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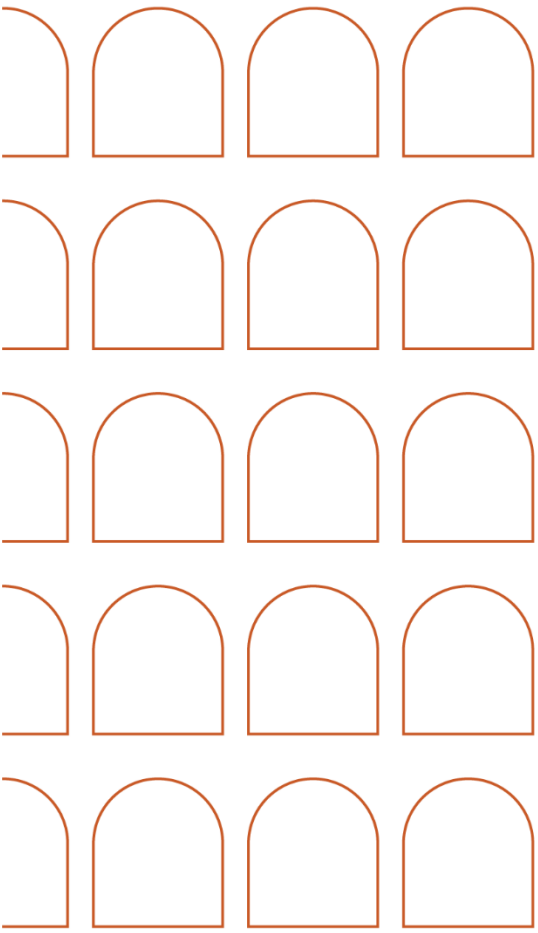

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European Economic and Environmental Constitutionalism as Driver for UN and WTO Sustainable Development Reforms

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Abstract

The Introduction recalls why the progressive transformation of European economic integration law into European community and constitutional law remains the most successful example for using *regional* law and jurisprudence for promoting also *global* community law. Section I explains why authoritarian and neoliberal rejection of "transnational constitutionalism" undermines collective protection of global public goods demanded by citizens. Section II describes how Europe's multilevel democratic constitutionalism continues to enable the European Union to exercise leadership for UN and WTO legal reforms such as compulsory WTO adjudication and international emission trading systems aimed at mitigating climate change by reducing carbon emissions. Section III uses the examples of competing internet regulations in China, Europe and the USA, and of international criminal law (like the arrest warrant of the International Criminal Court against Russian President Putin), for explaining the limits of constitutional and institutional restraints on UN and WTO governance.

Keywords

carbon border adjustment mechanism; climate change mitigation; constitutionalism; European Union; sustainable development; UN; WTO

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Introduction: From Regional to Global Community Law?

Human societies approach socio-political ideas and institutions from "paradigms of thought" shaped by the human desire for individual and democratic autonomy and for communitarian cooperation (e.g. in cities, states and hundreds of international organizations) aimed at protecting public goods (PGs). As long as relations between homogeneous communities were governed by unruly power politics, each community was considered more valuable than the individuals composing them.[1] Changing international law and institutions required new paradigms such as the democratic and republican "enlightenment revolutions" since the 18th century and the "human rights revolution" initiated by the United Nations (UN), its Universal Declaration of Human Rights (UDHR 1948), and UN human rights conventions prioritizing civil, political, economic, social and cultural rights of all human beings as constitutional limitations of democratic self-government and governmental "duties to protect" free and equal individuals. This *Global Community Yearbook of International Law and Jurisprudence* explores the global communitarian paradigm, advanced by its editor Professor Giuliana Ziccardi Capaldo in her editorials since its first 2001 edition, that UN law (e.g. on human rights, international criminal law) and the "UN global governance model" are based on "global constitutional principles" (like rule of law, protection of human rights, democracy, separation of powers, checks and balances, judicial review) which require conceiving the global community as a "universal human society".[2] This conception is endorsed by the constitutional principles of European Union law enumerated in Article 2 of the Lisbon Treaty on European Union (TEU), which defines the Union as being "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", in a European "society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." These multilevel, constitutional principles and "imaginaries" of UN and EU law are based on subsidiarity principles protecting also "the domestic jurisdiction of any state" (Article 2:7 UN Charter) and their "national identities" (Article 4 TEU); similarly, the "EU citizenship" of some 450 million EU citizens respects their diverse national citizenships and democratic self-government inside the 27 nation states composing the EU.[3] *Section I* explains why the long history from ancient and medieval constitutionalism to modern, multilevel European constitutionalism based on equal human rights has enabled democratic support by EU citizens for common EU principles and a European community governed by democratic EU institutions rejecting authoritarian and Anglo-Saxon claims that transnational constitutionalism – based on international agreements approved by domestic parliaments and actively supported by citizens and by judicial remedies in courts of justice - lacks democratic legitimacy.[4]

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[1] Cf. Sergio Dellavalle, Paradigms of Social Order. From Holism to Pluralism and Beyond (2021).

[2] *Cf.* Giuliana Ziccardi Capaldo, *Facing the Crisis of Global Governance—GCYILJ's Twentieth Anniversary at the Intersection of Continuity and Dynamic Progress*, 20 GLOBAL COMMUNITY YILJ 2020 (Giuliana Ziccardi Capaldo General ed.) 5–16 (2021). See also Ernst-Ulrich Petersmann, How to Constitute a Global Community through International Law and Jurisprudence? in: 21 GLOBAL COMMUNITY YILJ 779-792 (2022).

[3] Cf Jan Komarek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (OUP 2023), who explains - in his introductory chapter 1 - "(c)onstitutional imaginaries … as sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. They are as important as institutions and office-holders"…. "ideologies are indispensable for political rule." For a discussion of early proposals for "constitutionalizing" EU law and integration see Ernst-Ulrich Petersmann, Proposals for a New Constitution of the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the European Union, in: *Common Market Law Review* (1995), p. 1123 – 1175.

[4] Cf EU Commission, *70 Years of EU Law. A Union for its Citizens* (2023). The EU's democratic legitimacy is acknowledged today also by most British commentators: cf Martin Sandbu, *No, there isn't a 'democratic deficit' in the EU,* Financial Times 14 August 2023. See also Philip Stevens, *The EU is doing more – lots more*, Financial Times of 18 August 2023 (explaining why – contrary to the predictions during the Brexit referendum in 2016 that a leave vote would see the EU collapse under the weight of its intrusions into national affairs – the new EU migration,

Section II discusses how multilevel democratic constitutionalism continues to enable European leadership also for "constitutional" UN and WTO legal reforms such as compulsory, transnational adjudication, international emission trading systems aimed at mitigating climate change by reducing carbon emissions, and EU support for what Ziccardi Capaldo calls a "unified/integrated" UN governance system based on global principles and procedures, as documented in the more than 20 volumes of this Yearbook. Section II recalls why the ordoliberal principles governing European integration law and practices, and their emphasis on the "interdependence of orders" requiring coherent "constitutionalization" of the legal, political, economic and social dimensions of society, have enabled stronger solidarity in – and "constitutionalizing" of - European integration law compared with the neoliberal principles dominating many UN and WTO legal practices.[5] The more the social, economic, political and legal dimensions of societies interact, the more depends a liberal and peaceful, transnational rule-of-law on a coherently structured "constitutional framework" embedding "competitive social market economies" (as prescribed in Article 3 TEU) and multilevel "demoi-cracy" (as prescribed in Articles 9-12 TEU) into multilevel legal, democratic and judicial protection of equal constitutional, human, democratic and social rights of citizens (as codified in the EU Charter for Fundamental Rights (EUCFR) and in the European Convention on Human Rights (ECHR)) promoting equal opportunities, social justice and democratic peace across national borders. Yet, applying the EU's constitutional principles prioritizing "normative individualism" (e.g. protecting respect for human dignity and informed, individual and democratic consent as primary constitutional values) also in the EU's external relations (as prescribed in Articles 3, 21 TEU), for example by inserting human rights conditionalities into EU external agreements and making access to the EU's common market conditional on compliance with the EU's regulatory standards ("Brussels effect") and carbon emission trading system, is increasingly challenged by countries prioritizing authoritarian government traditions or parliamentary supremacy rather than cosmopolitan constitutionalism.

Section III explains why the geopolitical rivalries and suppression of human and democratic rights in authoritarian states undermine the hopes that the UN governance model can become an effective, constitutional framework for a global governance system unifying the different legal systems under constitutional principles and procedures respecting pluralism, diversity and democratic participation of citizens in UN and WTO decision-making. Section III illustrates these limits of global legal integration by the competing internet regulations in China, Europe and the USA and by international criminal law, where implementation of the International Criminal Court's 2023 arrest warrant against Russian President Putin was described by

health, environmental and common defense policies responding to the migration, Covid-19, climate change and security crises continue being supported by EU citizens and their democratic institutions). Even if recent opinion polls in the UK now show clear and consistent expressions of regret that the country left the EU, "rejoining the EU remains a very distant dream" (Robert Shrimsley, *Financial Times* 31 August 2023).

[5] Cf Ernst-Ulrich Petersmann, Neoliberalism, Ordoliberalism and the Future of Economic Governance, in *JIEL* 26 (2023 – issue 4). The emphasis on the need for systemic, multilevel limitations of market failures, governance failures and constitutional failures so as to better protect rule-of-law and social justice in transnational "competitive social market economies" distinguishes European ordoliberalism from neoliberal (e.g. Anglo-Saxon) beliefs in business-driven market competition with much weaker safeguards of non-discriminatory conditions of competition and other legal restraints on market failures and social injustices.

Russia's government as a declaration of war. The rulers in China and Russia seek an alternative, authoritarian world order without effective protection of human rights.[6]

What are the systemic consequences of the fact that the needed "integrated governance approach" (e.g. promoting the constitutional functions of law-making, law-enforcement, and law-adjudication beyond state borders) is increasingly opposed by authoritarian and neoliberal governments denying legal and judicial protection of human rights and of social justice? China and Russia used their accessions to the World Trade Organization (WTO) for successfully reforming their domestic economic systems without allowing similar liberal reforms of their authoritarian political, legal and "social surveillance" systems. How should democratic citizens and governments in and beyond Europe respond to the increasing human disasters like wars of aggression, suppression of human and democratic rights, global health pandemics, climate change, ocean pollution, biodiversity losses, and disregard for rule-of-law, which reflect *transnational* governance failures and "constitutional failures" to comply with UN and WTO law and with the universally agreed "sustainable development goals" (SDGs)? Can UN and WTO law remain effective without legal, democratic and judicial remedies and social safeguards of citizens inside states? The obvious global governance failures (e.g., in terms of arbitrary violations of UN and WTO law) make rethinking the global order, and exploring alternative approaches to re-ordering international relations, an existential necessity. The legitimate criticism by less-developed countries of the social injustices of the current, power-driven international order and "Anthropocene" (like climate change with its prospect of more than 140 million climate refugees by 2050) require promoting citizen-driven "sustainable development paradigms" for UN and WTO reforms. EU leadership for transforming the UN and WTO into "sustainable development organizations" offers "demoi-cratic strategies" for responding to the global governance failures.

