic implementation of EU law inside Member States protecting PGs across national borders. The Lisbon Treaty's (Treaty on European Union (TEU)) commitment (eg in Articles 3(5) and 21(1) and 2(b))[16] to protecting human rights and the rule of law also in the EU's external relations contributed to the worldwide recognition of multilevel judicial protection of the rule of law in trade and investment agreements through compulsory WTO adjudication and investment adjudication. Yet transforming *national* into *multilevel constitutionalism* remains resisted by authoritarian rulers defending their self-interests in discretionary powers without legal accountability towards citizens. The more authoritarian politics (eg in China and Russia) impose public disinformation, the fewer citizens remain capable of defending constitutional, parliamentary, participatory and deliberative democracy, and public reason.

European law and the emergence of 'illiberal' EU Member States (eg in Hungary and Poland) illustrates why the 'normative pull' of human rights depends on their

14. John Rawls, *A Theory of Justice* (rev edn, Harvard University Press, Cambridge MA 1999) 171–176.
15. Report of the Secretary-General, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels' (30 March 2012) UN Doc A/66/749.
16. Consolidated version of the Treaty on European Union [2016] OJ C202/13.

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'normative push', ie their effective legal implementation through (1) constitutional law, (2) democratic legislation, (3) administration, (4) adjudication supporting 'public reason', (5) international treaties, (6) multilevel governance institutions, (7) 'secondary law' of international institutions (such as the jurisprudence of European economic and human rights courts), and (8) its domestic legal implementation. The limitation of EU membership to constitutional democracies and the democratic, judicial and regulatory EU institutions promoted citizen-driven enforcement in EU law of constitutional guarantees of civil, political, economic and social rights, and common-market freedoms (like free movements of goods, services, persons, capital and related payments, and freedom of profession), which the more than 450 million EU citizens never enjoyed before the creation of the European community. European economic law became embedded and restrained by multilevel human and constitutional rights of EU citizens protected by multilevel constitutional, democratic and judicial institutions and treaty systems, such as the EU Charter of Fundamental Rights (EUCFR),[17] the European Convention on Human Rights (ECHR),[18] the EU's common-market constitution, its partial extension to the EEA, the EU's incomplete monetary constitution, and its functionally limited 'foreign policy constitution'.[19] The democratic, judicial and other institutional 'checks and balances' constraining 'executive emergency governance' inside the EU during economic, financial, public health and environmental crises confirmed how HRL can become more effective if citizens can invoke and enforce precise, unconditional, international rules inside States and challenge power politics (eg by judicial remedies of citizens in national and European courts). It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation was adopted. Notably, the European climate law approved in June 2021, and the 13 legislative EU Commission proposals published on 14 July 2021, aim at making Europe the first carbon-neutral continent by 2050;[20] they offer leadership inside and beyond Europe for implementing the Paris Agreement on climate-change mitigation. After the illegal US blocking of the appointment of the WTO Appellate Body (AB) judges rendered the AB incapable in December 2019 of accepting new appeals, the EU law requirement of promoting the EU's constitutional principles (like the rule of law) also in the EU's external relations prompted the EU initiative for a plurilateral WTO appeal arbitration system based on Article 25 of the WTO Dispute Settlement Understanding, now accepted by more than 50 WTO Member States. Multilevel constitutionalism in internal and external EU relations remains a major driving force for strengthening the international rule of law and human rights in multilevel governance of the SDGs (eg by insisting on the protection of human rights and of the SDGs in EU trade agreements). This is empirically confirmed also by the EU's prompt economic sanctions in response to Russia's illegal invasions of Ukraine and by the EU's humanitarian assistance, since spring 2022, to millions of Ukrainian refugees seeking shelter from Russian military aggression.

17. Charter of Fundamental Rights of the European Union [2016] OJ C202/389.
18. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).
19. Petersmann (n 6) ch 5; Kaarlo Tuori, *European Constitutionalism* (CUP, Cambridge UK 2015) 289. European HRL remains, however, imperfectly protected (eg vis-à-vis migrants and refugees seeking protection inside the EU).
20. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L243/1 ('European Climate Law') art 2.

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4 CONSTITUTIONAL PLURALISM DOES NOT EXCLUDE MULTILEVEL CONSTITUTIONALISM

