CHAPTER 2

Constitutional Pluralism, Regulatory Competition and Transnational Governance Failures

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1 How to Respond to UN and WTO Governance Failures?

This contribution uses the term 'constitutionalism' in a broad sense for constituting, limiting, regulating and justifying multilevel rules and governance institutions of a higher legal rank for providing public goods (PGs). It explains why globalization, its transformation of *national* into *transnational PGs*, and the demand by citizens for more effective protection of transnational PGs (such as climate change mitigation) require extending 'constitutional safeguards' to multilevel governance of PGs; and why human and democratic rights protecting informed, individual and democratic consent of free and equal citizens must remain the 'co-constitutive legitimation' of transnational constitutionalism.[1] All UN member states adopted national Constitutions (written or unwritten) constituting, regulating and justifying national governance of PGs. The 'constitutional politics' necessary for transforming agreed constitutional principles into democratic constitutionalism was described by the American philosopher Rawls as a 'four-stage sequence' as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional 'principles of justice' (e.g. in the 1776 US Declaration of Independence

1 cf Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart 2017). Martin Loughlin, *Against Constitutionalism* (Harvard UP 2022), rejects Europe's 'ordo-constitutionalism' and 'cosmopolitan constitutionalism' as being inconsistent with his nationalist conception of British democracy (as represented by 'the Crown, the Lords and the Commons' claiming 'parliamentary sovereignty') – without offering any solutions for limiting transnational governance failures and responding to citizen demand for protecting transnational PGs more democratically and more effectively. His preference for nationalism and its greater solidarity and 'common sympathy' neglects the social welfare, rule-of-law and solidarity created by Europe's 'social market economy' and monetary union limiting individual and nationalist egoisms. Anglo-Saxon neoliberalism and constitutionally unrestrained foreign policy discretion favor populist and feudal abuses of representative democracies, where 'ordinary politics' is typically driven by narrow self-interests and money-driven interest group politics; cf Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991).

and Virginia Bill of Rights), (2) elaborate national Constitutions (e.g. the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens; and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights and rule of law.[2] National constitutional practices differ enormously among countries, as illustrated by the greater reliance on evolutionary constitutionalism in common law jurisdictions (like the United Kingdom) compared with constitutional constructivism (e.g. in India and Switzerland with their frequent constitutional amendments). All countries joined multilateral treaties of a higher legal rank for protecting transnational PGs like human rights and rule-of-law. But transnational 'constitutional politics' constituting, limiting and regulating multilevel legislative, executive and judicial governance institutions beyond states remain contested and underdeveloped outside Europe. Similarly, the 'constitutional economics' underlying UN and WTO law is not effectively implemented inside many states. This contribution explains why constitutional nationalism and disregard for 'constitutional economics' undermine democratic protection of the sustainable development goals (SDGs) like food security (SDG2) undermined by Russian wars of aggression, climate change mitigation (SDG15) undermined by China's and India's use of coal-powered energy, and transnational rule-of-law (SDG16) undermined by hegemonic disregard for judicial protection of transnational rule-of-law.

The more globalization transforms *national* into *transnational PGs* (like human rights, rule of law, most SDGs) which – in a globally interdependent world composed of 200 sovereign states – no state can unilaterally protect without international law and multilevel governance institutions, the more '*national constitutionalism 1.0'* has become an incomplete system for governing transnational 'aggregate PGs'. In European integration among constitutional democracies since the 1950s, the demands by EU citizens for regional and global PGs transformed *national* into *multilevel constitutionalism* extending the national 'four-stage sequence' to (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU law (like legal primacy, direct effects and direct applicability by citizens of precise, unconditional EU rules) and (8) domestic implementation of EU law

2 cf John Rawls, *A Theory of Justice* (rev edn Harvard UP 1999) 171–173.

inside member states protecting PGs across national borders (cf Section 2).[3] Following the fall of the 'Berlin wall' (1989) and the dissolution of the Soviet Union (1991), democratic constitutionalism also contributed to worldwide recognition of multilevel judicial protection of rule of law in UN law (e.g. in the UN Convention on the Law of the Sea (UNCLOS)), trade law (e.g. in WTO law), in investor-state arbitration, and in international criminal law. Yet, transforming *national* into *multilevel constitutionalism* remains resisted by authoritarian and nationalist rulers avoiding democratic and judicial restraints on foreign policy powers. For example,

- the UN Security Council system is rendered ineffective by authoritarian abuses of veto-powers and illegal aggression and threats of military force;
- the UN human rights system fails to prevent violations of human and democratic rights in many UN member states;
- the 1992 UN Framework Convention on Climate Change (UNFCCC) failed to prevent climate change;
- UN environmental law and institutions also failed to prevent ocean pollution, over-fishing and biodiversity losses;
- the World Health Organization (WHO) failed to prevent and effectively respond to global health pandemics;
- the Food and Agriculture Organization (FAO) failed to protect food security for currently more than 200 million people;
- the Bretton-Woods Agreements failed to prevent the 2008 financial crises and remain one-sidedly dominated by the industrialized G7 countries; and
- China, Russia and the USA increasingly reject international adjudication if judicial rulings limit their foreign policy decisions to violate UN or WTO law; the increasing number of abuses of military power (e.g. in Central Africa) reinforce this trend towards power politics.

1.1 *How to Define and Explain 'Transnational Governance Failures'?*

Constitutionalism proceeds from the 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. The diverse forms of *democratic constitutionalism* (e.g. since the ancient Athenian democracy), *republican constitutionalism*

3 cf Giuliano Amato and others (eds), *The History of the European Union: Constructing Utopia* (Hart 2019).

(e.g. since the ancient Italian city republics), and of *common law constitutionalism* (e.g. in Anglo-Saxon democracies) aim at limiting 'governance failures' through commitments to agreed 'principles of justice' (like human rights, democratic self-governance, separation of powers) and institutions of a higher legal rank (like democratic and judicial protection of rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, 'mixed government'), of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*), and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and rights of property owners) have been progressively developed and incorporated into modern, written Constitutions as necessary for protecting PGs. The 2030 UN Sustainable Development Agenda (SDA) links economic, environmental and social rules with human rights, democratic governance and rule-of-law also for multilevel governance of transnational PGs like the universally agreed 17 SDGs. Yet, as discussed in Section 3, the 'constitutional principles' underlying UN human rights law (HRL) and the SDA are neither effectively implemented ('constitutionalized') in the legislative, administrative and judicial practices inside and among many states (e.g. authoritarian states like China, Iran, Myanmar, North Korea, Russia, Syria etc) nor in UN law. The current economic, environmental, food and migration crises, global health pandemics, Russia's unprovoked military aggression and war crimes in Ukraine confirm the constitutional insight (e.g. of Kantian legal theory) that national Constitutions and 'inter-national law' cannot protect citizens against external human disasters unless abuses of policy discretion are legally limited also in external relations for the benefit of all citizens. Democratic constitutionalism – in the sense of citizen-driven constitutional politics, constitutional economics and constitutional law as restraints on market failures and governance failures and as safeguards for protecting informed, individual consent of citizens and their individual and democratic self-development of human capacities as foundational values justifying market economies and democratic governance of PGs – is under increasing attack also inside business-driven, neoliberal democracies with high social inequalities as inside the USA.

Transnational governance failures can be narrowly defined in terms of violations of international law and arbitrary disregard for the universally agreed SDGs; but they may also be defined more broadly by the lack of justifiable 'principles of justice', as illustrated in the chapter by Marceddu on the reforms of international investor-state arbitration. Understanding the causes of governance failures and remedial options requires distinguishing market failures (like distortions of competition, external effects, social injustices, information

asymmetries), government failures (e.g. to protect PGs, human and democratic rights, and limit market failures) and constitutional failures (e.g. to protect transnational PGs like the SDGs). Public choice theories explain why public and private actors may benefit from exploiting such 'failures' (like corruption, externalization of pollution costs, related 'rent-seeking' at the expense of social costs). Transnational governance failures violating international law confirm that path-dependent governance methods – like constitutional nationalism, intergovernmental power politics, and conceptions of international organizations as mere 'international functionalism' (rather than as multilevel governance of PGs) – may not suffice for realizing the universally agreed SDGs. In contrast to 'realism' prioritizing power-oriented, individual and national self-interests (like maximization of relative power, income and self-help), democratic constitutionalism prioritizes protection of equal individual and democratic freedoms and related PGs – in both the economy and the polity – through rules and institutions of a higher legal rank. This 'normative individualism' perceives voluntary, informed individual and democratic consent to 'just rules' and 'institutionalization of public reason' as most important sources of values and as necessary constitutional restraints against abuses of public and private power. Hence, state sovereignty derives value from protecting individual and democratic self-determination (e.g. as protected by UN HRL) rather than from authoritarian power politics. From such a citizen perspective prioritizing equal human and constitutional rights, the UN and WTO governance crises can be explained in terms of 'constitutional failures' (e.g. to protect human rights, rule-of-law and the SDGs), related 'governance failures' (including both public and private abuses of power) and 'market failures' (like restraints of non-discriminatory competition, environmental pollution, social injustices). Even though human and democratic preferences and constitutional agreements differ among countries, UN and WTO law and the SDGs offer multilaterally agreed benchmarks for defining 'transnational governance failures'.