I. Constitutionalism and Transnational Governance Failures

Constitutionalism proceeds from the ancient insight that constitutional contracts among free and reasonable citizens can limit abuses of public and private power and promote voluntary, mutually beneficial cooperation by institutionalizing public reason. Constitutionalism is often narrowly defined as a political theory that protects individuals from the arbitrary exercise of power through (1) the rule-of-law, (2) separation of powers, (3) the assertion of constituent power, and (4) fundamental rights.[7] Yet, during the centuries of ancient, medieval and modern constitutionalism in Europe, the diverse forms of *democratic constitutionalism* (e.g. since the ancient Athenian democracy), *republican constitutionalism* (e.g. since the ancient Italian city republics), and of *common law constitutionalism* (e.g. in Anglo-Saxon democracies) elaborated many more agreed "principles of justice" (like human rights, democratic self-governance, proportionality and subsidiarity of the exercise of government powers) and institutions of a higher legal rank (like diverse democratic institutions and courts of justice). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, "mixed government"), of republican constitutionalism since ancient Rome (like separation and mutual balance of power, rule-of-law, transnational *jus gentium*), and of

[6] Cf James Kynge, China's blueprint for an alternative world order, in *Financial Times* 23 August 2023. On "universalistic individualism as the third paradigm of world order", the failed paradigmatic revolution, and on currently competing paradigms of world order see also Dellavalle (note 1), chapters 4 to 8.

[7] Anthony F. Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2017), Introduction at 2-4.

common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognized in national Constitutions as well as in functionally limited, international treaty constitutions as necessary for protecting PGs against the ubiquity of abuses of public and private power. Multilevel constitutionalism in and beyond Europe (like compulsory dispute settlement systems in UN law, WTO law, investment law and international criminal law) remains an incremental trial-and-error development of human and democratic emancipation from perennial abuses of power.

The 2030 UN Sustainable Development Agenda emphasizes the importance of human rights, democratic governance and rule-of-law also for multilevel governance of *transnational PGs* like the universally agreed 17 SDGs. The citizen demand for protecting *transnational* supply of private and PGs requires defining modern constitutionalism more broadly as constituting, limiting, regulating and justifying multilevel rules and governance institutions of a higher legal rank for providing (trans)national PGs demanded by citizens. Human rights and democratic self-government based on legal, democratic and judicial protection of human and constitutional rights of citizens are today not only co-constitutive for the legitimacy of governments; their democratic function has also become recognized as a necessary complement of the republican function of constitutionalism for protecting multilevel governance of PGs.[8] The more globalization transforms *national* into *global PGs* (like the SDGs), the more citizen demand for effective protection of transnational PGs (such as climate change mitigation) requires extending "constitutional safeguards" to multilevel governance of PGs. Human and democratic rights protecting informed, individual and democratic consent of free and equal citizens to democratic decision-making offer not only "co-constitutive legitimation" for *transnational constitutionalism*; ordoliberal economic policies – in contrast to the neoliberal prioritization of civil, political and property rights – also recognize that non-discriminatory conditions of competition in economic and labor markets depend on empowering all market participants through economic and social rights to develop their human capacities, protect themselves against abuses of economic power, and to adjust to the often disruptive effects of market competition (like economic losses, bankruptcies, and unemployment).[9]

All UN member states adopted national Constitutions (written or unwritten) constituting, regulating and justifying national governance of PGs. Yet, the collective action problems, mandates and decision-making procedures of functionally limited, international organizations (like the EU, the UN and its 15 Specialized Agencies, the WTO) differ enormously; this diversity of transnational regulatory challenges, and the diverse conceptions of sovereignty and of individual rights exclude centralized regulation in a world constitution.[10] As international

[8] Cf Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (2017), who argues for integrating the successive developments of "national constitutionalism 1.0", "international constitutionalism 2.0" and transnational "cosmopolitan constitutionalism 3.0" as progressively done in European constitutional law. *The Cosmopolitan Constitution* (OUP 2014) by Alexander Somek focuses, by contrast, on the successive, emancipatory changes of liberal national "We the people Constitutions" (like the US Constitution focusing on negative freedoms and the US common market as a source of freedom) to post-war "human dignity Constitutions" (like Germany's 1949 Basic Law protecting civil, political, economic and social rights, democratic self-government and rule-of-law) and national "cosmopolitan Constitutions" in EU member states (e.g. promoting multilevel administrative, democratic and judicial protection of common markets, common policies, human rights and rule-of-law beyond national borders).

[9] See Petersmann (n 5), reviewing *The Oxford Handbook of Ordoliberalism* edited by Thomas Biebricher/ Werner Bonefeld/Peter Nedergaard (2022).

[10] See also Michael W. Doyle, The UN Charter and global constitutionalism, and Jan Klabbers, Functionalism, constitutionalism and the United Nations, in: Lang/Wiener (note 7), at 338ff, 355ff.

organizations remain composed of member states and dominated by governments with diverse governance paradigms, the "international constitutionalism" practiced among states (e.g. in international courts of justice) differs from the "cosmopolitan constitutionalism" based on the "democratic trinity" of human rights, democracy and rule-of-law (e.g. as practiced inside the EU)[11]; as illustrated in section II, "member-driven governance" in power-oriented UN and WTO practices often entails governance failures impeding the "constitutional politics" and "constitutional economics" necessary for effective, and democratically legitimate protection of transnational PGs[12], such as recognition of citizens and peoples as "democratic principals" of multilevel governance institutions as mere agents with limited powers that must remain accountable to, and controlled by parliaments and citizens. The emergence of ever more dangerous global governance crises suggests that the constitution, limitation, regulation and justification of multilevel rules and institutions for protecting transnational PGs remain the biggest regulatory challenge in the 21st century.

The current economic, environmental, food and migration crises, global health pandemics, Russia's unprovoked military aggression and war crimes in Ukraine reveal "democratic input-deficits", "republican output-deficits" and insufficient constitutional restraints of UN and WTO law; they confirm the constitutional insight (e.g. of Kantian legal theory) that national Constitutions and "horizontal inter-national law" cannot protect citizens against external human disasters unless abuses of policy discretion and transnational governance failures are legally limited also in external relations for the benefit of all citizens.[13] Arguably, the "democratic peace" objective of the Schuman Declaration (1950) was successfully realized through the European Coal and Steel Community Treaty (1952-2002) and the successive European integration agreements progressively "constitutionalizing" national economic and foreign policy discretion by transforming nationalist policy-making processes into multilevel constitutional, legislative, executive and judicial decision-making procedures and non-discriminatory market competition. Yet, this institutionalization of cosmopolitan and "demoi-cratic", new forms of "public reason" and of multilevel legal, judicial, political and economic accountability mechanisms remains strongly resisted by autocratic governments seeking concentration of powers (e.g. in China, Cuba, Iran, North Korea, Russia). Why are Anglo-Saxon "Brexit advocates" and neoliberal US trade diplomats no longer willing to subject policy discretion to multilevel legal, judicial and democratic constraints, as illustrated by the British opposition against European courts and by the US' illegal blocking of the WTO Appellate Body and of its jurisprudence limiting abuses of WTO trade remedies and "national security exceptions" (like US President Trump's abuse of Article XXI GATT for imposing discriminatory import restrictions for steel and aluminum imports from NATO allies on grounds of "US security")? Are the increasing "dysfunctions" of the US government – as illustrated by government shutdowns, partisan impeachment inquiries, the former President Trump facing multiple felony charges

[11] Cf Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in *Ruling the World? International Law, Global Governance, Constitutionalism* (ed. Jeffrey L. Dunoff/Joel P.Trachtman, CUP 2009), 258-326. The relationships between the constituent powers of the people (as protected in UN human rights law and in democratic constitutionalism as exercised since 1776 by the American people and in 1789 by the French people) and "state sovereignty" remain contested not only by authoritarian governments, but also in democracies (e.g. if they recognize parliamentary supremacy rather than popular sovereignty and counter-majoritarian constitutional restraints). EU law confirms how human rights law can effectively protect democratic self-government through multilevel democratic constitutionalism, including cosmopolitan rights to participate in multilevel governance of PGs (cf Petersmann, note 8, Part 3).

[12] On constitutional politics and constitutional economics see Ernst-Ulrich Petersmann/Armin Steinbach (eds), *Constitutionalism and Transnational Governance Failures* (2024), chapts 1-3.

[13] See Petersmann (n 8) and the case studies in Petersmann/Steinbach (n 12).

across four criminal cases, and money-driven presidential election campaigns – undermining international security (e.g. by inviting authoritarian dictators to manipulate US social media similar to the distortion of the 2016 "Brexit referendum" by electronic disinformation campaigns)?[14] Does the "putsch attempt" of former US President Trump on 6 January 2021, and the possible re-election of Trump as US President in 2024, confirm the risk that the US republic could be transformed - like many other republics since ancient Rome and Venice – into some kind of autocracy?[15]

1. Against transnational constitutionalism?

In his recent book *Against Constitutionalism*, the British constitutional lawyer Martin Loughlin criticizes the prevailing conflation of constitutional democracy with "constitutionalism", which he defines narrowly by the following six criteria: a modern Constitution "(1) establishes a comprehensive scheme of government, founded (2) on the principle of representative government and (3) on the need to divide, channel, and constrain governmental powers for the purpose of safeguarding individual liberty. That constitution is also envisaged (4) as creating a permanent governing framework that (5) is conceived as establishing a system of fundamental law supervised by a judiciary charged with elaborating the requirements of public reason, so that (6) the constitution is able to assume its true status as the authoritative expression of the regime's collective political identity".[16] Loughlin claims that the people and their elected representatives, rather than citizens and courts of justice invoking and defending human and constitutional rights and related PGs, should define the nation's political identity and make its most important policy decisions[17]. He rejects Europe's multilevel "ordo-constitutionalism" (e.g. based on multilevel legal and judicial protection of EU common market rights and monetary constitutionalism) and "cosmopolitan constitutionalism" (e.g. based on multilevel legal and judicial protection of transnational fundamental rights as codified in the ECHR and in the EUCFR) as being inconsistent with his conception of Britain's representative democracy prioritizing parliamentary sovereignty exercised by "the Crown, the Lords and the Commons" (i.e. including non-elected feudal and aristocratic institutions). Notwithstanding his acknowledgment that "constitutional democracy remains our best hope of maintaining the conditions of civilized existence"[18], Loughlin's argument against constitutionalism "rests on the claim that it institutes a system of rule that is unlikely to carry popular support"[19]. Yet, his idealization of Britain's "island democracy", and his support of the populist "Brexit politics" (like the false claims that the EU aims at establishing a federal state)[20], disregard the democratic demand for protecting transnational PGs, the regulatory challenges of global PGs, and the realities of European integration.