The above-mentioned four- and eight-stage sequences of constitutionalism are devices for applying agreed constitutional principles of justice for constraining legal systems from different perspectives of justice, 'each point of view inheriting the constraints adopted at the preceding stage'.[21] Hence the legal design of democratic legislation protecting SDGs should respect and remain constitutionally and institutionally restrained by the diverse constitutional and international legal principles and institutional restraints democratically agreed upon at the eight different levels of multilevel governance. Consequently, all national Constitutions and multilevel governance regimes differ depending on the path-dependent histories and democratic preferences of the people concerned. At each of the eight successive 'constitutionalisation processes', diverse democracies and their 'constitutional politics' may take diverse value decisions. Just as multilevel governance of *transnational PGs* is based on hundreds of separate, multilateral agreements, so must the question of 'constitutionalising' related treaty provisions (eg on the dispute settlement and rule of law safeguards) be examined separately for each treaty regime. For example, European courts and increasingly also climate litigation outside Europe acknowledge greenhouse gas (GHG) reduction obligations of governments by invoking multilevel GHG reduction commitments recognised in UN law and domestic politics.[22] Investor-State arbitration (ISA) awards based on more than 3,200 bilateral or multilateral investment agreements tend to be legally enforceable in national courts. Yet multilateral environmental agreements tend to provide for more flexible dispute settlement procedures compared with trade and investment adjudication. Moreover, as illustrated by the US$15 billion compensation claim filed in 2021 by Canadian company TC Energy challenging President Biden's cancellation of the Keystone XL oil pipeline and the potential conflicts between fossil-fuel-based energy investments invoking the protection standards of the Energy Charter Treaty (ECT) challenging climate mitigation measures by host States,[23] ISA can undermine climate-change mitigation and other SDGs if the arbitrators disregard international environmental law.[24] According to the Court of Justice of the European Union (CJEU), ISA is no longer consistent with the judicial remedies under EU constitutional law in relations among EU Member States.[25] Arguably, the systemic treaty interpretation requirements codified in the Vienna Convention on

21. Rawls (n 14) 176.
22. Petersmann (n 6) ch 9; Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill, Leiden 2021) part 1.
23. Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 Title 1–2.
24. Claudia Müller-Hoff and Laura Duarte, 'Don't Stick to a Fossil Treaty – Pull the Plug on the Energy Charter Treaty' (Völkerrechtsblog, 31 January 2022) <voelkerrechtsblog.org/dont-stick-to-a-fossil-treaty-pull-the-plug-on-the-energy-charter-treaty/> accessed 24 August 2022; Camilla Hodgson, 'European Energy Groups Seek €4bn Damages Over Fossil Fuel Projects' (Financial Times, 21 February 2022) <www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab> accessed 24 August 2022. The latter article reports that five energy groups are suing four European governments for around €4 billion over restrictions of coal, oil and gas projects as climate-change concerns rise, using the secretive ECT arbitration procedures.
25. Case 284/16 *Slowakische Republik v Achmea BV* [2018] ECR 158; see Petersmann (n 6) chs 7 and 8.

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the Law of Treaties[26] require governments and judges to construe multilevel trade, investment and environmental regulation in conformity with the WTO and SDG commitments to 'sustainable development' and HRL for the benefit of citizens. Yet, just as States have ratified and implemented UN human rights conventions in diverse ways in accordance with their particular legal and governance traditions and democratic preferences, so the 'sustainable development policies' of particular States confronted with particular resource problems, regulatory and constitutional challenges remain.

4.1 Need for challenging 'constitutional implementation deficits'

From the perspective of the 'eight-stage constitutionalism' underlying European integration law, most UN and WTO agreements are insufficiently 'constitutionalised' in terms of parliamentary implementing legislation, administrative and judicial protection of human rights, the rule of law, and enforceability of UN/WTO rules by citizens. For instance, labour and health rights based on the 'constitutions [sic]' establishing the ILO, WHO and UN human rights conventions cannot be effectively enforced by citizens in many UN Member States. The US disruption of the compulsory WTO dispute settlement system, and authoritarian disregard for human rights in China and Russia, illustrate how insufficient institutional 'checks and balances' facilitate abuses of executive powers undermining UN and WTO treaty systems. As already explained by Kantian legal philosophy, 'democratic peace' among national legal and political systems cannot be secured by 'international law' as long as discretionary policy powers are not constitutionally constrained also by cosmopolitan human and constitutional rights and judicial remedies protecting humanity.[27] The 'telecommunications revolution' enables 'weaponisation' of social media, politics, and undeclared civil wars (eg through abuses of artificial intelligence, China's data-driven 'surveillance capitalism' and 'social credit systems' for individuals and corporations, electronic disinformation, computer hacking and subversion), multiplying the constitutional reasons for limiting social conflicts and related abuses of power through multilevel constitutionalism, civilising, stabilising and legitimising multilevel governance of PGs.[28]

As human rights protect individual and democratic diversity, the permanent fact of diverse moral, religious and political 'worldviews' of citizens entails the need for respecting 'constitutional pluralism'; 'public reason' must be institutionalised so that citizens support multilevel governance of PGs (like climate-change mitigation) in spite of their diverse moral beliefs. Multilevel constitutionalism must build upon an 'overlapping consensus' respecting legitimate diversity of cultures and individual values. For example, in contrast to the social contract theories proposed by Thomas Hobbes (eg interpreting social contracts as submission to the absolute powers of monarchs protecting social peace) and by Jean-Jacques Rousseau (eg interpreting social contracts as submitting free and equal citizens to the 'general will' of democratic legislators), the US founding fathers were inspired by John Locke's conception of social contracts among citizens delegating only limited governance powers restrained by human and constitutional rights retained by citizens, as specified in the US bill of rights added to the US constitution in 1791. Multilevel constitutionalism for limiting

26. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 31–32.
27. Petersmann (n 8) 135 and 169.
28. Mark Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War* (Yale UP, New Haven CT 2022) chs 2–9.