1.2 *Diverse Constitutional Responses to Transnational Governance Failures*

UN member states tend to define – and respond to – transnational governance failures in diverse ways depending on which UN legal values their governments prioritize:

- *Process-based, representative democracies* (e.g. in Anglo-Saxon countries with parliamentary supremacy) prioritize constitutional nationalism, majoritarian institutions, their democratic accountability, civil and political liberties over economic, social and cultural rights of

citizens, and discretionary foreign policy powers;[4] arguably, their prioritization of business-driven market processes ('markets know best') and of money-driven, democratic majority decision-making (e.g. in US federal elections financed by business interests) is distorted by high social and financial inequalities and only selective enforcement of competition and environmental laws (e.g. inside the USA).

– *Rights-based, multilevel democratic constitutionalism* is practiced notably in the 27 EU member states interpreting their Treaties on European Union (TEU), on the Functioning of the EU (TFEU) and the EU Charter of Fundamental Rights (EUCFR) as functionally limited 'treaty constitutions' restraining market failures (e.g. by competition, environmental and social rules protecting individual and common market freedoms, social rights and judicial remedies), constitutional failures (e.g. by constituting democratic, judicial and regulatory EU institutions protecting human and constitutional rights of EU citizens, transnational PGs and 'national identities'), and governance failures (e.g. by rule-of-law enforcemenet, institutional 'checks and balances');[5] arguably, the EU's normative and methodological individualism (explaining social phenomena like competition in terms of the interplay of individual actions and rights) justifies the EU's more comprehensive, multilevel legal, democratic and judicial protection of equal civil, political, economic, social and cultural rights of EU citizens (e.g. as codified in the EUCFR and clarified and enforced through

4 Loughlin (n 1) claims that the people and their elected representatives, rather than citizens and courts of justice invoking and defending human and constitutional rights, should define the nation's political identity and make its most important policy decisions (pp. 124–35). His focus on nation states neglects multilevel protection of human and constitutional rights and transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g. Arts 9–12 TEU), including protection of transnational PGs as a task of 'living democratic constitutionalism'. The focus in US courts on 'negative freedoms' from coercion by government – and on judicial deference to 'political questions' to be decided by the US Congress (like the regulatory powers of the US Environmental Protection Agency) – impedes judicial recognition of 'positive constitutional rights' (e.g. to health and environmental protection) if they have not been explicitly recognized in legislation.

5 As discussed in Sections 2 and 5, European courts perceive their judicial mandates as 'constitutional guardians' more broadly in view of the multilevel guarantees of human and constitutional rights and related PGs in Europe's multilevel, democratic constitutionalism. On the need for more 'progressive constitutionalism' also in the USA challenging 'originalist interpretations' of the US Constitution see: Joseph Fishkin and William E Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy (Harvard UP 2022); Adrian Vermeule, Common Good Constitutionalism (Polity Press 2021).

multilevel judicial remedies), including Europe's greater trust in science-based, independent regulatory institutions.[6]

– *Authoritarian states* (like China and Russia) often adopt 'fake constitutions' that neither effectively constrain power monopolies (e.g. of China's communist party, the oligarchic rulers in the Kremlin) nor protect independent, democratic and judicial remedies and human rights. Dictatorships often challenge UN law as being based on 'Western values' in order to justify disregard of human and democratic rights and rule-of-law inside and beyond their national borders.

This reality of constitutional pluralism (also in less-developed countries with particular development priorities) suggests that diverse preferences, regulatory competition, geopolitical rivalries and authoritarian opposition against 'constitutional UN and WTO reforms' will remain permanent facts. Russia's wars of aggression, war crimes and 'weaponization' of energy and food supplies illustrate how – the more the UN and WTO systems are undermined by

6 The democratically defined mandates of such science-based regulatory agencies, and their limitation of market and governance failures subject to judicial remedies of citizens and democratic oversight, justify such 'ordo-liberal agencies'; they refute neo-liberal criticism (e.g. by Friedrich August Hayek, *Knowledge, Evolution and Society*, Adam Smith Institute 1983) of their 'inevitable ignorance' and 'pretense of knowledge'; cf. Ernst-Ulrich Petersmann, Competition-oriented Reforms of the WTO World Trade System – Proposals and Policy Options, in: Roger Zäch (ed.), *Towards WTO Competition Rules* (Kluwer 1999), 43–71. On the categorical differences between utilitarian neoliberalism (as illustrated by the prioritization of legal protection of intellectual property rights and rejection of WTO competition disciplines) and rights-based ordoliberalism see Ernst-Ulrich Petersmann, Neoliberalism, Ordoliberalism and the Future of Economic Governance, in *JIEL* 26 (2023) 836–842. The neglect of these value differences prompts frequent 'neo-liberal mis-interpretations' of European economic regulation (e.g. by Emma Luce Scali, *Sovereign Debt and Socio-Economic Rights Beyond Crisis*, Cambridge UP 2022, who attributes the 'austerity-conditionality' of the EU's financial assistance in response to Greece's sovereign debt crises to 'Hayekian neoliberalism' (grounded in F.A. Hayek's explanation of market competition as information-, coordination-and sanctioning-mechanism) rather than to the 'democratic constitutionalism' emphasized in the relevant jurisprudence by the German Constitutional Court). Similarly, Loughlin (n 1) conflates EU ordoliberalism with neoliberalism (e.g. on p. 186, 195) by overlooking that the multilevel legal and judicial protection of social, labor and human rights co-constituting Europe's 'social market economy' aims at protecting the autonomy, dignity and capabilities of all EU citizens by limiting the neoliberal prioritization of property rights and of market distortions benefitting the powerful. Cosmopolitan constitutionalism is not inconsistent with Loughlin's claim that 'constitutional democracy remains our best hope of maintaining the conditions of civilized existence' (p.24); yet, his dismissal of democratic constitutionalism as baseless 'faith' (p.149) amounts to a neoliberal recipe for human disaster and continued human failure to protect global PGs demanded by, and of existential importance for citizens.

abuses of powers – UN and WTO law and governance, and the 'regulatory competition' among authoritarian and democratic countries, risk failing to protect the universally agreed SDGs. The successful, albeit modest results of the WTO Ministerial Conference in June 2022 confirm the need for continuing global cooperation in protecting the SDGs. Yet, the realities of power politics in UN and WTO governance call for second-best, *plurilateral* reforms among 'willing countries' (e.g. through democratic defense alliances like NATO, 'climate protection clubs' conditioning market access on protection of the SDGs).

1.3 *Citizen Struggles for Justice and Democratic Governance beyond Borders*

Do the realities of intergovernmental power politics – and the difficulties of multilevel democratic governance of PGs – justify the frequent disregard of transnational constitutionalism, for instance by arguing 'against constitutionalism' beyond constitutional democracies and by pragmatic focus on 'what works', whether successful arrangements in one field can be replicated in others, and on the interests, incentives, power, costs and benefits of the actors involved?[7] As Europe's multilevel constitutional guarantees of civil, political, economic and social rights have protected mutually beneficial cooperation in protecting transnational PGs (like rule-of-law, the common market) more effectively than constitutional nationalism: Why is it that national welfare economics (e.g. examining costs and benefits of alternative policy instruments within the given constitutional context of states) and power-oriented,

7 cf Loughlin (n 1), who argues 'against constitutionalism' without offering any strategy for protecting transnational PGs like the SDGs, notwithstanding his acknowledgment (e.g. on p 202) that constitutional democracy has proven to be the most effective method for protecting peace, security and welfare. Loughlin's argument against constitutionalism 'rests on the claim that it institutes a system of rule that is unlikely to carry popular support' (p. 202); yet, EU citizenship rights, EU constitutional rights and remedies, EU parliamentary, deliberative and participatory 'demoi-cracy' have promoted transnational 'constitutional patriotism' (Günther Habermas) justifying and supporting EU law and acknowledging past 'constitutional failures' in national governance systems. The case-studies of this book confirm that legal empowerment of citizens beyond states and private-public partnerships can render transnational governance (e.g. for producing and distributing food and vaccines, holding governments accountable through climate litigation) more legitimate and more effective. See also the report by George Papaconstantinou and Jean Pisani-Ferry (eds), *New World, New Rules? Final report on the Transformation of Global Governance Project 2018–2021* (EUI 2022), which admits that 'a new world requires new rules' (p. 40), and that 'top-down constitutionalisation through treaties and law' (p. 120) is no realistic template for global governance reforms in a multipolar world (cf. p. 19). Yet it hardly discusses Europe's historical experience that multilevel, bottom-up democratic constitutionalism remains crucial for protecting transnational PGs at regional and plurilateral levels of governance.