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[14] See Robert M. Gates, The Dysfunctional Superpower. Can a Divided America Deter China and Russia? in *Foreign Affairs* 29 September 2023.

[15] See Ferdinand Mount, *Big Caesars and Little Caesars: How They Rise and How They Fall — From Julius Caesar to Boris Johnson* (2023).

[16] Martin Loughlin, *Against Constitutionalism* (2022), at 6-7.

[17] *Idem*, pp 124-135.

[18] *Idem*, p 24.

[19] *Idem*, p 202.

[20] Cf Loughlin's podcast interview on "Constitutionalism – an opium for the lawyers" in: https://revdem.ceu.edu/2023/03/15/constitutionalism-an-opium-for-the-lawyers/

A. Against democratic constitutionalism beyond state borders?

Loughlin defines constitutionalism narrowly without regard to citizen demand for limiting the abuses of intergovernmental power politics undermining the SDGs, and without regard to the "democratic principles" of the Lisbon Treaty (Arts 9-12 TEU) for EU citizenship and multilevel constitutional, parliamentary, participatory and deliberative "demoi-cracy" throughout the EU. His nationalist conception of representative democracy in Britain does not acknowledge that EU citizenship rights, EU constitutional rights and remedies, and multilevel EU parliamentary, deliberative and participatory "demoi-cracy" have promoted transnational, democratic decision-making processes throughout the EU and "constitutional patriotism" (G.Habermas) of EU citizens supporting EU law.[21] Most European PGs – like the codification of fundamental rights in the EUCFR, their multilevel legal, democratic and judicial protection beyond national frontiers through European parliamentary, executive and judicial institutions limiting national "constitutional failures" - depend on multilevel legal constitution, limitation and regulation of multilevel governance promoting democratic consensus-building beyond national frontiers.[22] Europe's centuries of wars and of intergovernmental power politics confirm the need for multilevel constitutional restraints of transnational market failures (e.g. by EU competition, environmental and social law) and governance failures (e.g. by EU institutions protecting transnational rule-of-law and fundamental rights). The limited "international constitutionalism" for protecting rule-of-law and PGs in UN and WTO practices does not effectively protect cosmopolitan constitutionalism like human rights, democratic input-legitimacy and republican output-legitimacy in UN and WTO law-making, administration and adjudication. Most national parliaments do not effectively control intergovernmental power politics in distant UN and WTO governance institutions. Hence, Loughlin's rejection of democratic constitutionalism beyond state borders amounts to neoliberal support for continued, executive power politics (like frequent violations of UN and WTO agreements approved by national parliaments for protecting general citizen interests), as in the case of the illegal blocking of the WTO Appellate Body system undermining transnational rule-of-law.[23] Loughlin's belief that constitutional entrenchment of prior policy choices against current ones is *prima facie* a deprivation of the ability of today's people to govern themselves, fails to respond to the historical pathologies of representative democracies (like support of slavery, gender and racial discrimination, "regulatory capture" of parliamentary legislation by rent-seeking business interests), which justify constitutional entrenchment of human and constitutional rights as constraints on the potential "tyranny of the majority".[24] Loughlin's preference for "parliamentary sovereignty" is not supported by citizens in the increasing number of constitutional democracies that have deliberately limited majority voting in order to protect human and democratic rights permanently. The disinformation distorting "Brexit politics", like the executive power politics

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[21] Cf Kalypso Nicolaides, The Peoples Imagined: Constituting a Demoicratic European Polity, in Komarek (note 3), chapter 12.

[22] The EU's legal obligations (e.g. under Article 21 TEU) to "support democracy, the rule of law, human rights and the principles of international law" aim at limiting transnational governance failures like neglect for *transnational* rule-of-law and for transnational PGs like "sustainable economic, social and environmental development" (Article 21 TEU); cf Petersmann (n 8), Parts 2 and 3.

[23] Cf Ernst-Ulrich Petersmann, Transforming World Trade and Investment Law for Sustainable Development (2022), chapter 4.

[24] The national Constitutions of almost all UN member states require specific majorities for constitutional amendments, thereby recognizing that some important subjects of political life be removed from ordinary politics except through some extraordinary modes of constitutional amendment or replacement. Arguably, the American democratic process has become distorted by the practice of unlimited corporate spending to influence elections as upheld by the U.S. Supreme Court's ruling of 21 January 2010 in *Citizens United*. In the EU, the political influence of business interests is more restrained by the public financing of democratic elections and greater influence of civil society groups on parliamentary regulation.

increasingly disrupting UN and WTO politics, demonstrate that "bounded rationality" and interest group politics require transnational constitutionalism for the same reasons that necessitate domestic constitutional restraints: as famously said by James Madison, law and constitutional self-restraints are necessary because human beings aren't angels; human psychology requires reasonable "pre-commitments" ("hands-tying" as practiced by Ulysses) like recognition of fundamental rights. Loughlin offers no solutions for limiting transnational governance failures and responding to citizen demand for protecting transnational PGs more democratically and more effectively. Anglo-Saxon neoliberalism and constitutionally unrestrained foreign policy discretion invite populist and feudal abuses in representative democracies, where ordinary politics is typically driven by narrow self-interests, money-driven interest group politics, and populist disinformation (e.g. by Brexit advocates and the "big lies" by former US President Trump).

B. Against multilevel judicial protection of human rights?

Loughlin notes that the "global trend of judicial empowerment through the constitutionalization of rights is one of the most important governmental developments of the contemporary era"[25]; yet, he dismisses democratic constitutionalism advancing "constitutional litigation as a surrogate political process" as baseless faith.[26] His disregard for the regulatory challenges of citizen demand for protecting transnational PGs of existential importance for human welfare amounts to a neo-liberal recipe for disaster; for, most national parliaments do not effectively control foreign policies and multilevel governance in distant international organizations; and the collective action problems often differ depending on the design of international organizations. Due to this frequent collusion between parliaments and executives, protection of human, constitutional and democratic rights of citizens beyond frontiers requires impartial judicial remedies. In economic integration and human rights law, multilevel judicial protection of individual rights remains crucial for institutionalizing public reason and protecting citizen interests in multilevel governance of PGs. For example, non-discriminatory competition in economic as well as in political markets depends on protecting the general interests of all market participants (like consumers in economic markets, voters in political markets) and on fundamental rights, democratic and judicial procedures reconciling particular interests (e.g. of workers vs managers and investors, unemployed people vs taxpayers, company shareholders vs adversely affected stakeholders). The dynamic changes in open societies, economies and democracies are likely to be more supported if adversely affected citizens have judicial remedies enabling courts to ensure democratic and constitutional accountability based on justiciable legal criteria (e.g. for deliberative and participatory democracy complementing representative, parliamentary democracy) and equal constitutional rights of citizens. Objective constitutional principles limiting policy discretion – like transparent policymaking, non-discrimination, proportionality and necessity of governmental restrictions – risk remaining ineffective unless citizens can invoke corresponding rights and judicial remedies. Loughlin's authoritarian refusal to recognize citizens as "democratic principals", and to constitutionally restrain all delegated governance powers through multilevel human and constitutional rights and remedies, is not shared by EU citizens benefitting from the European human rights revolution and of multilevel judicial protection of human rights, rule-of-law and democratic governance acknowledging "justice as the first virtue of social institutions".[27]

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[25] *Idem*, at 132.

[26] *Idem*, pp 148-150.

[27] The quotation is from J.Rawls, *A Theory of Justice* (revised edition 1999), at 3.

C. Against republican protection of the SDGs through transnational constitutionalism?

Loughlin neglects not only the democratic functions and human rights functions of transnational constitutionalism, but also its "republican functions" for protecting transnational PGs like the SDGs.[28] He acknowledges that constitutional democracy has proven to be the most effective method for protecting peace, security and welfare at national levels of governance[29] - without admitting that Europe's multilevel constitutionalism has, likewise, proven to be the most effective method for protecting peace, security and welfare in post-1945 economic integration among the 31 democratic member states of the European Economic Area (EEA).[30] The universal recognition of human and democratic rights and of other "constitutional principles" (like access to justice, rule-of-law) in UN law and in the UN Sustainable Development Agenda reflects the ancient insight that constitutional self-limitations of equal freedoms through agreed principles of justice of a higher legal rank (like human and social rights promoting human capabilities, transparent and accountable governance, rule-of-law, proportionality and judicial accountability of governmental restrictions of individual freedoms) are reasonable responses to the "bounded rationality", passions, egoism and struggles for survival of human beings so as to limit the "paradox of liberty", i.e. that equal freedoms among individuals and social groups with unequal resources and capacities prompt the strong to exploit weaker members of society (as confirmed by millennia of slavery, gender discrimination and colonialism).[31] Bounded rationality problems are even greater impediments for collective governance of *transnational* PGs, for instance due to discretionary foreign policy powers, executive power politics, insufficient parliamentary control, and "rational ignorance" of most citizens vis-à-vis complex governance in distant international organizations. Multilevel legal protection of individual rights and judicial remedies offer compensatory, constitutional remedies incentivizing and enabling citizens to defend their interests in multilevel governance institutions and courts of justice. Loughlin's preference for the greater solidarity and "common sympathy" inside national communities neglects the social welfare, rule-of-law and solidarity created by Europe's "social market economy" (Article 3 TEU) and monetary union limiting individual and nationalist egoisms. Loughlin's disregard for protecting human and constitutional rights and judicial remedies beyond state borders - as necessary parts of democratic governance of transnational PGs - reveals democratically irresponsible nationalism and parochial indifference to the global regulatory challenges of the 21st century.