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abuses of power and protecting human rights in multilevel governance of PGs must respect legitimate 'constitutional pluralism' (eg in Anglo-Saxon neoliberal democracies and European ordoliberal constitutionalism) within multilaterally agreed limits. If Chinese forced-labour practices violate UN HRL, and Russia's invasions of Ukraine undermine the sovereignty principles underlying UN/WTO law, UN and WTO Member States must defend the international rule of law. Successful, rights-based climate litigation in Europe and conditional membership in 'climate protection clubs' illustrate how 'environmental constitutionalism' can pressure governments to reduce GHG emissions and phase out coal subsidies.[29]

4.2 Disagreements on human rights do not prevent the transnational rule of law

Many authoritarian governments invoke UN principles (such as 'sovereign equality of States' and 'non-intervention' into domestic affairs) as 'shields' against external criticism (eg suppression of human and minority rights in China and Russia). The disagreements among the five veto-powers in the UN Security Council on the scope of UN HRL also reflect the selective ratification and domestic implementation of UN human rights conventions:

- China ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) but not the UN Covenant on Civil and Political Rights (ICCPR) in order to shield its communist party's political monopoly;
- the USA ratified the ICCPR but not the ICESCR in view of US political preferences for business-driven neoliberalism and prioritisation of civil and political over economic, social and cultural rights;
- most European countries ratified both the ICCPR and the ICESCR; in contrast to the rejection by China and the USA of regional human rights conventions and human rights courts, they protect civil, political, economic, social and cultural rights also through regional HRL (like the ECHR and the EUCFR); and
- Russia suppresses human rights of political dissidents and democratic self-determination inside and beyond Russia (eg in former Soviet republics such as Ukraine).

This constitutional pluralism has not prevented Europe's multilevel constitutionalism from promoting the international rule of law, for instance, through EU initiatives for the compulsory WTO dispute settlement system and for ISA based on more than 3,000 investment protection treaties. Disagreements on human and constitutional rights limit the constitutionalisation of international law only in certain areas: judicial remedies for the transnational rule of law and impartial third-party adjudication of economic and environmental disputes remain of constitutional importance for sustainable development even if the relationships between HRL and international economic law (IEL) are often contested.

Similarly, UN rules on rights of self-defence (Article 51 UN Charter), HRL, international humanitarian law, and the neutrality rules codified in the 1907 Hague Conventions must be construed in mutually coherent ways to the effect that, for

29. Alogna et al (n 22); ENNHRI, *Climate Change and Human Rights in the European Context* (European Network of National Human Rights Institutions, 2021) 37 <ennhri.org/wp-content/uploads/2021/05/ENNHRI-Paper-Climate-Change-and-Human-Rights-in-the-European-Context_06.05.2020.pdf> accessed 24 August 2022.

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example, supplying defensive arms to Ukraine in its self-defence against the Russian invasion does not render the supplier country a party to the military conflict in the sense of international humanitarian law as long as it exercises no military force in the Ukraine war.[30] Constitutional democracies must collectively defend their constitutional values and the jus cogens prohibitions of the threat and use of military force (Article 2(4) UN Charter) against authoritarian crimes of aggression and related war crimes. Climate-change mitigation and other SDGs require third-party adjudication of the inevitable disputes over decarbonising and digitalising economies. Divergent conceptions of human rights and democracy do not exclude the transnational rule of law.

5 CONSTITUTIONAL ECONOMICS CONFIRMS THE NEED FOR CONSTITUTIONALISING INTERNATIONAL LAW

Max Weber's distinction of three sources of political authority (traditional, charismatic and rational–legal) explains not only today's reality that an increasing number of authoritarian legal and political regimes in Africa (such as Algeria or Zimbabwe), Asia (such as China and 'Eurasian autocracies'), Europe (such as Belarus, Russia and Turkey) and Latin-America (such as Cuba or Venezuela) remain dominated by traditional, populist power politics serving the self-interests of their ruling classes. It also accounts for the fact that the international legal practices of many authoritarian governments disregard UN law (eg in Russia's war against Ukraine), WTO law (eg in President Trump's trade war against China and against the WTO AB), and legally binding judgments of international courts (eg Russia's disregard for the 2022 preliminary orders of the International Court of Justice and European Court of Human Rights to suspend Russia's military aggression in Ukraine[31] or China's disregard for the arbitral award of July 2016 rejecting China's sovereignty claims over the South China Sea[32]). Standard economics focuses on the *homo economicus* and his utility-maximising *choices within rules* (pretending rules and institutions to be exogenously given and fixed). Constitutional economics (CE) considers constitutional, legislative, administrative and judicial *choices of rules*, their economic incentives, and their effects. In contrast to result-oriented macroeconomic 'Kaldor–Hicks efficiencies', CE proposes to define welfare standards more systematically (eg acknowledging adverse impacts of governance failures and 'constitutional failures' on economic welfare) and more inclusively (eg including fundamental rights, common-market freedoms, 'decent work', gender equality, the satisfaction of other basic needs, development of human capacities, sustainable development, and non-economic 'sovereignty costs'). CE explains why EU law includes competition, and environmental, social and constitutional rules of a higher legal rank aimed at limiting 'market failures'; yet CE and constitutionalism remain neglected by many economists and political scientists, and most international lawyers

30. Markus Krajewski, 'Neither Neutral Nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (Völkerrechtsblog, 9 March 2022) <voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/> accessed 24 August 2022.
31. Eg *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, Order (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) General List No 182 [2022] ICJ Rep 1.
32. *The South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*) (Award of 12 July 2016) XXXIII RIAA 153.