intergovernmental pursuit of national self-interests remain the prevailing paradigms for analyzing international politics outside Europe? This chapter proceeds from the constitutional insight that constitutionalism offers the most convincing response to 'bounded rationality', human passions, rational egoism and psychopathic autocrats (e.g. using and threatening military force at home and abroad) as perennial challenges to peaceful cooperation among citizens. It criticizes path-dependent nationalism for neglecting how 'constitutional economics' (e.g. underlying EU common market law) and transnational 'constitutional politics' (like EU human rights and environmental constitutionalism) have promoted economic and social welfare, for instance by empowering EU citizens and promoting transnational constitutional, parliamentary, participatory and deliberative democracy at national and European levels of governance (as prescribed in Articles 9–12 TEU). Also European 'moonshot management' (e.g. for responding to the COVID-19 health crises, the climate crisis, and to the European security crisis caused by Russia's war against Ukraine) has become more legitimate and more effective by embedding it into mutually beneficial constitutional restraints, efficient rule-of-law principles, democratic civil society support and successful 'PG s litigation' reinforcing democratic accountability of governments. Due to the interdependence of social, economic, political and legal orders, Europe's post-1945 struggles for a coherent 'constitutional house' protecting social peace and justice remain grounded in respect for human dignity (e.g. in the sense of respecting individual and democratic diversity by protecting equal freedoms) and diverse human capacities (e.g. through protecting 'positive human rights' to education, food, decent work, non-discrimination, democratic participation) promoting mutually beneficial cooperation and reasonable, individual and democratic self-development. Informed, individual consent to constitutional rules protecting 'consumer sovereignty' in economic markets, 'citizen sovereignty' in political markets, and rule-of law – rather than mere national politics, utilitarian cost-benefit analyses, and neoliberal interest group politics cloaked as 'representative democracy' – justify multilevel legal protection of equal rights of citizens and of inclusive social, economic, democratic and legal policy responses to transnational regulatory challenges.

The policy question underlying constitutionalism – how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting informed, individual consent to collective supply of PGs? – remains of existential importance for reasonable citizens in all states. National Constitutions differ among countries according to their histories and preferences. Their diverse value priorities and 'implementation deficits' entail geopolitical rivalries, regulatory competition, and authoritarian opposition against multilateral restraints on power politics (like President Putin withdrawing

Russia from European institutions, China suppressing human and democratic rights, President Trump withdrawing the USA from some UN and regional treaties). The multilateral treaties establishing the 15 UN Specialized Agencies governing special PGs differ among each other in response to their diverse collective action problems. Yet, their effectiveness depends on private-public partnerships as discussed in this book; their multilevel governance regimes remain embedded into the UN Charter and limited by general principles of UN law, just as the various EU institutions remain embedded into general EU constitutional law principles (e.g. as codified in the European Convention on Human Rights (ECHR) and the EUCFR); also national legislatures, executives, judiciaries and independent regulatory bodies remain constrained by agreed constitutional rules in their joint governance of PGs. The diverse constitutional structures, principles, human and democratic rights and duties protect private-public partnerships, legal and democratic accountability for limiting transnational governance failures, and guidelines for *normative governance reforms* (e.g. for protecting universal access to vaccines, decarbonizing economies, educating and institutionalizing public reason, constraining disinformation by populist demagogues, judicial remedies protecting equal rights and rule-of-law, countermeasures against Russia's war crimes and *jus cogens* violations).

Arguably, constitutionalism offers citizens also the most reasonable strategy for preventing that 'de-globalisation' between democracies and authoritarian regimes provokes, once again, devastating conflicts similar to those caused by the 'first de-globalisation' (1914–1945) provoking World Wars I and II, the great economic depression, the rise in dictatorships responsible for the killing of millions of people, and other abuses of public and private power.[8] Authoritarian abuses of power and disinformation also increase the 'paradox of globalization', i.e., the rational ignorance of most people (including populist rulers) towards global regulatory challenges (like the UN and WTO legal systems protecting transnational freedoms and rule-of-law). European integration law has demonstrated that – by empowering citizens through human and constitutional rights, rule-of-law and democratic governance beyond

8 On this 'paradox of freedom' – i.e., that insufficient legal and institutional protection of equal freedoms favors abuses of public and private power disrupting order and social peace, as already discussed in Plato's book on *The Laws* – see: Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century* (Oxford: Hart 2012) 61–66; Tara Zahra, *Against the World: Anti-Globalism and Mass Politics between the World Wars* (New York: Norton 2023). Modern democratic constitutionalism has reversed Europe's long history of feudalism and absolutism by reconciling liberty, equality, solidarity and democratic inclusion.

states and legally limiting market failures, governance failures and nationalist 'constitutional failures' – transnational 'social market economies' (Article 3 TEU) and democratic governance of PGs can be promoted more effectively than by constitutional nationalism and populism disregarding transnational governance failures. Authoritarian 'survival governance' cannot be trusted; hence, transnational governance must remain limited by constitutional rights, remedies, 'checks and balances', and by 'de-risking' cooperation with constitutionally unrestrained autocrats 'weaponizing' economic dependencies (e.g. on Russian energy and food exports).

1.4 *Insights from 'Constitutional Economics' and 'Constitutional Politics'*

'*Constitutional economics*' (explaining the welfare effects of constitutional agreements among citizens protecting equal freedoms and limiting 'market failures' and 'governance failures') and '*constitutional politics*' (transforming agreed constitutional 'principles of justice' into multilevel legislative, administrative and judicial protection of rule-of-law and PGs) remain neglected in state-capitalist and business-driven, neo-liberal governance regimes and in academic research on multilevel governance of global PGs.[9] 'Constitutional failures' and 'constitutional implementation deficits' aggravate market failures, governance failures and the current, worldwide human disasters undermining the SDGs. Constitutional economics suggests examining – and limiting – the man-made causes of the current environmental, health, food, security and rule-of-law crises, including 'market failures' (like harmful externalities), 'constitutional failures' (like insufficient constitution of democratic governance institutions protecting human rights) and related 'governance failures' (like disregard for rule-of-law) beyond national legal systems.[10] For

9 See note 7 above. For example, the acclaimed book by Mariana Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin 2020), recommends managerial 'mission-oriented approaches' for realizing the SDGs without acknowledging that most SDGs are 'aggregate PGs' (like ending poverty and hunger for all) requiring international cooperation among UN member states for overcoming collective action problems, which are fundamentally different from 'single best efforts PGs' (like inventing vaccines and sending astronauts to the moon, which may be realized by a single state). On the different kinds of PGs and their diverse 'collective action problems' see Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022) chapts 4 and 5.

10 On 'constitutional economics' and 'economic constitutionalism' see Chapter 3 in this book and Petersmann (n 9); Stefan Voigt, *Constitutional Economics: A Primer* (CUP 2020). Constitutional economics' justifications of protecting the common, reasonable interests of all citizens (like 'consumer sovereignty' in economic markets, 'citizen sovereignty' in democratic markets) complement moral, constitutional and democratic justifications of protecting individual, national and cosmopolitan citizen interests (e.g. in protection of

example, without taking into account 'pollution externalities', economists cannot even know to what extent the global division of labor increases consumer and citizen welfare. Rather than focusing only on result-oriented cost-benefit analyses within the limits of existing laws, constitutional economics explores enhancing economic welfare through mutually agreed, inclusive rules limiting market failures (like 'harmful externalities') and governance failures (like arbitrary domination). Europe's multilevel constitutionalism has, however, no equivalent in Africa, the Americas or Asia, where national constitutionalism often fails to effectively constrain abuses of power and to transform 'collective action problems' into constitutional reforms – not only in totalitarian states (like China and Russia), but also in other BRICS countries (like Brazil, India, South Africa) and Anglo-Saxon democracies (like 'Brexit Britain' and the USA under President Trump, cf Sections 3–5). Similar to EU law, also UN law and the SDA link economic, environmental and social rules with human rights, democratic governance and rule-of-law for protecting the SDGs. Yet, UN HRL and UN/WTO remedies do not effectively constrain ('constitutionalize') power politics (Sections 3–4). The 'regulatory competition' among neoliberal, state-capitalist and ordoliberal conceptions of governance is aggravated by the lack of effective UN and WTO legal disciplines on 'market failures' (like restraints of competition, adverse externalities, information asymmetries, social injustices), 'governance failures' (e.g. to respect rule-of-law and protect PGs), and 'constitutional failures' (e.g. in terms of protecting human rights against authoritarian power politics). The needed global cooperation in UN and WTO institutions is further eroded by regional power politics (e.g. in Eurasia) and related countermeasures (e.g. by democratic alliances sanctioning suppression of human rights in China and Russia by trade and investment restrictions). This contribution concludes that the UN SDA risks becoming a *utopia* unless democracies extend their diverse forms of constitutionalism to plurilateral protection of transnational 'aggregate PGs' (like public health and climate change mitigation) by empowering private and public, national and transnational actors to hold multilevel governance of PGs more accountable.

human rights, worker rights, property rights, refugee rights) and input- as well as output-legitimacy of rules and (self)governance.