2. Authoritarian and neoliberal constitutional nationalism as governance failures

Loughlin's disregard for the human rights functions, democratic functions and republican functions of transnational democratic and judicial institutions protecting human and

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[28] Loughlin's chapter 8 on "The Constitution as Civil Religion" and as "total constitution" focuses on the "Constitution as symbol of social unity" rather than on its instrumental function of protecting PGs demanded by citizens, without admitting the importance of "public reason" and of its joint clarification by citizens and democratic, judicial and science-based regulatory institutions for protecting PGs (like protection of monetary stability by central banks, of non-discriminatory conditions of competition by independent competition authorities, of public health and the environment by expert-based health and environmental institutions).

[29] Cf *idem,* p. 202.

[30] This is documented by the EU Commission (see note 4) and by Petersmann (note 8).

[31] On the "paradox of freedom" see Karl Popper, *The Open Society and its Enemies* (reprint Princeton University Press, 1994) at 117, 257, 333-339; Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century* (2012) 61-74. On "bounded rationality in public decision-making" see chapter 21 in: Eduardo Araral *et alii* (eds), *Routledge Handbook of Public Policy* (2012). On the "constitutional functions" of international agreements limiting foreign policy discretion by constitutional principles (like human rights, non-discrimination, necessity and proportionality of governmental restrictions of individual freedoms, judicial remedies) see Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991; new edition 2020 by Routledge).

constitutional rights of citizens beyond frontiers is widely shared by non-European governments in authoritarian countries (like China and Russia) and Anglo-Saxon countries (like Australia and the USA) rejecting international human rights courts, transnational parliamentary institutions, and regional economic integration courts. Even though the UN Charter was adopted in the name of "We the Peoples" and displays constitutional characteristics[32], UN member states and also UN institutions tend to interpret UN law as a functionally limited principal-agent relationship based on limited delegation of powers by member states (as principals) to UN agencies - rather than as a global constitution.[33] Like Loughlin's conception of representative democracy relying not only on elected members of parliament but also on non-elected institutions (like the Crown and the House of Lords) as representatives of British sovereignty, many UN member state governments neglect the "human right functions" to empower every citizen and inclusive, democratic self-government in all policy areas. Democratic self-determination requires recognizing the people with their inalienable human rights as constituent powers. Their human and democratic rights mutually interact and limit each other depending on the diverse forms of "constitutional politics" and "constitutional economics" in the implementation of the agreed constitutional rights and principles of justice through legislative, administrative and judicial protection of PGs. Human and constitutional rights limit majoritarian legislation and administration in diverse ways in diverse jurisdictions, as illustrated by the diverse, democratic and judicial determinations of these constitutional limitations – and the diverse legislative, administrative and judicial protection of PGs (like human rights to equal treatment, freedom of opinion, free elections, access to justice, rule-of-law, education, food and public health protection) – inside democracies (e.g. depending on the democratic preferences, public reason and available resources of people). In transnational constitutional "demoi-cracies" like the EU, support from the citizens depends essentially on collective protection of PGs demanded by citizens and on respect for their equality and "national identities" (as explicitly protected in Article 4 TEU). The more these republican functions of multilevel governance of transnational PGs assume existential importance for the survival of citizens (e.g. in global food, health, security and environmental crises), the more anachronistic becomes Loughlin's refusal to respond to the constitutional challenges of global governance crises, and to the need for stronger democratic and judicial control of executive power politics violating UN and WTO agreements approved by parliaments for protecting transnational PGs. Constitutional nationalism reveals an impoverished conception of democracy in the 21st century due to its neglect of citizen demand for protecting human rights and transnational PGs beyond national frontiers. Constitutionally unrestrained, executive power politics can be viewed as a "transnational governance failure", for example if it leads to arbitrary violations of UN and WTO legal obligations without authorization by national parliaments and to the detriment of general citizen interests.

A. From neoliberalism to ordoliberalism in European integration law

Loughlin's characterization and rejection of EU law as a neoliberal project, and his regret that the EU aims beyond a common market project, reveal misunderstandings of Europe's "competitive social market economy" (Article 3 TEU) and of its democratic and social "enabling functions": Europeans perceive economic regulation as part of a broader moral, social, and political project for reconciling individual self-development with the common citizen interests in PGs and social justice. Ordoliberalism sees open societies and economic freedoms as

[32] Examples include the "supremacy clause" in Article 103, the conclusion of the UN Charter without a time-limit and without a termination provision, the UN Security Council monopoly on authorizing the use of force, the assertion of jurisdiction vis-à-vis non-member states (e.g. in Article 2:6 UN Charter).

[33] Cf Pierre-Marie Dupuy, The Constitutional Dimension of the UN Charter Revisited: Almost One Quarter of a Century Later, in: *Max Planck Yearbook of United Nations Law* 25 (2022), 89-114.

prerequisites for competitive economic and democratic orders, whose social, economic, political and legal dimensions interact and require embedding into a coherent "economic and democratic constitution". F.A. Hayek's neoliberal recommendations for a "Constitution of Liberty" based on evolutionary constitutionalism and general "Law, Legislation and Liberty" neglected human rights; Hayek's theory of knowledge contested – without convincing reasons - the capacity of governments, democracies and courts of justice to legally limit market failures, governance failures and constitutional failures at both national and international levels of governance.[34] "European ordoliberalism" (e.g. as practiced by the EU institutions) and the "Geneva school of ordoliberalism" emphasized, by contrast, the need for constitutional constructivism complementing national by international fundamental rights, competition, environmental and social rules, democratic and judicial remedies.[35] Preserving equal freedoms, rules-based order and social justice requires - in transnational economic cooperation no less than inside national democracies - protection of fundamental rights of citizens and legal limitations on arbitrary exercises of multilevel governance powers. Europe's multilevel democratic constitutionalism succeeded in progressively extending, since the 1950s, legal, democratic and judicial protection of civil, political, economic and social rights, rule-of-law and related PGs for the benefit of now more than 450 million European citizens.[36] The limiting, dividing and balancing of EU governance powers are embedded into "democratic principles" (Arts 9-12 TEU) and democratic, judicial and science-based, regulatory EU institutions transforming national into transnational rule-of-law systems, which created unique, communitarian systems of demoi-cratic self-government of the EU. The dynamic, democratic and judicial development of "general principles of the Union's law" (Article 6 TEU) and of EU fundamental rights "as they result, in particular, from the constitutional traditions and international obligations common to the Member States" (Preamble of the EUCFR), continues Europe's unique constitutional project of protecting "unity in diversity" throughout Europe through multilevel constructive and evolutionary, democratic constitutionalism.[37] Does it offer lessons for UN and WTO governance of PGs?

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[34] Cf Friedrich August Hayek, *The Constitution of Liberty* (1960); *idem, Law, Legislation and Liberty* (1979). Hayek emphasized the fundamental differences between organic "spontaneous order" and hierarchical "organizations"; the two kinds of diverse legal systems prevailing in each; the "pretense of knowledge" and "constructivist fallacies" of replacing "grown law" by deliberately "constructed legal orders" protecting what he criticized as "the mirage of social justice"; and the advantages of objective constitutional restraints on governmental limitations of liberty over enumerations of specific fundamental rights. Yet, the theory of knowledge underlying Hayek's neoliberalism neglects the "enabling functions" of human rights and of ordo-liberal constitutionalism protecting equal freedoms and cosmopolitan rights beyond states based on modern economic, political and psychological insights into market failures, governance failures and constitutional failures.

[35] Philip Mirowski, *Ordoliberalism within the Historical Trajectory of Neoliberalism*, in Thomas Biebricher (n 9, chapter 4), distinguishes the following eight schools of neoliberalism from the 1940s to the 1980s: Austrian school economists; ordoliberals; Hayekians; Chicago school economists; British LSE anti-Keynesians; Virginia constitutional and public choice economists; and Geneva school globalists. The relationship between neoliberalism and ordoliberalism remains contested. While Walther Eucken, who was one of the founders of the "Freiburg school of ordoliberalism", described his conception of ordoliberalism as being as different from neoliberalism as from state-capitalism, other scholars view ordoliberalism as a particular variant of neoliberalism (as distinguished from Manchester *laissez-faire* liberalism). On the different national schools of law and economics (like the Freiburg and Cologne schools in Germany, the Chicago and Virginia schools in the USA) and transnational schools of law and economics (like the Brussels and Geneva schools in Europe, the "Washington consensus" promoted by the Bretton Woods institutions) see Petersmann (note 23), chapters 2 and 4.

[36] See notes 4 and 8 and below section II.

[37] Even if national written Constitutions are "a product of the late eighteenth-century Enlightenment revolutions in America and France" (as argued by Loughlin, n 15, at 9), Loughlin admits that "constitutionalism was originally designed as a method of establishing a regime of limited government that could protect the basic liberties of the subject" (p.57); he offers no convincing reasons for rejecting transnational "democratic constitutionalism" protecting basic equal freedoms of citizens and cosmopolitan rights beyond states.

B. Constitutional pluralism and disagreements among UN member states

The ordoliberal insight underlying the EU's objective of a transnational "social market economy" – that citizens must be empowered by human and constitutional rights and social security to adjust to, and support, the changes imposed in open societies with economic and democratic competition – remains true also for the global transformations of today. Even though authoritarian countries (like China and Russia) successfully used their WTO memberships for reforming their communist economic systems, their authoritarian rulers, public disinformation and oligarchic interest group politics deny political "governance failures" (e.g. in terms of market distortions, violations of rule-of-law, suppression of human and democratic rights, neglect of related PGs). The ordoliberal focus on rules-based constraints making governments responsive to citizens' interests is shared neither by power-oriented authoritarian governments nor by business-driven neoliberal governments. In Asia and North-America, constitutional nationalism continues to prevail in the shadow of regional hegemons. Among African and Latin-American democracies, regional human rights conventions and common markets promoted much weaker constitutional reforms of regional law compared with European integration law; this was often due to populist politicians prioritizing nationalist over cosmopolitan responses to global governance crises, challenging science-based regulatory agencies and independent courts of justice, and promoting non-pluralist conceptions of society (e.g. by suppressing human rights and independent media). Asian countries did not conclude effective regional human rights conventions due to their communitarian (rather than individualist) governance traditions.