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and policy-makers, notwithstanding the importance of constitutional rules for overcoming conflicts between economic and political decision-making and institutionalising 'public reason' protecting shared, reasonable long-term interests (eg in sustainable development).[33] Constitutional questions of how to design and enforce rules and institutions in multilateral 'PGs treaties' remain under-researched.[34]

5.1 Positive and normative constitutional economics

Positive and *normative* economic analysis of (trans)national constitutional rules asserting a higher legal rank analyse the (economic) effects, the emergence and modification of constitutional rules (positive analysis), the legitimising foundation of constitutional rules at national and international levels of governance, and Pareto-optimising rule changes (normative analysis). *Positive CE* is interested in explaining (1) the emergence and modification of rules of a higher legal rank (such as the replacement of the GATT 1947 dispute settlement system with compulsory WTO adjudication) and (2) the outcomes of alternative constitutional rules (such as the compulsory WTO dispute settlement system and its more than 380 WTO dispute settlement findings since 1995).[35] *Normative CE* deals with questions of how societies should craft constitutional rules that fulfil certain criteria (like being just, fair and welfare-enhancing). It also explores which issues should be dealt with in constitutional rules (such as EU treaty rules on multilevel judicial governance) and which should be left to post-constitutional choices (such as private commercial arbitration).

Traditionally, these questions were analysed for Nation States. Exploring them for multilevel governance of PGs raises different problems of constitutional choices under international law. For example, can State consent legitimise international rules in ways similar to citizen consent to constitutional rules? Are UN Member States or their citizens the global *pouvoir constituent*? Does the permanent reality of political, economic, social and intellectual diversity of peoples and of 'reasonable disagreements' render unitary conceptions of constitutionalism (eg based on the 'trinity' of human rights, democracy, and the rule of law) utopian? What kind of constitutional pluralism do the diversity of national constitutions and the large number of competing international jurisdictions and tribunals require? Why was it possible that, from 1995 up until the illegal US destruction of the WTO AB in December 2019, all five permanent members of the UN Security Council complied with most WTO dispute settlement rulings notwithstanding their ideological conflicts in UN institutions?[36] Can the realities of international 'legal fragmentation' be tempered by 'systemic treaty interpretation' and adjudication by trade and investment courts protecting the transnational rule of law and reducing transaction costs in international trade and investments?

33. On CE, see Petersmann (n 6) ch 4; Voigt (n 10) ch 3.
34. Massimo Iovane, Fulvio M Palombino, Daniele Amoroso and Giovanni Zarra (eds), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (OUP, Oxford 2021) chs 5–7.
35. Ernst-Ulrich Petersmann and Armin Steinbach, 'Neo-Liberalism, State-Capitalism and Ordo-Liberalism: "Institutional Economics" and "Constitutional Choices" in Multilevel Trade Regulation' (2021) 22 Journal of World Investment & Trade 24.
36. Ernst-Ulrich Petersmann, 'Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System' (2021) 38 Chinese (Taiwan) Yearbook of International Relations 4, 7.

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5.2 Rational versus reasonable public choices

Public reason, based on inclusive reasoning respecting human dignity and human rights, differs from the cost–benefit analyses underlying rational utility-maximisation. 'Brexit', and the US withdrawal from multilateral treaties under President Trump, illustrate that populist, democratic governments may also disrupt regional treaty constitutions (such as the TEU) and worldwide treaties protecting PGs (such as the WHO Constitution, the WTO, and the 2015 Paris Agreement on climate-change mitigation). Both within and between States, economic and political constitutionalism remains challenged by power politics, revealing the 'dark sides' of human beings (such as violence and egoism) and social conflicts among competing groups. Authoritarian governments often undermine compliance with UN law by not protecting human rights in domestic legislation, administration, and judicial remedies. In democracies, the 'regulatory competition' between the EU, the EEA and the European Free Trade Area (EFTA) illustrates how respect for 'constitutional pluralism' may promote mutually beneficial, economic and political synergies. Russian power politics dominating the Eurasian Economic Community among formerly Soviet republics, such as China's totalitarian State-capitalism dominating its bilateral economic cooperation with 'Belt and Road' partner governments, provoked 'systemic geopolitical conflicts' with WTO Member States (eg over discriminatory State trading, government procurement, and disruptive internet practices). Why is it that China and the EU have continued to cooperate in the WTO Multilateral Interim Appeal Arbitration procedures since 2020, while Russia and the USA have not joined? Are 'constitutional procedures' suitable for coordinating specialised international bodies, diverging special branches of international law, and *sectoral constitutions* (such as diverse common-market constitutions, monetary constitutions, regional human rights, and judicial systems)? Will the collective sanctions by democratic States against Russia's inhumane wars in Ukraine (such as Russia's suspension from the Council of Europe and from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system, and the freezing of Russian foreign-exchange reserves by democratic governments based on the customary rules on countermeasures against *erga omnes* violations of UN law) strengthen collective security systems? Can UN/WTO agreements be effective as long as veto powers continue being abused (eg for undermining WTO third-party adjudication), and domestic implementation of UN and WTO legal obligations inside States remains a matter of executive discretion?