2 Europe's Multilevel Constitutionalism Has No Equivalent outside Europe

Since the 1950s, the successful transformation of *national* into *multilevel European constitutionalism* protecting human rights and democratic peace among most European countries has confirmed the historical experience that democratic constitutionalism remains the most important 'political invention' for limiting transnational governance failures like abuses of public and private power caused by 'bounded rationality' of human beings. Citizens often remain dominated by their passions and selfish utility-maximization (as illustrated by millennia of wars, slavery and gender discrimination) rather than by their reasonableness and morality. European constitutional law emerged in response to unprecedented governance failures like WWII; it demonstrated that – also beyond states – constitutional self-limitations can limit abuses of public and private power by 'tying one's hand to the mast' (following the ancient wisdom of Ulysses) of agreed principles of justice (like human rights, democratic self-determination, rule-of-law) and inclusive institutions of a higher legal rank. WWII prompted all 193 UN member states to strengthen such 'legal self-commitments' at national and international levels of law and governance. 'Constitutional politics'[11] adjusting national Constitutions to global regulatory challenges remains, however, neglected by most citizens and governments outside Europe notwithstanding their universal experience that intergovernmental power politics (like colonialism and imperial wars) undermined democratic peace and welfare all over the world. Just as WWI led to communist dictatorships (e.g. following the Bolshevik revolution in 1917) and civil wars (e.g. in the dissolution of the Chinese and European empires), the Russian wars of aggression, current geopolitical rivalries and trade wars require 'de-risking' international relations through new forms of plurilateral, economic and political cooperation preventing autocratic 'strongmen' from realizing their threats of nuclear war, war crimes and environmental disasters, including new forms of transnational constitutional restraints on 'bounded human rationality'.

11 The term 'constitutional politics' is used here for describing dynamic democratic and judicial processes of implementing agreed 'constitutional principles of justice' in multilevel governance of PGs and for challenging the 'non-implementation deficits' causing constitutional-, governance- and market-failures.

2.1 *Constitutional Self-limitations of 'Market Failures' and 'Governance Failures' in Europe*

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's micro-economic 'common market constitution' for a 'competitive social market economy' limits 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). 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. 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 independent competition, monetary and other regulatory agencies, democratic institutions and courts of justice.

The 'regulatory competition' among EU member states, EFTA states and third European states remained 'constitutionally restrained', for instance due to the ECHR and related constitutional law principles protected by multilevel cooperation among European courts (like the European Court of Human Rights, the EFTA Court, the European Court of Justice) and national courts.[12] The common membership of European countries in the General Agreement on Tariffs and Trade (GATT 1947), the 1979 Tokyo Round Agreements, and the 1994 Agreement establishing the WTO offered additional legal disciplines, political institutions and judicial remedies for resolving disputes if diverse European regulatory systems and economic and trade policies created conflicts over perceived governance failures. The – relatively few – GATT and WTO disputes initiated by third European countries (like Norway and Turkey) challenging EU regulations confirmed how European integration law promoted 'democratic

12 For recent examples see Giovanni de Gregorio, *Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society* (CUP 2022).

peace'. Whenever financial, public debt, monetary, migration, public health and other (e.g. energy) crises inside the EU revealed 'constitutional failures' to secure rule-of-law and protect PGs, EU institutions responded by seeking to reform EU law, for example by monetary and fiscal integration in response to the financial crises since 2008, a 'health union' in response to the COVID-19 health pandemic of 2020, legal protection of privacy rights in digital services, and common migration, energy, foreign and defense policies in response to Russia's military aggression against Ukraine since 2014.

2.2 *Multilevel 'Constitutional Politics' Protecting Transnational European PGs*

European law responds to the fact that globalization transforms *national* into *transnational PGs*, thereby rendering national Constitutions incomplete. Globalization requires complementary, multilevel constitutionalism constituting, limiting and justifying multilevel governance of transnational PGs. European law illustrates how path-dependent 'constitutionalism 1.0' based on (1) national constitutional contracts (like the 1789 French Declaration of the Rights of Man and the Citizen), (2) national Constitutions, (3) democratic legislation and (4) administrative and judicial protection of rule-of-law for the benefit of citizens can be extended to international law and institutions for legally constituting *transnational PGs*, which no single state can protect without rules-based international cooperation. Maintaining the input-and output-legitimacy of functionally limited 'treaty constitutions 2.0' among states (like the 2009 Lisbon TEU) constituting and regulating such multilevel governance requires also 'cosmopolitan constitutionalism 3.0' (as codified in the EUCFR) based on multilevel, institutional protection of human and constitutional rights, transnational rule-of-law and multilevel implementing regulations respecting 'constitutional pluralism'. In Europe, the demands by EU citizens for regional and global PGs transformed *national 4-stage constitutionalism* into *multilevel constitutionalism* by 'constitutionalizing' (5) international law among EU and EFTA states, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules and (8) domestic implementation of EU law inside member states protecting PGs across national borders. The emergence of 'illiberal' EU member states (e.g. in Hungary and Poland) illustrated why the 'normative pull' of human rights depends on their 'normative push' through 'constitutional politics', i.e., their effective legal implementation through constitutional law, democratic legislation, administration and adjudication, international treaties, multilevel governance institutions, 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and its domestic, legal implementation.

Such multilevel 'constitutional politics' remained democratically acceptable due to its 'bottom-up construction' based on principles of subsidiarity, proportionality, protection of 'national identities', multilevel democracy and 'EU citizen rights' without a supranational 'European state'. The limitation of EU membership to constitutional democracies – and the democratic, regulatory and judicial EU institutions – promoted citizen-driven enforcement of EU law through multilevel, judicial protection of constitutional guarantees of civil, political, economic and social rights and common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession) across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the European community. The EU law commitments (e.g. in Arts 3, 21 TEU) to protecting human rights and rule-of-law also in the EU's external relations contributed to worldwide recognition of multilevel judicial protection of rule-of-law beyond the EU, for instance in trade and investment agreements (e.g. by prompting the EU to insist on compulsory trade adjudication in WTO law and on investment adjudication also in the EU's external investment treaties), in international criminal law (e.g. by constituting transnational criminal courts), and in other multilateral treaties with compulsory adjudication like the UNCLOS. Europe's historical experiences with centuries of wars, the institutionalized cooperation of 46 neighboring democracies in the Council of Europe, their common experiences of 'constitutional failures' (like feudalism, dictatorships, the holocaust) ushering in World Wars I and II and the 'cold war', and the positive 'constitutional transformation experiences' of EU citizens were major driving forces for Europe's multilevel constitutionalism.

2.3 *Opposition against Multilevel Democratic Constitutionalism outside Europe*

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' compared with European integration, 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 governance traditions. The social, economic, political, and legal context of multilevel, European integration – like transnational 'social market economies' (Article 3 TEU) helping citizens to

adjust to the economic and social changes in open societies – have no equivalent outside Europe, where many less-developed countries prioritize nation-building and the domestic rather than transnational challenges of the SDGs. 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. 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 often more communitarian or neo-liberal, business-driven cultures. Authoritarian rulers tend to prioritize 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 reflect 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 (as discussed below), 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). Societies and citizenship outside Europe remain national with lesser, transnational adjustment assistance and multilevel, legal restraints on the *homo economicus* and on oligarchic distortions of societies.[13]

3 Has UN Constitutionalism Become a *Utopia* in a Multipolar World?

The constitution, limitation, regulation and justification of legislative, executive and judicial UN institutions and procedures in the UN Charter and the 1948 Universal Declaration of Human Rights (UDHR) initiated revolutionary transformations and decolonization of the international legal system.

13 cf Loic Azoulay, 'The Law of European Society' (2022) 59 Common Market Law Review 203. Loughlin's nationalist conception of constitutional democracies (see notes 1, 4, 6–7) disregards the enormous social welfare and solidarity promoted by EU law among EU member countries and 'EU citizens'.