The social, economic, political, and legal context of multilevel, European integration – like more than thirty democracies with social market economies helping citizens to adjust to the economic and social changes in open societies - has no equivalent outside Europe, for example because many less-developed countries prioritize nation-building and the domestic rather than transnational challenges of the SDGs, and the US-Mexico-Canada free trade agreement (FTA) is dominated by US neoliberal power politics. EU common market, competition and human rights law prioritizes normative individualism (using individual welfare and informed, individual consent as relevant normative standards) and methodological individualism promoting economic "consumer sovereignty", democratic "citizen sovereignty" and voluntary, mutually beneficial agreements among citizens (like democratic elections), with informed, individual consent as ultimate source of values. General citizen interests (e.g. as consumers and citizens) and particular citizen interests (e.g. as workers, investors, unemployed migrants, students) are legally protected through stronger rights, remedies and constitutional restraints (like competition, environmental and social rules) inside the EU's common market compared with FTAs among neoliberal or authoritarian countries. Europe's millennia of republican and individualist legal traditions (e.g. in city states around the Mediterranean sea) have no equivalent in Africa, the Americas or Asia with their more communitarian or business-driven cultures. Authoritarian rulers tend to prioritize concentration (rather than separation) of power and collectivist state-values like re-conquering historical Russian territories in sovereign neighboring states, restoring China's ancient rule over most of the South China sea in violation of UNCLOS rules, and suppressing human and democratic rights inside and beyond authoritarian states. Recognition of human dignity and human rights in European law reflects legal recognition of EU citizens as being vulnerable and depending on social assistance for developing their human capacities, as illustrated by the EU's huge financial project (*Next Generation EU*) and new "Social Climate Fund" supporting the *European Green Deal* for climate change mitigation, and by multilevel EU assistance for responding to other global challenges (like health pandemics, migration, foreign debt and rule-of-law crises,

Russian disruption of energy and military security). Yet, as discussed in section II, even if societies and citizenship outside Europe remain *national* with lesser, *transnational* adjustment assistance and lesser multilevel, legal restraints on the *homo economicus* and on oligarchic distortions of societies[38], the EU's integration of economic, environmental and social law and governance offers important lessons for UN and WTO legal and political "sustainable development reforms".

II. The EU's Foreign Policy Constitution and the "Brussels Effect" as Incentives for UN and WTO Legal Reforms

The universal recognition (e.g. in the Preamble of the UDHR) "of the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world" has shaped the post-1945 Constitutions of EU member states (like Article 1 German Basic Law) and EU constitutional law (like Article 2 of the Lisbon TEU and its EUCFR) much more than UN legal practices. This "paradigm change" towards human rights conceptions of law and of democratic politics supported the jurisprudence of national and European courts of justice acknowledging the ECHR and the EU treaties as constitutional agreements of a higher legal rank conferring directly applicable rights to citizens. By integrating international, European and domestic legal systems, Europe's multilevel constitutionalism extended national constitutionalism to functionally limited "treaty constitutions" constituting, limiting, regulating and justifying European governance of transnational PGs (like the human rights protected in the ECHR, the common market freedoms and rule-of-law principles of Europe's common market and monetary constitutionalism). The Lisbon Treaty commitment to "strict observance of international law" (Article 3:5 TEU) in the EU's external relations confirmed another "paradigm change" based on insights into potential synergies of European and international economic law and adjudication.[39] The Lisbon Treaty's micro-economic "common market constitution" for a "competitive social market economy" limits abuses of private and public, national and EU powers through constitutional, competition, environmental, social rules and institutions of a higher legal rank restricting market failures (like abuses of market power, cartel agreements, environmental pollution, information asymmetries, social injustices) and related governance failures (like public-private collusion exploiting consumers and taxpayers for the benefit of rent-seeking industries). The institutionalization of multilevel competition, environmental, monetary and other EU regulatory agencies - and of related democratic and judicial remedies - limited governance failures through multilevel network governance of democratic institutions (like national and European parliaments and democratically elected executive institutions), courts of justice, and independent competition, monetary and other regulatory agencies.

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[38] Cf Loic Azoulay, The Law of European Society (2022) 59 *Common Market Law Review* 203. Loughlin's nationalist conception of constitutional democracies (see notes 16-20) disregards the enormous social welfare and solidarity promoted by EU law among EU member countries and EU citizens.

[39] These synergies were explained in my publications in the *Common Market Law Review* (CMLR) since Ernst Ulrich Petersmann, Application of GATT by the Court of Justice of the European Communities, in: *CMLR* 20 (1983), 397 – 437; *idem*, International and European Foreign Trade Law - GATT Dispute Settlement Proceedings against the EEC, in: *CMLR* (1985), 441 – 487; *idem,* GATT Dispute Settlement Proceedings in the Field of Antidumping Law, in: *CMLR* (1991), 69 – 114. On the need for integrating trade and environmental rules see Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round* (1995).

Inside the EU and in the external relations with European Free Trade Association (EFTA) countries, multilevel constitutionalism induced all EU and EFTA countries to cooperate in their multilevel implementation of European and national competition, environmental, social market economy rules, data protection and digital services regulations. Articles 3 and 21 TEU prescribe that the Union shall protect human rights and "the strict observance and development of international law, including respect for the principles of the United Nations Charter", also in its external relations and "consolidate and support democracy, the rule of law, human rights and the principles of international law, preserve peace, prevent conflicts and strengthen international security". This foreign policy mandate to advance its own constitutional principles "in the wider world" (Article 23:1 TEU) prompted the EU to act as "a worldwide promoter of the universality and indivisibility of human rights"[40], for instance by making external trade and investment agreements conditional on the inclusion of human rights clauses, requiring respect for human rights in all EU external actions, offering judicial remedies for making human rights enforceable, and holding EU and member state actions accountable for respect of human rights. European human rights standards are promoted through their application beyond EU borders, for example when - in the field of data protection - the Court of Justice extended the 1995 Data Protection Directive's territorial scope beyond EU borders, stating that the right to be forgotten applied regardless of "the location of the search engine's headquarters or the location where the relevant processing or indexing of the data takes place".[41]

1. EU economic and environmental constitutionalism as driver for reforming UN and GATT/WTO law

The formation of a customs union prompted the EU to join the WTO and some UN agencies (like the Food and Agricultural Organization) as full member and to promote transformation of state-centered international legal systems by recognizing sub-state actors (like Hong Kong and Macau as WTO members) and supra-national actors (like the EU) as members of international treaties and multilevel governance institutions. The rules-based internal and external EU mandates prompted the EU to become a leading advocate for compulsory adjudication in international trade law, investment law, the UN Convention on the Law of the Sea, and in the Rome Convention establishing the International Criminal Court. For example, when the WTO Appellate Body (AB) was rendered dysfunctional in 2019 by illegal US vetoes of the consensus-based nominations of WTO AB judges, the EU introduced voluntary Multi-Party-Interim Arbitration agreements (based on Article 25 of the WTO Dispute Settlement Understanding) providing for compulsory appellate arbitration among WTO members pending the blockage of the WTO AB, thereby limiting abusive "appeals into the void of a dysfunctional AB" preventing adoption of WTO panel reports.[42] The ongoing bilateral and UN negotiations on transforming investor-state arbitration into more transparent, and more accountable investment adjudication were initiated by the CJEU ruling that investor-state arbitration was inconsistent with EU constitutional law and had to be reformed in both the EU's internal and

[40] See European Commission (note 4), at 72ff.

[41] This European Court of Justice (CJEU) judgment in *Google Spain* is discussed in Anu Bradford, *The Brussels Effect: How the European Union rules the world* (2020), at 134f. This judicial clarification came before the adoption of the EU General Data Protection Regulation (GDPR), which now also applies to non-EU data controllers working on EU residents' data or providers that process EU data.

[42] Cf Peter van den Bossche, Can the WTO Dispute Settlement System be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization, in Petersmann/Steinbach (note 12), chapter 12.

external relations.[43] EU common market regulations often have global "Brussels effects" if access of foreign goods, services and investments to the EU market is conditional on compliance with EU fundamental rights and common market regulations (like EU product and production standards).[44] The EU's environmental constitutionalism, climate legislation and related climate litigation are discussed below as another illustration of how domestic constitutional reforms inside the EU can set incentives for governments and non-governmental organizations also outside the EU to increase their environmental and human rights protection standards.

The 1957 Treaty establishing the European Economic Community included no provisions specifically addressing protection of the environment. The first environmental action program was adopted by the EEC in November 1973 based on the general EEC Treaty provisions for the harmonization of common market law. The Single European Act of 1986 introduced the first treaty provisions for a European Community environmental policy requiring protection of the environment, as now prescribed in detail in Article 3 TEU as well as in Articles 191-193 of the Treaty on the Functioning of the EU (TFEU). Article 3:3 TEU requires the Union to regulate the internal market consonant with "the sustainable development of Europe" and based on "a high level of protection and improvement of the quality of the environment." Article 191 TFEU commits the EU's environmental policy to the principles of precaution, preventive action, proximity and polluter pays. These legal foundations have enabled the EU to adopt hundreds of environmental acts on protection of water, waste management, air quality, climate change, other natural resources and chemicals management. More than 80% of the national environmental legislation in the 27 EU member states are now based on EU regulations, directives and other EU environmental policy measures. Moreover, Article 11 TFEU stipulates that environmental protection requirements must be integrated into the definition and implementation of other Union policies and activities. Hence, pollution of the environment must be "internalized" also in the EU's internal market, energy, transport, fisheries and agricultural policies, foreign affairs and fiscal policies.

The EU's environmental "constitutionalisation" has evolved from a sectoral policy to one of the transversal guiding components of the EU legal order. The constitutional dimension of environmental protection is reflected in environmental objectives, principles and rules in EU primary and secondary law, which have promoted "environmental democracy" and an environmental dimension also in the EUCFR. The EU's environmental constitutionalism responds to global environmental challenges and to the consensus among EU Member States that environmental protection warrants high levels of legal and judicial protection. Environmental transition is particularly visible in EU secondary law like the adoption of the

[43] Cf Laura Marceddu, *EU and UN Proposals for Reforming Investor-State Arbitration*, in Petersmann/Steinbach (note 12), chapter 13.

[44] Cf Bradford (note 41), according to whom it is wrong to cast the EU "as an aging and declining power" (p. xiii) beset by slow growth (p. 267). The most fundamental constraint on EU power—its lack of autonomous capacity to mobilize human or fiscal resources ("blood and treasure") to project power in a traditional sense—compelled the EU to mobilize "regulatory power" based on an extensive apparatus of rules to govern the Union's large internal market (pp. 16, 36). In order to access that market, external actors must meet the EU's often stringent regulatory demands, and this generates a broader compliance pull with strong extraterritorial ramifications. The global impact of this regime, as well as its likely durability, demonstrate how the Union is "an influential superpower that shapes the world in its image" (p. xiii). "Even in the absence of a [political] federation," the global impact of the EU's market-access regulations shows how the Union "is already able to advance its interests".