6 ENVIRONMENTAL CONSTITUTIONALISM?

Positive and normative CE are important for improving the design of multilevel governance of transnational PGs like climate-change mitigation and the implementation of other SDGs. Environmental experts argue for new forms of c*onstitutionally more constrained governance* of the 'anthropocene' in order to better respond to rational, albeit unreasonable, economic and political choices that entail climate change and environmental pollution.[37] Rights to the protection of the environment are now recognised in the laws of more than 150 States, regional treaties, and by the UN Human Rights Council (HRC).[38]

37. Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, London 2016) 201.
38. United Nations Human Rights Council Res 48/13, 'The Human Right to a Safe, Clean, Healthy and Sustainable Environment' (8 October 2021) UN Doc A/HRC/48/L.23/Rev.1.

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Environmental and human rights have been invoked by litigants all over the world in hundreds of judicial proceedings on the protection of environmental interests over the past years.[39] In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights and constitutional principles. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda*[40] (a Dutch NGO suing the State on behalf of around 900 citizens) confirmed the 2018 Court of Appeals judgment that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25 per cent (compared to 1990 levels) by the end of 2020. The judgment clarified that HRL (eg the ECHR) and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens in order to enforce positive obligations to take appropriate measures mitigating climate change. Yet UN Member States continue to disagree on the draft UN Global Pact for the Environment and related constitutional principles for multilevel protection of the environment. International diplomats and environmental lawyers also disagree on whether multilevel environmental governance should focus on anthropocentric or on ecocentric conceptions of 'sustainable development'. The 'European climate law', adopted by the European Parliament and European Council in June 2021, can serve as a model for making the EU goals of cutting GHG emissions by 55 per cent by 2030 (compared with 1990 levels) and reaching climate neutrality by 2050 legally binding. Yet other UN Member States may neither be willing nor capable of following this EU leadership for environmental law reforms. In the USA, for instance, positive human and constitutional rights to a healthy environment and to governmental protection against climate change tend to be denied by US courts on grounds of judicial deference towards 'political questions' left open in the US constitution and not yet decided by the US Congress.[41]

Global regulatory challenges (like inventing and distributing vaccines for everybody, decarbonisation, de-plastification, and digitisation of economies) require private–public partnerships, civil society support, judicial protection of the transnational rule of law, and adjustments of UN, WTO and regional legal and political systems. Politicians struggle with regulating market failures (such as financial and digital empires claiming to have become 'too big to fail'), governance failures (such as moral hazards and corruption in non-compliance with environmental law and human rights) and responding to new regulatory challenges (eg of global health and migration crises). For instance, the EU's 'Digital Services Act', adopted on 23 April 2022, sets out unprecedented new standards for the legal accountability of online platforms protecting internet users and their fundamental

39. Pau de Vilchez Moragues and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?' (2021) Law and Philosophy Working Paper, 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3829114> accessed 24 August 2022.
40. De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) tegen Stichting Urgenda, Hoge Raad der Nederlanden, Civiele Kamer, Nummer 19/00135, 20 December 2019.
41. Daniel C Esty, 'Should Humanity Have Standing? Securing Environmental Rights in the United States' (2022) 95 University of Southern California Law Review (forthcoming). In 2022, the US Supreme Court rendered several judgments interpreting constitutional rights from narrow, historical perspectives and limiting executive powers delegated to regulatory agencies (such as the Environmental Protection Agency) unless Congress had decided the underlying 'political questions'.

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rights against illegal and harmful content.[42] Global UN and WTO governance (eg also of the internet and electronic commerce), however, remain dominated by power politics resulting in market distortion (such as anti-competitive practices, pollution, and social injustices), governance failures (eg in regulating giant technology firms, tax avoidance, carbon emissions) and constitutional failures (eg in protecting human rights and the rule of law beyond State borders). Incoherent governance contributing to human disasters remains frequent (as currently in Afghanistan, Haiti, Lebanon, Russia, Venezuela and other UN Member States). Authoritarian rulers justify their opposition against constitutional restraints (eg in China's techno-authoritarian, data-driven surveillance capitalism monitoring and directing people to an unprecedented degree through government-controlled cyber networks and police surveillance) by allegedly better 'survival governance' (eg imposing COVID-19 lockdowns). Constitutionally restrained leaders in democracies may lack majority support for similar, authoritarian responses to health and climate emergencies. Yet the centuries of historical abuses of monarchical powers and 'unbound executive emergency governance' confirm the constitutional wisdom of limited delegation, separation, and institutional checks and balances of governance powers, including emergency powers used and abused in health and environmental emergencies.