National constitutionalism and UN HRL induced some UN institutions to recommend 'constitutional governance models' (including protection of human rights, democracy, separation of powers, checks and balances, judicial remedies, rule-of-law) also for multilevel governance of the SDGs.[14] Yet, the proposed constitutional reforms remained limited to a few policy areas like compulsory adjudication in WTO law, investment law and in the UNCLOS; political UN and WTO institutions only rarely invoked 'constitutional arguments'. Without compulsory judicial remedies, UN HRL cannot be effectively enforced. The UN Security Council system continues being blocked by abuses of veto-powers. Only in exceptional situations did the UN Security Council (SC) assert 'legislative powers', for example to establish international criminal courts; the SC responses to international health pandemics remained political, for instance by adopting UN SC Resolutions 2532 and 2565 (2020) acknowledging that 'the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security'[15] and calling 'upon all parties to armed conflicts to engage immediately in a durable humanitarian pause' to provide humanitarian assistance to the world's most vulnerable in conflict zones.[16] Similar UN Security Council responses to environmental crises remain unlikely, notwithstanding the universal recognition of the need for decarbonizing economies and for protecting the potentially millions of climate refugees against the risks of climate change and rises in sea levels inundating countries and cities.

3.1 *Disagreements on Human Rights*

The disagreements – also among the five veto-powers in the UN SC – on the scope of UN HRL reflect the incomplete ratification and implementation of UN human rights conventions:

- China has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) but not the UN Covenant on Civil and Political Rights (ICCPR) in order to shield its communist party's political monopoly;

14 cf Giuliana Ziccardi Capaldo, 'Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model' in Mahmoud Cherif Bassiouni (ed), *Globalization and its Impact on the Future of Human Rights and International Criminal Justice* (OUP 2015) 629.

15 SC Res 2532 (1 July 2020) para 11; SC Res 2565 (26 February 2021) para 17.

16 SC Resolution 2532 (1 July 2020) para 2.

- the USA has ratified the ICCPR but not the ICESCR in view of US political preferences for business-driven, neo-liberalism and prioritization of civil and political over economic, social and cultural rights;
- most European countries have ratified both the ICCPR and the ICESCR; in contrast to the rejection by China and the USA of individual UN complaint mechanisms and of regional human rights conventions and human rights courts, they protect civil, political, economic, social and cultural rights also through individual UN complaint procedures and regional HRL (like the ECHR and the EUCFR) with individual access to national and European courts;
- Russia does not effectively implement human rights conventions; its oligarchic rulers suppress human rights (e.g. of political dissidents, freedom of information) and democratic self-determination at home and abroad.

The universal recognition of civil, political, economic and social rights in the UDHR illustrates how human struggles for freedom and peace, and for truth and justice (e.g. in the sense of 'reasonable justification'), are inseparably linked. Democratic self-constitution based on agreed 'principles of justice' (like equal freedoms as 'first principle of justice' as explained by I.Kant and J.Rawls) enables societies to strengthen social peace and mutually beneficial cooperation. Public disinformation and suppression of human rights characterize authoritarian governance in unfree societies like China and Russia. Constitutional economics perceives informed individual consent to reasonable, mutually beneficial rules – rather than only cost-benefit analyses – as primary source of consumer welfare and citizen welfare (e.g. in the sense of 'development as freedom' to realize one's human capacities).[17] The 'embedded liberalism' and rule-of-law systems underlying the UN and WTO sustainable development obligations are, however, increasingly disregarded by authoritarian rulers, as illustrated by

- China's refusal to comply with the 2016 UNCLOS arbitral award on China's illegal extension of sovereign rights in the South China Sea, and China's disregard for human rights inside China;
- the illegal US blocking of the WTO Appellate Body (AB) system since 2017, which reflected President Trump's efforts at politicizing and weakening judicial control also inside the USA; and

17 For developing international economic law from such citizen-oriented theories of justice see Petersmann (n 8).

– Russia's refusal to comply with the 2022 judicial orders by the International Court of Justice and the European Court of Human Rights to suspend its illegal suppression of human rights in Ukraine and inside Russia.

Disregard for human and democratic rights is the main reason for unprovoked and unjustified wars of aggression and related war crimes (as currently in Ukraine) and for 'constitutional implementation deficits' in UN and WTO legal practices ushering in governance failures to prevent unnecessary poverty (SDG1) and protect food security (SDG2), public health (SDG3) and public education for all (SDG4), gender equality (SDG5), access to water and sanitation for all (SDG6), the environment (SDGs 13–15) and many other SDGs like 'access to justice' (SDG16).[18] The annual UN reports on progress towards the SDGs document how 'decades of development progress have been halted or reversed' as a result of Russia's military aggression against Ukraine (e.g. forcing more than 15 million people inside Ukraine to flee from their homes), global health pandemics, related food and economic crises and violent conflicts.[19] The realities of power politics blocking constitutional reforms of UN and WTO governance do not exclude cooperation among 'willing countries', for instance at the WTO Ministerial Conference in June 2022 and in regional free trade agreements (FTAs). Yet, power politics impedes the 'constitutional functions' of UN/WTO law for limiting collective action problems and protecting PGs demanded by citizens by transforming constitutional nationalism into multilevel protection of transnational PGs.

3.2 *Executive Power Politics Undermines Democratic Constitutionalism*

Constitutional rules and international law – including also peremptory rules of law (like democratic self-determination, prohibition of the use of force and of denial of basic human rights) and prohibitions to recognize as lawful situations that were created by serious breaches of *jus cogens* (like Russia's aggression, annexation and 'Russification' of Ukrainian territories aimed at annihilating the people of Ukraine) – are recognized as 'higher law' vis-à-vis

18 The importance of democratically inclusive 'good governance' and of 'inclusive institutions' for promoting sustainable development in its economic, social, environmental and legal dimensions is empirically proven; see: Stefan Dercon, *Gambling on Development: Why Some Countries Win and Others Lose* (Hurst 2022); Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile RBP 2011).

19 UN Economic and Social Council, Report of the Secretary-General (advance un-edited version) E/2022/XXX.

post-constitutional legal practices. As the collective action problems inside and among states often differ, also the 15 UN Specialized Agencies provide for diverse 'treaty constitutions' for multilevel governance of specific PGs, as illustrated by the 'constitutions' (*sic*) establishing

- the International Labor Organization (e.g. providing for labor rights and tri-partite ILO membership of governments, employer and employee representatives),
- the World Health Organization (WHO, e.g. protecting health rights through international health regulations and conventions),
- the Food and Agriculture Organization (FAO, e.g. protecting food security and related human rights of access to food) and the
- UN Educational, Scientific and Cultural Organization (UNESCO, e.g. protecting rights of access to education).

Likewise, the collective action problems of regulating private goods, PGs, 'club goods' with limited membership, exhaustible common pool resources and 'global commons' (like outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, cultural heritage) differ among each other. Democratic support for their multilevel regulation is impeded by the fact that most citizens tend to prioritize their 'local lives' (e.g. as members of families, villages, and professional organizations); they often remain 'rationally ignorant' toward global governance in distant organizations dominated by academic and political elites. The (inter)governmental power politics dominating UN institutions (like abuses of veto-powers in the UN SC, China's lack of full cooperation in WHO attempts at clarifying the origins of the COVID-19 pandemic in Wuhan) undermines UN protection of human rights and related PGs. Some of the agreed governance principles (like benefit-and burden-sharing, protection of the environment) for the 'global commons' are disregarded (e.g. by pollution of the atmosphere and the High Seas). The diverse regulatory regimes (like UNCLOS as the legal 'constitution of the oceans', the UNFCCC as legal 'constitution of the atmosphere') remain distorted by market and governance failures (as illustrated by ocean pollution, over-fishing and climate change). Without enforcement of the *jus cogens* limits of 'higher' international and constitutional rules protecting 'planetary boundaries', the prevailing power politics continues undermining the legitimacy and effectiveness of UN and WTO law.[20]

20 cf Petersmann (n 1) and the work of the International Law Commission on codification of the international law rules on *jus cogens*.