2021 European climate law[45] for decarbonizing and greening the EU's economy. The multiple policy tools and mandatory standards aim at a socially "just transition" with active industrial policies to secure continuing economic growth. Their promotion of "climate change litigation" and of external "carbon border adjustment mechanisms" (CBAMs) – aimed at reducing Green House Gas (GHG) emissions, inducing industries to use greener technologies, and to prevent "carbon leakage" (i.e. the relocation of production outside EU borders to countries with lower environmental standards) - confirm the transformative nature of the EU's environmental constitutionalism.

The emergence of the "Anthropocene" caused by human transgressions of laws of nature provoking climate change, biodiversity losses, and disruption of other ecosystems (like water and land uses) continues to promote support by EU citizens for the regulation of environmental rights, duties, principles and policy goals in the EUCFR (like Article 37), in the Lisbon Treaty (e.g. Arts 11, 191-193 TFEU) as well as in national Constitutions and human rights law. EU primary and secondary law empowers citizens to complement the constitutional, parliamentary, participatory and deliberative dimensions of European democracy (cf Articles 9-12 TEU) by engaging also in strategic climate litigation (as discussed below), thereby promoting citizen-driven transformation of agreed environmental principles into democratic legislation, administration and judicial protection of rule-of-law, including also international law and multilevel governance of transnational PGs for the benefit of citizens. The multilevel legal and political means for enforcing EU environmental law – for instance, by the EU Commission (Article 17 TEU) and the EU Court of Justice (CJEU), EU member states and citizens resorting to EU and national law enforcement institutions - distinguish EU law from other national and international jurisdictions; they strengthen the enforcement also of UN environmental agreements and legal principles such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[46] Yet, as apparent from the European Commission's regular reports on monitoring compliance with Union law, they have not prevented considerable gaps between existing EU statutory requirements and their effective enforcement across all EU member states, notably in areas like waste management, nature protection, water and air qualities.

2. Constitutionalization through EU climate change legislation and litigation

Ratification of the Aarhus Convention required the EU and its member states to ensure that citizens are guaranteed rights to access information concerning the environment, rights to participate in certain decisions affecting the environment (like planning and approval of development projects), as well as rights securing effective access to environmental justice (notably by administrative and judicial review of breaches of national environmental laws). The effectiveness of EU environmental legislation is strengthened by its "constitutional embedding" into multilevel judicial remedies, democratic constitutionalism promoting civil society participation, and multilevel European and national, environmental agencies enhancing legal

[45] Cf 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 (European Climate Law), OJ L 243, 9.7.2021, p. 1.

[46] The Convention was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, OJ 2005 L 124, 17.5.2005, p. 1. See also Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.

implementation and monitoring of EU environmental requirements by the public and private sector.[47] The environmental regulations, directives and other EU environmental acts (like EU decisions and environmental agreements) proposed by the EU Commission and adopted by the EU parliamentary and legislative procedures can assert higher "democratic input-legitimacy" compared with UN environmental agreements negotiated among democratic and non-democratic UN member states. The European Green Deal adopted by the EU Commission in 2019[48] sets out the Commission's strategy for tackling climate and environmental challenges, such as global warming, the changing climate, the risk of extinction for a large number of species, and challenges related to the pollution and destruction of forests and oceans. The EU is setting ambitious targets to reduce net greenhouse gas emissions by at least 55 % by 2030, compared with 1990, and to be the first climate-neutral continent by 2050. The related legal obligations are specified in the European Climate Law and in 14 additional implementing regulations and directives in various policy areas, such as climate change, energy, environment, mobility and the circular economy.

The principal mechanisms at the disposal of the Commission to ensure application of EU environmental law are the powers and infringement procedures laid down in Articles 258 and 260 TFEU enabling it to take legal action against defaulting member states. Under Article 19 TEU, the CJEU is vested with the task of ensuring that "in the interpretation and application of the Treaties the law is observed". Article 4:3 TEU enshrines the principle of sincere co-operation and requires the Union's member states, *inter alia*, to "take any appropriate measure, general or particular, to ensure fulfilment of obligations arising out of the Treaties or resulting from the acts of institutions of the Union". This duty is entrenched further within the specific context of the Union's common environmental policy by Article 192(4) TFEU, which specifies that the member states "shall implement the environmental policy". The legal legitimacy of Union measures to challenge state failures to secure implementation of EU environmental legal obligations is confirmed by the support among EU citizens and national governments within the Union for infringement proceedings promoting rule-of-law, non-discriminatory conditions of competition and sustainable development among member states and their citizens.

Article 258 TFEU grants the European Commission the power to take legal action against member states violating their EU obligations, ultimately bringing them before the CJEU. If the CJEU finds against the defendant, a judicial declaration may be made by the Court confirming the non-compliance with EU law. Since the entry into force of the Lisbon Treaty on 1 December 2009, the CJEU has also acquired the power to impose penalty payments not exceeding an amount specified by the Commission where the case concerns failure by member states to notify the Commission of measures to transpose a legislative EU directive into national law by the deadlines set in the legislative instrument. In practice, penalty payments are used where

[47] The importance of individual rights and judicial remedies for the decentralized enforcement of EU law is explained in: European Commission (note 4). The CJEU recognizes individual rights of access to judicial remedies as a matter of EU law before national courts if they enforce a directly effective rule in an EU directive (e.g. on ambient air quality). Individual access to the CJEU in order to plead for annulment of an EU regulation or directive on grounds of its alleged illegality requires, by contrast, private plaintiffs to demonstrate (according to Article 263:4 TFEU) that they are both directly and individually concerned by a disputed EU measure, which must affect private plaintiffs by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually.

[48] European Commission, Commission communication – The European Green Deal, COM(2019) 640 final.

the infraction is ongoing at the time of the judicial ruling until the breach is remedied. Article 260(1) TFEU requires member states to take the necessary measures to comply with judgments of the CJEU. Where a member state fails to take such steps, Article 260:2 TFEU gives the Commission the option of bringing further legal proceedings against the member state concerned. If the CJEU finds that a defendant member state has failed to comply with a "first round judgment", the CJEU may impose another penalty payment and/or lump-sum fine. In practice, several hundred infringement judgments have been handed down by the CJEU concerning breaches of EU environmental law by member states.

The citizen-driven dimension of the EU's environmental constitutionalism, and the contribution of judicial remedies of citizens to the "constitutionalization" of environmental law, are also illustrated by the increasing climate litigation relying on international human right treaties and environmental commitments originating outside the EU legal order, with a higher legal rank than the domestic executive and legislative actions and inactions that they challenge. For example, the Dutch Supreme Court in *Urgenda* relied on the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR) in order to oblige the Dutch government to reduce the overall GHG emissions from its territory.[49] Neither of these provisions directly refers to the environment. While the European Court of Human Rights (ECtHR) had earlier interpreted these rights to cover situations where people's (private) lives were affected by environmental pollution, the courts in *Urgenda* pioneered by interpreting Articles 2 and 8 ECHR to entail an obligation to mitigate climate change. These legally binding norms are interpreted in light of strong and repeated political commitments by national and European governments as to what they consider necessary to mitigate climate change. The judicial reasoning process uses these political commitments for concretizing what open-textured legally binding norms mean in practice and for the individual case.[50] Climate litigation implements constitutional and legislative commitments and citizen-driven environmental constitutionalism.

Other successful climate litigation inside the EU includes the Irish climate case,[51] the *Neubauer* case in Germany,[52] and the *Grand Synthe* and *Notre Affaire à Tous* cases in France,[53] *Klimaatzaak* in Belgium,[54] and the *Net Zero Strategy* case in UK.[55] The (ultimately) unsuccessful cases of *Plan B* in UK,[56] *Natur og Ungdom* in Norway,[57] the ongoing case of

[49] *State of the Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, Civil Division).

[50] Cf Christina Eckes, Constitutionalising Climate Mitigation Norms in Europe, in: Petersmann/ Steinbach (note 12), chapter 4.

[51] Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] Appeal no. 205/19 (Supreme Court) (Irish case).

[52] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court).

[53] *Commune de Grande-Synthe v France* [2021] No. 427301 (Conseil d'Etat); *Notre Affaire à Tous and Others v France* [2021] Nos. 1904967, 1904968, 1904972, 1904976/4-1 (Paris Administrative Court).

[54] *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] 2015/4585/A (Brussels Court of First Instance).

[55] R v Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 1841 ('Net Zero Strategy Case').

[56] Plan B Earth et al v Secretary of State for Transport [2020] EWCA Civ 214.

[57] Nature and Youth Norway and others v Norway [2020] HR-2020-24720P (Supreme Court).

Klimatická žaloba ČR in Czech Republic,[58] the Finnish climate case,[59] and *Klimasenerioninnen* in Switzerland[60] did not impose emission reduction obligations; yet, they contributed to the ongoing climate constitutionalization, for instance by prompting some of these complainants (e.g. in *Klimaseniorinnen*[61] and *Carême/Grande Synthe*[62]) to challenge the national judgments in the ECtHR; this precedent induced also new climate litigation (like *Duarte Augustino*[63]) in the ECtHR.[64] Apart from recognizing human rights to the protection of the environment including climate change mitigation, most of these court cases also refer to states' responsibility for adaptation, as regulated in the 2015 Paris Agreement and the 2021 Glasgow Climate Pact. Ratifying and participating in the UN Framework Convention on Climate Change (UNFCCC) has repeatedly been viewed as justification for demanding greater mitigation efforts than originally planned by national institutions.

3. Development of UN and WTO climate mitigation law through European emission trading and carbon border adjustment systems

The UN climate law regime – based essentially on the 1992 UNFCCC, the 1997 Kyoto Protocol, the 2015 Paris Agreement, and the numerous decisions of the parties to these instruments[65] - aims at "(h)olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change" (Article 2,a Paris Agreement). As part of their "nationally determined contributions" (NDCs) and in conformity with both WTO law and the Paris Agreement (cf Article 6), the EU member states have adopted the EU Emission Trading System (ETS) as a "cap and trade" scheme intended to lower GHG emissions in the most cost-effective ways without significant government intervention.[66] The ETS is complemented by a carbon-border adjustment mechanism (CBAM) requiring that, for all products subject to the relevant legislation (iron and steel, cement, fertiliser, aluminium, hydrogen and electricity) - whether domestic or imported - a carbon price is paid commensurate with the carbon emissions generated during production. Payments under CBAM will be phased in over a decade until 2035 in parallel with the phasing-out of the free allowances which are currently available under the ETS, ensuring equal treatment between EU and non-EU producers. In conformity with Article 6 of the Paris Agreement, if, for an imported product, a carbon price has been paid in the non-EU country, no adjustment is required upon importation into the EU. If not, an adjustment tariff must be paid equivalent to the carbon price that would have been paid if the product had been made in the EU. As any effective decarbonisation is likely to reduce ETS/CBAM payments, ETS/CBAM systems promote "internalization" of the environmental

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[58] *Klimatická žaloba ČR v Czech Republic* [2023] 9 As 116/2022 – 166 (Czech Supreme Court).