CE refutes nationalist propositions to view legal restraints on policy discretion as a 'sovereignty cost' (eg justifying 'Brexit'), just as most GATT/WTO rules only prohibit welfare-reducing 'third-best policy instruments' (such as discriminatory non-tariff trade barriers), national and international constitutional rules prioritise 'first-best policy instruments' (such as equal market freedoms, non-discriminatory competition rules, monetary stability, the rule of law, human and property rights, and judicial remedies) that tend to be welfare-enhancing preconditions for protecting PGs. The almost universal membership in the Bretton Woods institutions and WTO confirms the insight that no country is rich enough to ignore citizen-driven market mechanisms, market-conforming policy instruments (such as floating exchange rates and tariffs) and (inter)national, legal self-commitments to rules of a higher legal rank promoting efficient uses of scarce resources. Behavioural economics and politics explain why constitutional self-restraints ('hands-tying') limiting 'market failures', 'governance failures' and 'constitutional failures' (such as insufficient protection of human rights, and political monopolies) are preconditions for protecting PGs effectively. The more globalisation renders distinctions between *foreign* and *domestic policies* unrealistic, the more citizens must accept cosmopolitan responsibilities for protecting global PGs beyond State borders. Overcoming alleged conflicts among 'State interests' requires prioritising the shared human interests of reasonable citizens and recognising the transnational nature of ever more PGs, which require constitutional reforms of intergovernmental power politics. Yet, following the US destruction of the WTO AB system in December 2019 and the increasing criticism of investor-State arbitration (eg under the Energy Charter Treaty), can the UN and WTO laws prevent or settle the inevitable disputes over trade, investment, energy and climate conflicts through the rule of law without functioning, compulsory UN/WTO dispute settlement systems, especially if the EU should unilaterally introduce 'carbon border adjustment mechanisms' as of 2023 if such 'CBAMs' cannot be multilaterally agreed?

42. European Commission, 'Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment' (23 April 2022) <ec.europa.eu/commission/presscorner/detail/en/IP_22_2545> accessed 24 August 2022.

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7 SECTORAL REPUBLICAN CONSTITUTIONALISM AS A FUNCTIONAL COMPLEMENT OF NATIONAL CONSTITUTIONALISM

The legal transformation of the world into networks of interdependent Nation States resulted from centuries of cultural evolution and violent conflicts within and between societies. The human desire for legal legitimacy (justice), economic efficiency (welfare), democratic acceptability of governments, and social solidarity entails that (even if globalisation and the universally agreed SDGs require multilevel governance institutions) Nation States will remain political foundations of civil, political and legal cultures. The transformation of *national* into *transnational* and *global PGs* sets incentives for citizens to limit their 'rational ignorance' towards the increasingly multilevel, global nature of politics, economics, law-making, and related struggles for 'constitutionalising' power and multilevel governance of PGs.[43] This contribution explained why national 'constitutionalism 1.0' cannot protect global PGs without complementary, functionally limited treaties among States constituting, regulating and justifying multilevel governance of transnational PGs; yet the input and output legitimacy of such 'republican treaty constitutions 2.0' among States depend on multilevel governance remaining democratically and constitutionally embedded and accountable towards citizens and their diverse, 'democratic' institutions. The post-1945 world order treaties (such as the UN Charter, the Bretton Woods Agreements, the UN Convention on the Law of the Sea, and the Agreement establishing the WTO) have not prevented geopolitical rivalries among neoliberal, authoritarian, ordoliberal constitutional and 'third world conceptions' of regulation. 'Brexit' illustrates that the EU's 'cosmopolitan constitutionalism' empowering EU citizens remains contested also in democracies: the needed transformation of national 'four-stage constitutionalism' into multilevel constitutionalism requires never-ending 'struggles for justice', which often fail, as illustrated also by the disappointing results of the COP26 climate-change conference in Glasgow in November 2021.

Regulating PGs and 'club goods' with limited membership, exhaustible common pool resources, and 'global commons' (such as outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, and cultural heritage) must respond to diverse collective action problems. The 15 UN Specialized Agencies provide for diverse, functionally limited 'treaty constitutions' for multilevel governance of specific PGs; constitutional restraints on intergovernmentalism (such as the tripartite ILO governance structures and the compulsory WTO dispute settlement system) improved the legitimacy and effectiveness of governance institutions, for instance, by linking specific treaty objectives (such as protecting decent work conditions) to the labour and human rights universally recognised in UN law. 'Open access regimes' for the 'global commons' share common principles (such as non-appropriation, common management, peaceful use, openness to scientific research, benefit- and burden-sharing, and the protection of the environment), but their regulation also necessitates treaty rules, institutions and restraints responding to specific regulatory challenges, including safeguards of human rights, related principles of justice, and judicial remedies (eg protecting 'systemic interpretation' and the rule of law). European integration illustrates how evolutionary constitutionalism (eg as clarified in the jurisprudence of European courts on general principles of EU law) and functionally

43. Rational ignorance results from the choice of most individuals to prioritise their individual, social and economic spheres of development over their political participation in governing PGs. Many individuals also prioritise their rational self-interests and sentimental joys over their cosmopolitan reasoning.