3.3 *Constitutional Economics Remains Neglected in UN and WTO Legal Practices*

State-capitalist countries and business-driven, neoliberal economies rely more on management approaches to economic and environmental regulation than ordoliberal economies (e.g. inside the EU) restrained by multilevel constitutionalism. Mazzucato's acclaimed book on 'Mission Economy: A Moonshot Guide to Changing Capitalism' (2020) argued for managerial 'mission approaches' to organizing economies and realizing the SDGs, for instance following the example of the inclusive 'Green Deal' advocated by the EU Commission. Such approaches are appropriate for 'single best effort PGs' that can be supplied by a single state (like inventing medicines, exploring the moon) as well as for the pursuit of 'aggregate PGs' within regional communities like the EU. Yet, globalization has transformed most PGs into global 'aggregate PGs' (like human rights, rule-of-law, most SDGs) dependent on global 'aggregation' of local, national and transnational PGs, which no state can secure without cooperation with other states. Overcoming global collective action problems (e.g. in controlling 'rogue governments' circumventing nuclear non-proliferation as a PG, preventing 'wrong GATT panel reports' by mandating the GATT/WTO Secretariats to 'assist' GATT/WTO panel proceedings) requires legal restraints limiting managerial discretion and 'technological solutions' proposed for multilevel regulatory challenges (like geo-engineering aimed at mitigating climate change, artificial intelligence regulating social media). Europe's 'constitutional constructivism' illustrates how 'evolutionary constitutionalism' (e.g. as clarified in European and national jurisprudence on general constitutional principles) and Europe's functionally limited – and periodically adjusted – 'treaty constitutions' interact dynamically. Without multilevel cooperation (as among national and European governments, parliaments, courts, central banks, competition and other regulatory authorities, civil societies), constitutional reforms of UN and WTO law risk being blocked (e.g. by veto powers in UN institutions and WTO consensus practices). Similarly, the impunity of war crimes (as in Russia's war of aggression in Ukraine), distortions of economic competition (e.g. by state subsidies, state-trading practices, environmental pollution), 'pollution externalities' and neoliberal 'rent-seeking' in WTO member states call for stronger legal restraints.

Both inside the EU and in the wider European Economic Area (EEA) with EFTA countries, human, constitutional and economic rights were enforced by citizens protected by multilevel democratic, judicial and regulatory institutions and treaty systems like the EUCFR, the ECHR, the EU's common market constitution, its partial extension to EFTA countries, the EU's incomplete monetary constitution and functionally limited 'foreign policy constitution' (e.g. as codified in Arts 3, 21 TEU). The institutional 'checks and balances'

constraining 'executive emergency governance' inside the EU during economic, financial, public health and environmental crises confirmed how human rights became more effective if citizens could invoke and enforce (e.g. in national and European courts) precise, unconditional, international rules and judicial remedies for challenging power politics. Rather than relying only on result-oriented, macro-economic 'Kaldor-Hicks efficiency gains' and 'welfare economics' within the existing framework of national constitutionalism, Europe's multilevel economic constitutionalism is based on 'constitutional economics' deriving values from voluntary, informed consent of EU citizens to common market, monetary, competition and environmental rules and EU policies promoting mutually beneficial, human and constitutional rights and non-discriminatory conditions of competition for a 'competitive social market economy' (Art. 3 TEU) enhancing general consumer welfare and 'citizen sovereignty'. In contrast to British, Chinese, US and Russian executives claiming 'sovereign powers' to violate international treaties ratified by parliaments (e.g. for realizing 'Brexit', starting US trade wars against China and NATO allies, concluding hundreds of 'executive trade deals' without asking for approval by the US Congress), EU executive powers are constitutionally more constrained, for example by respect for human rights and rule-of-law (Arts 3, 21 TEU) and for the common market freedoms, customs union rules and judicial remedies in the EU's common market constitution. *Constitutional economics* confirms the welfare-enhancing effects of changes in constitutional rules (like EU common market freedoms, constitutional and social rights of access to food, public health and environmental protection);[21] it explains, *inter alia,*

- why economic and social welfare functions must be defined through democratic constitutionalism (e.g. respecting demand of citizens for equal freedoms, human rights and other PGs) with due respect also for multilateral treaties protecting transnational PGs;
- why mutually complementary economic and democratic constitutionalism tend to avoid human disasters (like famines, abuses of

21 cf n 10. Institutional and constitutional economics share with neoclassical economics certain fundamental assumptions (such as methodological and normative individualism, pursuit of efficiency gains). Yet, they extend economic analyses to aspects that are typically ignored in neoclassical economics, such as the interdependencies between democratic constitutionalism (e.g. protecting civil and political freedoms, voter preferences, limitation of all government powers, democratic accountability) and transnational, economic constitutionalism (e.g. protecting economic and social rights, consumer preferences, non-discriminatory competition, legal accountability and consumer welfare by limiting business-driven neo-liberal politics and social inequalities).

military power) that have been tolerated in dictatorships (e.g. under Stalin, Mao and colonialism); and
– why legal institutions limiting 'moral hazards' (e.g. by 'balanced budget rules', the fiscal and debt disciplines prescribed in the TFEU) and prohibiting gender and racial discrimination are likely to increase economic welfare inside states.

Economic analyses of international, legal and political systems can enhance their respective contribution to economic welfare. For instance, GATT/WTO law and their legal ranking of alternative trade policy instruments according to their economic welfare effects enabled all 164 WTO members to reduce poverty and enhance national welfare for the benefit of their citizens. Out of the 10 most productive countries in 2021/22 (measured by GDP by hour worked), seven were EU members, and two were EEA/EFTA members following most EU common market rules. Constitutional economics insists on citizen-consent to reasonable 'constitutional choices' respecting human dignity (human and democratic rights), protecting human capabilities, constitutional rights of citizens (like equal access to education, health protection, satisfaction of basic needs), social justice (e.g. promoting 'social market economies' reducing unjust income distribution) and the principal-agent relationships between citizens and governance agents with limited, delegated powers – not only on moral, democratic and legal, but also on economic grounds. Yet, rules and institutions must be designed with due regard to diverse political economy environments. For instance, invention, clinical testing and production of vaccines by pharmaceutical industries supported by intellectual property rights, subsidies and government procurement may offer efficient health policy strategies for industrialized market economies (provided 'rent-seeking interest group politics' and 'regulatory capture' are limited); less-developed and state-capitalist countries, however, may justify different health policies. The 'rational ignorance' of most citizens towards complex foreign policy challenges (like abuses of discriminatory tariffs for taxing and redistributing domestic income) justifies constitutional restraints on foreign policy discretion (e.g. as prescribed in the EU's 'foreign policy constitution' set out in Arts 3, 21 TEU). 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) reinforced insistence by EU citizens on 'environmental constitutionalism', as illustrated by the regulation of environmental rights, duties, principles and policy goals in the EUCFR (e.g. Article 37), in the Lisbon Treaty (e.g. Arts 11, 191–193 TFEU) as well as in national Constitutions and HRL empowering citizens to complement the constitutional, parliamentary,

participatory and deliberative dimensions of European democracy (cf Articles 9–12 TEU) by engaging in 'strategic climate litigation' (as discussed below).

Business-driven economic regulation in the USA and GATT/WTO practices often prioritize macro-economic 'Kaldor-Hicks efficiency gains' rather than related social costs (e.g. of tobacco consumption and pollution costs).[22] The EU rules governing Europe's 'competitive social market economy' limit market failures and discriminatory protectionism systematically. Britain's 'Brexit' and the US withdrawal from the draft Transatlantic Trade and Investment Partnership (TTIP) illustrated the conflicts between utilitarian, neoliberal nationalism and multilevel, constitutional ordoliberalism. In many UN member states (like China, Iran, North Korea, Myanmar and Russia), the lack of rule-of-law, of independent, judicial protection of human rights, and of non-discriminatory conditions of competition reflect suppression of democratic constitutionalism and constitutional economics. Also some UN governance institutions, like the monetary and financial Bretton Woods institutions dominated by US policies (e.g. defending the US dollar as global reserve currency and preventing a more equitable redistribution of quotas), remain driven by neoliberal power politics.

3.4 *UN Climate Law Prioritizes State Sovereignty over Environmental Constitutionalism*

Intergovernmental climate politics since the 1992 UNFCCC failed to prevent climate change and the increasing heat waves, droughts, floods and related threats to SDGs (like access to food and water). This transgression of 'earth system boundaries' for sustainable development is bound to create increasing social injustices (e.g. due to the richest 1% of the world population causing twice as much carbon dioxide emissions as the poorest 50%, China causing more carbon emissions than all 38 OECD countries) and political conflicts (e.g. over hosting the 140 million climate refugees predicted by the UN for 2050).

The 2015 Paris Agreement prioritizes national sovereignty by focusing on 'nationally determined contributions', which differ enormously among UN

22 cf Petersmann (n 9) 189–191. In contrast to neoliberal conceptions of self-regulatory markets and competition as gift of nature subject to 'governmental fixes', Europe's ordoliberalism perceives markets and non-discriminatory conditions of competition as legal constructs requiring systemic legal restraints of market failures, constitutional failures and related governance failures. On the differences between 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 (n 9) ch 2.

member states (e.g. regarding phasing-out of fossil-fuel subsidies and of coal-based energy). The regular 'conferences of the parties' (COP) to the UNFCCC, and their science-based and political review mechanisms, exert pressures for progressive legal clarifications of greenhouse gas (GHG) reduction obligations. Multilevel democratic, parliamentary, executive and judicial climate mitigation governance in the context of Europe's 'environmental constitutionalism' is more legally developed compared with UN climate mitigation policies and their authoritarian neglect in many UN member states.