[59] Greenpeace Nordic and the Finnish Association for Nature Conservation v Finland [2023] ECLI:FI:KHO:2023:62 (Supreme Administrative Court of Finland) ('Finnish climate case').

[60] KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications [2020] 1C_37/2019 (Switzerland Supreme Court).

[61] *KlimaSeniorinnen Schweiz et al v Switzerland*, no. 53600/20 (application communicated to the Swiss Government in March 2021 – Relinquishment in favour of the Grand Chamber in April 2022).

[62] *Carême v France*, no. 7189/21 (Relinquishment in favour of the Grand Chamber in May 2022).

[63] *Duarte Agostinho and Others v Portugal and 32 Other States*, no. 39371/20 (application communicated to the defending governments in November 2020 – Relinquishment in favour of the Grand Chamber in June 2022).

[64] All these climate cases are discussed by Eckes (note 50).

[65] Cf *International Climate Change Law* (eds Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, 2017).

[66] For an explanation of the ETS and its legislative framework see the EU Commission website https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en.

costs of carbon emissions by giving effect to the "polluter pays" principle. Apart from the EU ETS, national or sub-national emission trading systems are operating or under development also in Canada, China, Japan, New Zealand, South Korea, Switzerland and the United States. The EU ETS legislation provides for the possibility to link the EU ETS – as the world's first major and biggest, international carbon market - with other compatible emissions trading systems (e.g. as agreed with EFTA countries). The EU's bilateral and multilateral consultations with exporting countries – e.g. in the OECD, the G7's Climate Club, the WTO and the UNFCCC – are assisting exporting countries and industries to find WTO-consistent agreements (e.g. on participation in ETS) promoting decarbonization of industries. As the voluntary NDCs under the Paris Agreement fall short of preventing climate change and the few emission trading systems outside Europe apply only at national or sub-nation levels of governance, the EU's multilateral ETS/CBAM system enables bottom-up EU leadership for additional ETS/CBAM systems and GHG reductions in third countries.[67]

The more the EU raises its climate ambitions, and less stringent environmental and climate policies prevail in non-EU countries, the stronger becomes the risk of "carbon leakage", for example if companies based in the EU move carbon-intensive production abroad to take advantage of lower emission standards, or if EU products subject to the ETS are replaced by more carbon-intensive imports. In order to avoid carbon leakage shifting emissions outside the EU and thereby undermining EU and global GHG reduction efforts, the EU CBAM Regulation – as finally adopted in May 2023 - requires EU importers in emissions-intensive sectors to report, during the transitional phase as of 1 October 2023, the carbon content and carbon emission prices paid for the imported goods from all third countries (except those participating in the EU's ETS) and, as of 1 January 2026, to purchase certificates equivalent to the weekly EU carbon price.[68] As importers will be able to claim a reduction in the number of CBAM certificates to be surrendered based on the carbon price paid in the country of export, the gradual introduction of the mechanism incentivises third-country governments to put in place greener policies and encourages third-country producers to reduce their emissions, particularly if alternative low-carbon technologies are available and affordable. The CBAM will replace the free allocation of emission allowances which the EU granted to some domestic producers in order to avoid competitive distortions.

Article 6 of the Paris Agreement authorizes the voluntary use of "internationally transferred mitigation outcomes to achieve nationally determined contributions under this Agreement" in the context of CBAMs. Yet, the Paris Agreement does not specify how the "common but differentiated responsibility"-principle (Article 4) should be implemented in the context of CBAMs. The EU is committed to regulating and implementing its CBAM in conformity with both UN law and WTO law.[69] Even if collecting carbon tariffs at the border as an integral part of the EU ETS could violate GATT Articles II or III, Article XX GATT justifies the EU's ETS/CBAM system to the extent it is non-discriminatory and necessary for protecting the human right to protection of the environment (Article XX, para. a), human, animal and plant life or health (para. b), non-discriminatory internal product and production standards like ETS systems (para. d), or is related to the conservation of exhaustible natural resources "in conjunction with

[67] See European Commission (note 4), at 154ff, 268ff.

[68] The CBAM and its legislative framework are explained on the EU Commission website https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en.

[69] See European Commission (note 4), at 268ff.

restrictions on domestic production or consumption" (para. g).[70] The EU Commission initiated bilateral negotiations with third countries (like India, African countries, the USA) on, *inter alia*, how to define agreed production standards (e.g. for carbon-intensive "dirty steel"), agreed procedures for calculating the carbon content of traded products and services, mutual recognition of diverse climate change mitigation policies in import and export countries (e.g. environmental taxes and subsidies), and "common but differentiated responsibilities" (e.g. exemptions of least developed countries and of small and medium enterprises from less-developed countries).

III. Limits of Transnational Constitutionalism: The Examples of Internet Regulation and International Criminal Law

Sections I and II explained how international legal guarantees of human rights, democratic governance, rule-of-law and protection of related PGs can serve as "a second line of constitutional entrenchment" protecting corresponding rules in national Constitutions against transnational governance failures (e.g. by holding governments accountable through UN and WTO adjudication). Yet, as UN and WTO agreements do not effectively protect many PGs (like the SDGs), multilevel governance of PGs depends on bottom-up leadership by democratic countries committed to reforming UN and WTO law and governance for the benefit of citizens and their human rights. UN and WTO lawmaking tends to require state consent in view of the sovereign equality of states; hence, plurilateral agreements among "willing countries" aimed at improving and complementing UN and WTO law often remain controversial in the consensus-based UN and WTO governance practices. For example, even though UN environmental law fails to prevent climate change, deforestation and other environmental degradation, third countries often challenge "unilateral" EU measures for protecting the SDGs – like the ETS/CBAM regulations and EU draft legislation on banning imports of products linked to deforestation (including cattle, cocoa, coffee, palm oil, soya, wood and rubber) – and their "extraterritorial Brussels effects" on foreign exporters to the EU. Both WTO law (e.g. GATT Article XX) and the Paris Agreement (e.g. Article 3 on NDCs) protect national sovereignty; they justify national and regional leadership for introducing higher protection standards inside domestic jurisdictions provided such rules are implemented in non-discriminatory ways, including respect for the "special and differential treatment" principles of WTO law and the "common but differentiated responsibility" principle of the Paris Agreement. In some policy areas, EU leadership enabled worldwide agreements (like the 1998 Rome Statute establishing the International Criminal Court) or plurilateral agreements (like the 2020 agreements establishing the Multi-Party Interim Arbitration among now more than 50 WTO members) strengthening UN and WTO law. Yet, democratic bottom-up leadership through EU regulations on higher protection standards for the SDGs (like SDG13 on climate change mitigation, SDG15 on sustainable management of forests reversing land degradation and biodiversity losses, SDG16 on access to justice and rule-of-law) often encounters limits, for instance if third countries are politically not ready for worldwide treaty negotiations (e.g. on a global carbon-pricing agreement[71]); or whenever third countries prioritize different values in their respective

[70] For a detailed legal explanation see James Flett, The EU Carbon Border Adjustment Mechanism. A Transnational Governance Instrument Whose Time Has Come, in: Petersmann/ Steinbach (note 12), chapter 6.

[71] Cf. Zeid Ra'ad Al Hussein/Farrukh Iqbal Khan, The Case for a Global Carbon-Pricing Framework: An Agreement Is the Last, Best Hope for Averting Climate Disaster, in *Foreign Affairs* 15 September 2023. The IMF

national legislation and foreign policies, as illustrated by the "regulatory competition" in the field of internet regulation (below 1) and by the refusal of hegemonic nuclear powers (like China, Russia and the USA) to accept the jurisdiction of the International Criminal Court (below 2). The increasing geopolitical rivalries among authoritarian alliances (e.g. among China, North Korea and Russia) and democratic alliances (e.g. among NATO countries) render constitutional reforms of UN and WTO law unlikely.

1. Competing internet regulation: European constitutionalism vs US neoliberalism and authoritarian internet control

Control over knowledge, data and intellectual property has become a key battleground for the exercise of economic and political power and for competition in "digital market economies" and political election campaigns.[72] Over the past decade, the EU has emerged as the leading regulator of the "digital economy" (like electronic platform businesses, work from home, financial services markets) notwithstanding the domination of the "tech industry" by American tech companies. The EU's stringent rules on data privacy, disinformation, hate speech, and online copyright, and the EU regulatory proposals for platform workers, digital services taxes and artificial intelligence, are frequently contested by global US companies - even if the latter often implement EU rules across their worldwide operations to avoid the costs of complying with multiple different regulatory regimes. These "Brussels effects" and EU regulatory constraints reflect the EU's ordoliberal belief in regulating "market failures" and protecting citizens' rights in the digital era. European digital regulations implement the EU's constitutional commitment to fundamental rights, democracy, fairness, and redistribution, as well as its respect for the rule of law and judicial remedies. These normative commitments, and the laws implementing those commitments, have been described as a "functional (small c) constitution"[73] aimed at protecting fundamental rights of individuals, preserving the democratic structures of society, ensuring a fair distribution of benefits in the digital economy, and advancing European integration by creating a digital single market:

a) *Fundamental rights* as constitutional foundation for European integration require all EU governments to protect fundamental rights also in the digital economy, such as protection of data privacy via-à-vis abuses by public and private actors (like undue government surveillance, private exploitation of internet users' personal data by tech companies) [74]; protection of internet users from discrimination (e.g. by regulating the ways artificial intelligence systems are developed and deployed); safeguarding freedom of expression (e.g. against undue moderation of online content by internet platforms); and balancing of internet freedoms with other fundamental rights (such as protecting human dignity against illegal and harmful content online). Protection of fundamental rights is at the heart of Europe's digital constitution.

has long supported carbon taxes as a means of reducing GHG emissions and increasing the fiscal resources for decarbonizing economies. Nearly 50 countries already have some kind of carbon price schemes in place.

[72] Blayne Haggart/Natasha Tusikov, *The New Knowledge: Information, Data and the Remaking of Global Power* (2023).

[73] Anu Bradford, Europe's Digital Constitution, in: 64 Virginia Journal of Int'l Law 1 (2023); see also Giovanni de Gregorio, Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society (2022).