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limited 'treaty constitutions' constituting, limiting, regulating and justifying multilevel governance of PGs interact in complex ways. Their success depends on institutionalising 'public reason' and mobilising civil society support (eg for decarbonising economies, supplying vaccines worldwide and defending the rule of law) for transforming 'ideal' into 'real' constitutions.

Ordoliberalism emphasises the need for coherent limitations of 'market failures', 'governance failures' and 'constitutional failures' through 'constitutional constructivism'. Comparative constitutional studies of regional integration systems confirm that regional economic organisations and common markets function more effectively if they protect legitimacy through regional 'human rights constitutions' (such as the ECHR and EUCFR), 'common-market freedoms', competition rules and judicial remedies. Ordoliberal conceptions of economic organisations, free trade areas, and customs unions aimed at protecting 'social market economies' (such as the EEA and EU) are democratically and socially better capable of promoting structural changes (such as decarbonisation and digitalisation of economies, and provision of vaccines to everybody in health pandemics), and of resisting 'regulatory capture', than money and business-driven, neoliberal free trade agreements. Neoliberal conceptions relying on markets as self-regulatory 'natural orders' are contested also in North America, where governments increasingly limit market failures (eg by protecting workers and public health).[44] Yet business-driven economic regulation remains much more influential in the USA (eg due to business-financing of democratic elections, only selective enforcement of US antitrust laws) compared with the multilevel, economic, and human rights constitutionalism inside the EU.

Human rights require constituting governmental legitimacy 'bottom up' through citizen-driven national constitutions, democratic legislation, and administrative and judicial protection of the rule of law. Extending this path-dependent 'constitutionalism 1.0' to multilevel governance of transnational PGs requires respect for legitimate constitutional pluralism and defending the transnational rule of law (like compulsory trade and investment adjudication) against power politics (such as US destruction of the WTO AB based on disinformation about alleged 'judicial over-reach' and Russia's disinformation of civil society on its war in Ukraine). As constitutional nationalism fails to protect citizens against external human disasters (such as global health pandemics, climate change, and military aggression), cosmopolitan rights and remedies are necessary incentives for citizens to participate in the multilevel governance of transnational PGs. Executive withdrawal (eg by President Trump) from multilateral PGs treaties and illegal, executive disruption of judicial accountability (eg in the WTO) reflect insufficient democratic control over parliamentary restraints on foreign policy powers. Additional accountability mechanisms (such as parliamentary and judicial remedies, science-based health, and environmental institutions) are needed for protecting transnational PGs. Promoting PGs requires democracies to push for more legal and democratic accountability in international legal practices as prescribed in the TEU (Articles 3 and 21) and acknowledged also in the UN SDA which seeks to promote and defend human rights, democratic governance, the rule of law, and SDGs in external relations for the benefit of humanity. From such constitutional perspectives, power

44. The recent support by the International Monetary Fund (IMF) and the World Bank of activist fiscal, economic, health and environmental policies in response to the global health pandemic and climate change, illustrates how distinctions between 'neoliberalism', 'State-capitalism' and 'ordoliberalism' refer to policy trends that elude precise definitions and (like the 'Washington Consensus') continue to evolve.

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politics denouncing 'PGs treaties' as mere intergovernmental bargains, abuses of legal privileges (such as veto-powers in the UN Security Council and the WTO Dispute Settlement Body), and denying that cosmopolitan rights are signs of 'governance failures', which citizens must challenge by imposing constitutional restraints protecting human rights and related PGs more effectively.

8 CONCLUSION: NEED FOR 'MILITANT DEMOCRATIC DEFENCES' AGAINST POWER POLITICS

Most constitutional democracies emerged from internal civil wars or external anti-colonial struggles to overcome abuses of power. The Russian military threats and invasions into neighbouring countries confirm this historical lesson that survival of democracy may require 'democratic wars of independence'. Europe's peaceful economic union may also survive only by integrating Europe's multilevel democratic constitutionalism more strongly with NATO's democratic defence alliance. Similarly, realising the SDGs requires more active civil society struggles against the ubiquity of market failures, governance failures and 'constitutional failures' endangering human welfare. If governance failures, as defined in UN and WTO laws, are not constitutionally restrained or limited by countermeasures, the institutionalisation of public reason and of civil society support for PGs may fail. Merely criticising power-oriented conceptions of 'international law among sovereign States' for privileging the self-interests of governments and contributing to the 'collapse of global government' without proposing institutional and constitutional reforms of multilevel governance of PGs continues our collective failure to learn from the history of constitutionalism for protecting PGs, which no State can protect without international law and multilevel governance institutions embedded into multilevel constitutionalism.[45] This contribution has suggested lessons from constitutionalism and CE for constitutional reforms of international law that would strengthen mutual cooperation among democratic States and their common defences against abuses of power by authoritarian States. Even though Europe's multilevel constitutionalism has enabled unprecedented decades of democratic peace and social welfare among the 30 EEA Member States, this contribution has acknowledged the imperfections of European integration law and the need for respecting constitutional pluralism justifying diverse forms of national and regional constitutional reforms.