In Europe, Articles 2 and 8 ECHR prompted ever more courts to protect human rights to life and family life against harmful environmental pollution and climate change. Some European states adjusted their national Constitutions by recognizing environmental rights or constitutional duties to protect the environment (as in Article 20a German Basic Law). According to Article 37 EUCFR, a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. Combatting climate change, promoting sustainable development in cooperation with third states, and principles of 'environmental constitutionalism' (like the principles of precaution, prevention and rectifying pollution at source, the 'polluter pays' principle) are included into the EU Treaty provisions on EU environmental policies (e.g. Arts 11, 191–193 TFEU). It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation – notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050 – offered leadership for implementing the Paris Agreement on climate change mitigation, for instance by making the goals of 'at least' 55% GHG reductions by 2030 and a climate-neutral European economy by 2050 legally binding for EU and member state policies. The multiple policy tools and mandatory standards aim at a socially 'just transition' with active industrial policies to secure continuing economic growth. The EU emissions trading system (ETS) will be complemented by carbon border adjustment measures (CBAM) aimed at preventing 'carbon leakage' and distortions of competition in countries with more ambitious climate change policies. Climate litigation increasingly acknowledges invocation by private and public complainants of GHG reduction obligations of governments as recognized in EU law and UN law.[23] The EU climate mitigation objectives, principles and legal obligations are more precise, more uniform,

23 cf the chapter by Eckes to this book.

more democratically controlled and judicially enforceable than the respective objectives, principles and legal obligations under UN law.

Rights to the protection of the environment are increasingly recognized in the laws of now more than 150 states, regional treaties, and by the UN General Assembly Resolution of 28 July 2022 recognizing human rights to a clean, healthy and sustainable development.[24] Environmental rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests. In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights, constitutional principles, and to international GHG reduction commitments in order to hold governments and also companies legally accountable for climate change mitigation. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda* confirmed that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that human rights and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens to enforce positive obligations to take appropriate measures mitigating climate change.[25] The ruling of the District Court of The Hague on 26 May 2021 in *Milieudefensie v Royal Dutch Shell* was the first judgment in which a multinational corporation was held responsible for its contribution to climate change based on national and international law.[26] The case was brought as a public interest class action by a Dutch NGO; it does not focus on compensation for past damages but on corporate obligations to reduce emissions and invest

24 See Res. A/76/L.75, confirming the previous Resolution 48/13 adopted by the Human Rights Council of 8 October 2021 recognizing that having a clean, healthy and sustainable environment is a human right.

25 *State of the Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court). For comparative overviews of climate litigation see: César Rodriguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action* (CUP 2021); Francesco Sindico and Makane M Mbengue, *Comparative Climate Change Litigation* (Springer Publishing 2021). For systemic collections of climate cases see: Margaretha Wewerinke-Singh and Sarah Mead, 'Fighting Dangerous Climate Change: A Best Practice Guide for Judges and Courts' (World Commission of Environmental Law, 19 January 2022) <https://www.iucn.org/news/world-commission-environmental-law/202201/a-climate-law-primer-forthcoming-book-offers-guidance-judges> accessed 28 August 2023. See also the chapter by C. Eckes in this book.

26 *Milieudefensie et al. v. Shell* [2021] ECLI:NL: RBDHA:2021:5339 (The Hague District Court).

more in cleaner fuels to protect the common interest of current and future generations in preventing dangerous climate change. Similar litigation against energy companies focusing on corporate responsibilities for climate change is pending in many countries. Even though the judgment is based on corporate duties of care under Dutch tort law, the Court's references to international law and to the shared responsibilities of corporate actors may influence the reasoning in future judgments by other courts. The Court found that the total CO_2 emissions of the Shell group exceeded the emissions of many states, including the Netherlands. The group's global CO_2 emissions contributed to global warming and climate change in the Netherlands; they entailed significant risks for residents of that country. The court agreed with the complainants that Shell had an obligation to reduce CO_2 emissions of the Shell group's entire energy portfolio, holding that:

- Shell is obliged to reduce the CO_2 emissions of the Shell group's activities by net 45 per cent by the end of 2030 relative to 2019 through the Shell group's corporate policy;
- the policy, policy intentions, and ambitions of the Shell group imply an imminent violation of this obligation;
- the Court, therefore, allowed the claimed order for compliance with this legal obligation.

The judgment considered human rights and the Paris Agreement in its interpretation of the unwritten standard of care. The Court also referred to the UN Guiding Principles on Business and Human Rights (UNGP), which it found to constitute an authoritative, internationally endorsed soft law instrument setting out the responsibilities of states and businesses in relation to human rights; the UNGP 'are suitable as a guideline in the interpretation of the unwritten standard of care'. According to the Court, the responsibility to respect human rights encompasses the company's entire value chain' including the end-users of the products produced and traded by the Shell group. The Court concluded that the human rights standards, the UNGP, and the Paris agreement all support the conclusion that Shell should be ordered to reduce the CO_2 emissions of the Shell group's activities by net 45 per cent at the end of 2030 relative to 2019 through the group's corporate policy. In the USA, by contrast, similar constitutional and human rights tend to be denied by US courts, for instance on grounds of judicial deference towards 'political questions' left open in the US Constitution and not (yet) decided by the US Congress, which remains reluctant to enact legislation recognizing new human, constitutional or environmental rights and prescribing climate change mitigation based on the 'polluter pays

principle' (aimed at enhancing 'total welfare' protecting all citizens against environmental harms) rather than on macro-economic 'Kaldor-Hicks-efficiencies' (justifying also polluting industries). The US Inflation Reduction Act (IRA) adopted in August 2022 uses discriminatory tax credits, domestic content requirements and trade discrimination for promoting de-carbonization of the US economy, thereby further undermining WTO law and increasing trade conflicts. While the IRA's financial incentives for 'green investments' are important, their economic discrimination will undermine non-discriminatory conditions of trade and competition. The EU's response to the US's announcement that it would plough $369bn-worth of tax credits and subsidies into its clean tech industries – a key part of President Biden's IRA – marks a return to mutually competing industrial policies at a time when the WTO dispute settlement system has been undermined by the USA.

4 Disruption of WTO Law by Executive Power Politics

Authoritarian states (like China and Russia) do not protect effective constitutional and judicial remedies of their citizens against executive suppression of human and democratic rights (like freedoms of information and of political opposition). Nor do their power monopolies and state-capitalism protect non-discriminatory conditions of competition. GATT/WTO law provides for insufficient legal disciplines on state-trading companies, subsidies and other distortions of trade and competition. Hence, market economies increasingly introduce countermeasures in their trade relations with China and Russia aimed at limiting competitive distortions and perceived violations of the 'embedded liberalism'[27] underlying WTO law. China's 'unlimited partnership' with Russia of February 2022, and its network of bilateral 'Belt and Road Agreements' with over 80 countries, lay the foundations for an alternative trade regime dominated by bilateral power-politics without multilateral rules, independent judicial remedies and guarantees of human and democratic rights of citizens.

Abuses of executive powers by populist demagogues (e.g. disregarding international obligations like the EU-UK Brexit Agreement and the Paris Agreement on Climate Change) are an increasing challenge also inside democratic countries. US President Trump (2017–2021) interpreted his executive powers under Article II of the US Constitution very broadly as allowing him to do whatever

27 Arguably, the 'embedded liberalism' underlying WTO law has evolved beyond its limited meaning under GATT 1947, for instance by including new UN and WTO legal obligations like human rights and the recognition of four Chinese customs territories as subjects of international law.

he wanted in the foreign policy area (e.g. withdrawing the US from multilateral treaties like the WHO Constitution and the 2015 Paris Agreement). The 'tribal support' from Republican party majorities in the US Congress for President Trump undermined parliamentary control of executive politics (like President Trump's 'big lies' denying the 2020 federal election outcome, his 'putsch attempt' on 6 January 2021), including congressional control of US trade policies which are now based on hundreds of 'executive deals' without oversight by the US Congress. Following the refusal by the US Congress to ratify the GATT 1947 and the 1948 Havana Charter for an International Trade Organization, the US Congress did adopt implementing legislation for the 1979 Tokyo Round Agreements and the 1994 Uruguay Round Agreements establishing the WTO. As this implementing legislation does not recognize a power of the US President to unilaterally withdraw the USA from the WTO and change the pertinent US trade laws without involving the US Congress, US constitutional lawyers disagree on whether President Trump's executive orders blocking the functioning of the WTO AB and ordering discriminatory import restrictions in clear violation of WTO law are justifiable under US constitutional law.[28] Since the 1980s, US President Reagan's neoliberal policies promoted business-driven economic regulation, money-driven democratic elections, 'rent-seeking' limitations of trade and competition (e.g. by protecting domestic producers through ever more discriminatory 'trade remedies', subsidies, regulatory standards, tax reductions, intellectual property rights, only selective enforcement of US antitrust laws) and increasing social inequalities. Unilateral US trade sanctions (e.g. against foreign violations of US intellectual property rights) and US interest group politics in the 'GATT Rounds' of multilateral trade negotiations reinforced selective US import protection (e.g. for domestic agricultural, cotton, textiles and steel producers) and export opportunities for dominant US suppliers (notably for services trade and US 'tech empires' protected by intellectual property rights and systemic tax avoidance).