[74] The General Data Protection Regulation of the EU recognizes "t]he protection of natural persons in relation to the processing of personal data" as 'a fundamental right", Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, 04.05.2016; cor. OJ L 127 23.5.2018, Recital 1.

b) The "democracy principles" may require EU regulation if digital technologies risk undermining democracy (e.g. by online communication spreading disinformation distorting public debate and the legitimacy of democratic elections). Preservation and promotion of democracy are driving the EU's co-legislation by the European Parliament and the EU Council.

c) Values relating to social fairness and solidarity are defining features not only of Europe's "social market economy", but also of EU regulation of digital transformation in order to prevent a few powerful companies from acquiring disproportionate economic wealth and political power (e.g. by shifting power away from platforms to workers, internet users, smaller businesses, and to the public at large through use of EU competition laws, fair digital tax regimes, and social protections of platform workers).

d) The EU's digital regulation also seeks to advance European integration by promoting a *digital single market* based on harmonized EU regulations (e.g. on safeguarding personal data). The single market imperative provides a legal basis for many EU tech regulations including the Artificial Intelligence Act, the Digital Services Act and the Digital Markets Act.

Europe's ordoliberal digital regulations differ from America's neoliberal tech regulation prioritizing innovation and self-regulation of tech platforms. From a European perspective, the techno-libertarian American approach to digital regulation is perceived as too permissive; and the authoritarian Chinese approach is viewed as too oppressive.[75] The diverse regulatory requirements of the competing internet regimes (e.g. regarding data privacy, data localization, internet censorship) limit the scope of worldwide agreements (e.g. in the current WTO negotiations on e-commerce rules). In contrast to climate change practices which are multilaterally constrained by worldwide UN and WTO rules, the constitutional rules justifying Europe's ordoliberal "internet constitution" are likely to remain fundamentally different from those underlying the USA's neoliberal constitutionalism (e.g. prioritizing free speech over data privacy and other fundamental rights, free markets, the free internet, permissive content moderation rules shielding tech companies from liability) and China's authoritarian constitutionalism (e.g. prioritizing power monopolies of China's communist party over internet censorship, "political surveillance capitalism" and communist party influence on all major companies through subsidies, taxation, regulatory privileges and political restraints, insistence on "data sovereignty", forced "data localization" and transfer of digital source codes inside China). Notwithstanding the "Brussels effect" resulting from EU regulations of its common market treating domestic and foreign companies doing business inside the common market in non-discriminatory ways, neither China nor the USA are likely to change their diverse domestic internet regulations in response to the EU's "internet constitutionalism". It remains to be seen to what extent the realities of this "constitutional pluralism" and regulatory competition can be limited by negotiating multilateral internet disciplines (e.g. for abuses of artificial intelligence). Plurilateral agreements on e-commerce (e.g. as part of the 2020 Regional Comprehensive Economic Partnership Agreement between 15 Asia-Pacific nations creating the largest FTA in the world) and mutual recognition agreements on personal data protection (e.g. between the EU and the USA) promote only limited legal harmonization so far.

[75] For detailed comparisons see Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (2023); Henry Gao, Data Sovereignty and Trade Agreements: Three Digital Kingdoms (Hinrich Foundation, 18 January 2022).

2. The International Criminal Court and the limits of constitutionalism

European governments exercised leadership also in the multilateral UN negotiations leading to the 1998 Rome Statute establishing the International Criminal Court (ICC). The Rome Statute was ratified by 123 states and entered into force in 2002; it mandates the ICC and its prosecutor to investigate and, where warranted, try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. As a court of last resort, the ICC seeks to complement, not replace, national Courts. The Rome Statute governing the ICC and protecting the rights of the accused and of victims – even though negotiated and ratified by states - reflects constitutional principles like rule-of-law, separation of powers (e.g. among the prosecutor and the trial chambers), protection of individual rights, due process of law, criminal justice and legal accountability.[76]

The existence of criminal laws and criminal courts in all UN member states confirms the insight that legal and constitutional restraints are responses to the bounded rationality and frequent domination of human beings by their passions and sentiments: as famously stated by James Madison, law and governance would not be necessary if people were angels. In a multipolar world dominated by geopolitical power rivalries, the Rome Statute continues to be opposed by many governments (e.g. in China, Russia and the USA). Following the announcement by the ICC, on 17 March 2023, that it had issued an arrest warrant for Russian President Putin (and one of his officials – Ms Lvova-Belova), the government of South Africa – prior to its hosting of a summit conference of the BRICS countries (Brazil, Russia, India, China and South Africa) in August 2023 – acknowledged that

- "The International Criminal Court … confirmed that the Republic of South Africa, and all other state parties, are obligated to arrest President Putin in terms of the ICC's arrest warrant and requests for cooperation"; and

- Russia had made it clear "that the arrest of President Putin would be a declaration of war against Russia."[77]

President Putin's decision not to personally attend this BRICS conference illustrates how constitutional rules (e.g. about criminal justice and accountability) and institutions (like the ICC) may have only limited territorial effectiveness towards accused war criminals; yet, defending this territorial effectiveness is necessary for defending the integrity of constitutional laws in a multipolar world. Just as the emergence of the Anthropocene sheds doubts on humanity's capacity of ever realizing the SDGs, the impunity of war criminals sheds doubts on whether international law is capable of protecting a peaceful, rules-based global community and the human and democratic rights of all citizens as legitimate principals of multilevel governance institutions with limited, delegated rights and powers.

[76] Cf Andrea Birdsall/Anthony F. Lang, The International Criminal Court and global constitutionalism, in: Lang/Wiener (note 7), 383-394.

[77] See Max du Plessis/Andreas Coutsoudis, The Putin-South Africa arrest warrant saga: A tale of the shrinking world of an accused war criminal, in *EJIL Talk* 18 August 2023.

3. Conclusions: ordoliberalism requires transformative constitutional politics

The Introduction and section I explained how – since the creation of the European economic communities in the 1950s – the democratic input functions, republican output functions and human rights functions of Europe's transformative, multilevel constitutionalism succeeded in creating a European society (as legally defined in Article 2 TEU) as a sociological reality. European integration remains governed by coherent ordoliberal principles recognized in European constitutional law and practices:

(1) The *interdependence of orders* in European economic, political, legal and social integration and policy processes (e.g. as emphasized in Article 2 TEU) has prompted the EU to protect social and human rights more comprehensively than in neoliberal and authoritarian economies with their diverse economic and environmental regulations neglecting social justice.

(2) EU law prescribes a "*competitive social market economy*" (Article 3 TEU) with active social policies responding to the social, economic and political disruptions caused by economic and democratic competition, for instance by assisting market participants (like workers, consumers, producers, citizens and migrants) to adjust to open competition, and by protecting non-discriminatory conditions of competition in both economic and political markets in ways rejected by authoritarian and neoliberal governments.

(3) EU law recognizes (e.g. in Arts 3-12 TEU) the need for supplementing democratic constitutions by "*economic constitutions*" structured by mutually coherent legal, political, economic and social principles for limiting market failures and related governance failures and constitutional failures, thereby supplementing national constitutionalism by multiple, functionally limited transnational constitutionalism.

(4) The need for embedding national into *transnational, rules-based liberal orders* based on respect for human and constitutional rights, transnational rule-of-law and multilevel constitutionalism is recognized (e.g. in Arts 3 and 21 TEU) and promoted EU leadership for transnational rule-of-law reforms.

(5) The dynamic evolution of EU constitutional, legislative, administrative, judicial and foreign policy practices reflect EU efforts at promoting coherent *constitutional politics and constitutional economics* inside and beyond democracies and their social market economies.

Section II described examples where the EU's economic and environmental constitutionalism contributed to UN and WTO legal reforms (e.g. of judicial remedies, human rights and environmental protection). Section III illustrated the realities of "constitutional pluralism" and of "regulatory competition" (e.g. among diverse, national internet regulations and criminal justice systems) limiting constitutional UN and WTO legal reforms. These factual realities of power politics do not justify abandoning the universally agreed UN human rights and governance ideals in the never-ending human search for justice (e.g. in the sense of reasonable justification of law and governance). Constitutional democracies must follow their mandates (e.g. in Article 21 TEU) to promote human rights, democratic self-government, rule-of-law and the universally agreed SDGs at home and abroad. The Paris Agreement and the neoliberal WTO practices have so far failed to protect sustainable development of the world economy. Hence, UN and WTO members should support EU leadership for designing ETS/CBAM systems in conformity with UN and WTO law – in contrast to the US Inflation Reduction Act of 2022 with its WTO-inconsistent tax and subsidy discriminations, and to the unwillingness of China and India to accept the 2021 Glasgow climate policy commitment of phasing-out fossil fuel electricity and coal subsidies aimed at realizing zero-carbon economies by 2050. It remains to be seen whether - at the WTO Ministerial Conference in February 2024 – the WTO consensus practices

will enable WTO Ministerial Declarations promoting synergies between UN climate law and WTO law[78], such as mutually coherent interpretations and agreed clarifications of trade and climate change rules (e.g. on environmental subsidies, the "common but differentiated responsibilities and respective capabilities" as vaguely defined in Article 4 of the Paris Agreement). Just as trade and environmental rules tend to be coherently interpreted in national and European jurisdictions, overcoming the political "fragmentation" of "member-driven WTO governance" and UN governance requires "sustainable UN and WTO governance systems" realizing the promise of the 2015 SDG commitments to "transforming our world" through stronger respect for human rights, rule-of-law and democratic governance in making economic, environmental and social systems more coherent and sustainable.[79]

If former US President Trump should be re-elected as US President in 2024 and realize his plan to introduce a protectionist tariff wall around the US market, the world risks a repetition of the retaliatory trade protectionism provoked by the 1930 Smoot-Hawley Tariff Act of the US Congress, leading to further economic disintegration, political conflicts and environmental disaster. The current geopolitical conflicts suggest that – if the UN and WTO legal systems further disintegrate - UN and WTO members will no longer be capable of recreating equivalent "world order treaties". Transnational governance failures (e.g. by nuclear powers opposing constitutional restraints needed for constructing a rules-based "sustainable global community") increasingly entail existential threats for the welfare of humanity. The transnational governance failures of the 1930s provoked unprecedented human tragedies (like the transformation of Germany's "Weimar Republic" of 1919 into a failed state committing the greatest holocaust crime in human history). If humanity does not learn now from its past constitutional failures and from Europe's multilevel democratic constitutionalism enabling 70 years of democratic peace among EU member countries, securing a peaceful "global community" protecting sustainable development risks becoming a utopian dream.

[78] Such needed synergies are described in: Dan Esty/Jan Yves Remy/Joel Trachtman (eds), Report of the Remaking Trade Project - Villars Framework for a Sustainable Global Trade System of 7 September 2023.

[79] UNGA Res 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (25 September 2015) UN Doc ARES/70/1.