The 2030 UN SDA recommends principles of constitutionalism for protecting human rights and the rule of law in the UN governance of PGs. Yet constitutional, parliamentary, deliberative and participatory democracy remain underdeveloped in respect of UN governance; the 'constitutional implementation deficits' in authoritarian and many less-developed States entail 'SDG implementation deficits' like domestic legislation, administration and adjudication denying human rights,

45. For my criticism of Martti Koskenniemi's 'legal deconstruction' based on 'argumentative interpretation games' and Philip Allott's 'institutional agnosticism' towards the needed reforms of international law and institutions, see Ernst-Ulrich Petersmann, 'Self-Constitution of Mankind Without Constitutional Constructivism?' (EJIL Talk!, 4 January 2022) <www.ejiltalk.org/self-constitution-of-mankind-without-constitutional-constructivism/> accessed 24 August 2022; Ernst-Ulrich Petersmann, '"Constitutional Constructivism" for a Common Law of Humanity? Multilevel Constitutionalism as a "Gentle Civilizer of Nations"' (2017) MPIL Research Paper Series No 2017-24, 10–11 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3054442> accessed 24 August 2022.

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democratic self-determination, and compliance with UN law (such as jus cogens prohibitions of military aggression and war crimes committed by Russia in Ukraine). As input-legitimacy must be protected 'bottom up', national 'constitutionalism 1.0' (eg based on national constitutions, democratic legislation, and administrative and judicial protection of the rule of law) must be extended to international law and institutions for protecting PGs. Maintaining the output-legitimacy of functionally limited 'treaty constitutions 2.0' among States requires 'cosmopolitan constitutionalism 3.0' based on institutional protection of rights of citizens, the transnational rule of law, and multilevel implementing regulations (eg enabling international courts to protect citizens against human rights violations by their own governments). Multilevel protection of international PGs requires linking UN/WTO agreements protecting SDGs to domestic implementing legislation, administration and judicial remedies empowering citizens, thereby demonstrating to citizens the 'constitutional functions' of UN/WTO law for overcoming collective action problems in multilevel governance of PGs, limiting bounded rationality and enhancing input-legitimacy and output-legitimacy of multilevel governance of transnational PGs. Constitutional nationalism cannot protect global PGs without complementary, functionally limited 'constitutionalism 2.0 and 3.0' transforming path-dependent 'four-stage sequences' of constitutionalism into multilevel, constitutionally justified governance of transnational PGs. Yet such plurilateral agreements among like-minded countries integrating national, international and cosmopolitan constitutional safeguards of PGs (like the SDGs) for the benefit of their citizens will inevitably differ among people willing to defend their human rights. Authoritarian rulers abusing State power for suppressing human rights and democratic constitutionalism within and beyond their jurisdictions are the biggest obstacle to realising the SDGs and 'enlightenment now'.

Protection of human rights and of 'democratic peace' within and between countries requires citizens to struggle for stronger democratic and republican constitutionalism, embedding national, international and cosmopolitan constitutionalism into coherent, 'demoi-cratic' theories respecting legitimate constitutional pluralism. The reciprocity principles underlying international law promote progressive learning processes, for example by justifying collective countermeasures responding to authoritarian rule violations. In Putin's war against Ukraine, the collective sanctions responding to Russia's violations of the prohibition of the use of force (Article 2(4) UN Charter), like the exclusion of Russian banks from the SWIFT ushering in, inter alia, the freezing of large amounts of foreign-exchange reserves held by the Russian central bank in foreign jurisdictions, could strengthen the UN collective security system, for instance, if NATO countries would clarify the customary rules on countermeasures against illegal aggression to the effect that the frozen central-bank assets of aggressor States can be used for compensating the victims of aggression and war crimes. The more geopolitical rivalries among authoritarian and democratic governments prevent consensus-based reforms of UN/WTO law, the more necessary become plurilateral reforms of multilevel governance of PGs by like-minded democracies. Just as the 'animal nature' of human beings necessitates perennial 'struggles for justice' in national politics, the same social and political antagonisms require democratic States to defend their constitutionally agreed principles of justice also in their external relations with other States, as prescribed in the TEU for the external relations of the EU (cf. Articles 3 and 21 TEU) and universally acknowledged in the UN SDA commitments to protecting human rights, democratic governance, the rule of law, and PGs for the benefit of all humanity. Unless citizens and democracies actively defend liberal constitutional principles against authoritarian power politics and tyrannic governments, human rights,

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and related SDGs (such as protection of the environment and public health) cannot be effectively protected. Democratic self-constitution of humanity risks remaining a *utopia*; multilevel democratic constitutionalism (*eunomia*) protecting democratic peace and SDGs remains, however, possible, at least among 'willing countries' ready to defend human rights and democratic constitutionalism against abuses of power. Yet the more geopolitical rivalries lead to the invocation of 'security exceptions' (such as Article XXI GATT), limiting the scope of global cooperation, the more protection of global PGs (like the SDGs) risks remaining limited. The abuses (eg by veto-powers) in UN and WTO governance practices suggest that HRL and IEL will also remain imperfect legal safeguards in the struggles of people to defend their human rights and related PGs.

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