4.1 *'Regulatory Capture' of US Trade Policies Distorts Competition*

Under the US Trump administration, the 'regulatory capture' of US trade policies (e.g. for import protection for steel and aluminum industries), the US withdrawal from various multilateral treaties by executive orders of President Trump, and the illegal US disruption of the WTO AB revealed some of the systemic conflicts between utilitarian, business-driven US neo-liberalism

28 Cf Ernst-Ulrich Petersmann, 'The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies' (2018) 10(2) Trade, Law and Development 179.

and Europe's ordoliberal, multilevel economic constitutionalism. US Trade Representative (USTR) Lighthizer, his deputy ambassador Shea, and US secretary of commerce Ross had all been long-standing business lobbyists who, like President Trump himself, identified US business interests (e.g. in rejecting WTO judicial findings limiting US trade policy discretion) with the national US interest. President Trump's decisions to withdraw the USA from UN agreements (e.g. on the WHO, the 2015 Paris Agreement) and from regional trade agreements (like the 2016 Trans-Pacific Partnership, the draft TTIP agreement) were taken unilaterally without requesting approval by the US Congress. The 2020 USTR Report criticizing the AB jurisprudence[29] perceived WTO law as an instrument of US power politics; it ignored the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules, yet without identifying violations by the AB of the customary law rules of treaty interpretation. The USTR Report – notwithstanding its valid criticism of some WTO rules and dispute settlement practices (e.g. that the AB no longer consulted with the parties when deciding to disregard the Article 17.5 deadline) – suffered from legal biases and false claims characteristic for the US Trump presidency and for Trump's 'big lies' (e.g. about having won the 2020 US federal elections):

- US denial of (quasi)judicial functions of WTO third-party adjudication, even though numerous WTO publications and WTO dispute settlement reports over more than 20 years acknowledged the (quasi)judicial mandates of WTO dispute settlement bodies (*i.e.,* WTO panel and AB reports as adopted by the DSB);
- US disregard for judicial AB arguments in the performance of the Dispute Settlement Understanding (DSU)'s mandate 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU), for instance whenever the AB found compliance with the time limit of 90 days (Article 17.5 DSU) – which was imposed by US negotiators in 1993 notwithstanding the widespread criticism that no other court seems to be limited by such an unreasonably short time

29 See USTR, 'Report on the Appellate Body of the WTO' (2007–2021 Press Releases, 11 February 2020)<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body> accessed 28 August 2023. For a detailed refutation of the false USTR legal claims see: Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Berlin: Grossmann 2019); Petersmann (n 9) ch 3.

limit – impossible to reconcile with the other AB tasks (e.g. due to illegal US blocking of the filling of AB vacancies);
- contradictory USTR claims that AB legal findings against the US violated the DSU prohibition to 'add or diminish the rights and obligations in the covered agreements' (Article 3.2 DSU) – even if the AB had justified these legal findings on the basis of the customary rules of treaty interpretation and its (quasi)judicial mandate-, notwithstanding the USTR's regular support of AB reports accepting 'creative WTO interpretations' advocated by the USTR as a legal complainant;
- US description of US 'zeroing practices' as a 'common-sense method of calculating the extent of dumping' even if their biases had been consistently condemned by the AB and DSB as violations of the WTO obligations of 'fair price comparisons' (which are hardly mentioned in the USTR report);
- one-sided focus on WTO texts as interpreted by US negotiators without regard to the customary law and DSU requirements to clarify the meaning of the – often indeterminate – WTO provisions with due regard also to WTO legal texts revealing the 'context, object and purpose' of WTO provisions and the explicitly recognized 'systemic character' of what the WTO Agreement calls 'this multilateral trading system' (Preamble) and its 'dispute settlement system' (Article 3 DSU);
- denigration of AB members as 'three unelected and unaccountable persons' whose 'overreaching violates the basic principles of the United States Government',[30] notwithstanding the election of AB members through consensus decisions of 164 DSB member governments (including the USA), their (quasi)judicial mandate, and the approval of WTO agreements (including the DSU) by the US government and US Congress;
- insulting claims that the AB Secretariat had weakened the WTO dispute settlement system by not respecting WTO rights and obligations.[31]

The financial and political influence of protectionist US interest groups on the US Congress prevented the US Trump and Biden administrations to accept compromise solutions for reforming the DSU. Most WTO members continue to reject US propositions for exempting trade remedies and unilateral invocations of WTO 'security exceptions' (e.g. for justifying the US trade war against

30 See the Introduction to the USTR Report (n 29) 8, 13.

31 USTR Report (n 29) 120.

China) from WTO third-party adjudication. The disruption of the WTO dispute settlement system by a dysfunctional AB led to non-adoption of ever more WTO panel reports due to their 'appeal into the void' of a no longer functioning AB system. The 'Economic and Trade Agreement' signed by the Chinese and US governments on 15 January 2020 provided for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and US trade restrictions (e.g. targeting Chinese technology companies) without third-party adjudication. This bilateral 'opt-out' – by the two largest trading nations – from their WTO legal and dispute settlement obligations was subsequently continued and deepened (e.g. by additional US export restrictions on technology products as of 2022) by the US Biden administration in order to contain China's rise as a new military and technology threat openly challenging human and democratic rights and other UN legal obligations (e.g. on maritime boundaries and freedom of the seas as defined in UNCLOS).

4.2 *Geopolitical Disruption of the Rules-Based Trading System Endangers the SDGs*

The SDA explicitly acknowledges (e.g. in paras 17.10–12) that realizing most SDGs – like ending poverty for everybody, securing access to food, water and medicines, and de-carbonizing economies – requires a 'rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO'. Without a multilateral WTO dispute settlement system, successful realization of climate change mitigation, of future WTO negotiations, and of inducing market-oriented reforms in China's totalitarian state-capitalism are unlikely to succeed. President Trump's arbitrary destruction of the WTO AB – and the lack of majority support in the US Congress for restoring the WTO AB system, for concluding new FTAs, and for introducing carbon taxes as the most efficient policy instrument for carbon reductions aimed at climate change mitigation – illustrate some of the continuing differences between business-driven US neoliberalism (e.g. US preferences for power-oriented trade protectionism unrestrained by impartial adjudication), compared with EU ordoliberalism (like leadership for introducing Multi-Party Interim WTO arbitration in 2020, for adopting the European climate law in June 2021, and for implementing the currently 14 legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050, thereby exercising EU leadership inside and beyond Europe for implementing the Paris Agreement on climate change mitigation).[32]

32 cf Petersmann (n 9) ch 9; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee

The recent support by the IMF and World Bank of activist fiscal, economic, health, and environmental policies in response to the global health pandemic, climate change, security and food crises illustrates how distinctions between 'neoliberalism', 'state-capitalism', and 'ordoliberalism' refer to policy trends that continue to evolve and elude precise definitions. Also in the USA, government spending, budget deficits, central bank interventions, welfare payments and corporate bailouts have increased over the past decades. The neoliberal focus on business efficiency in terms of consumer prices is now challenged by focusing also on the welfare of workers, farmers, house owners, and citizens adversely affected by media concentration, rising health and housing costs, and environmental harm. The focus on more systematic legal limitations of 'market failures', 'governance failures' and 'constitutional failures' through multilevel constitutionalism continues, however, to distinguish European ordoliberalism from Anglo-Saxon and authoritarian, constitutional nationalism. The money-driven US elections and business-driven US economic legislation (e.g. on import protection, domestic sales of guns and tobacco, discriminatory environmental regulation and tax benefits) undermine US leadership for protecting the SDGs. For example, the US Inflation Reduction Act – as the most important climate change mitigation legislation in US history – could be adopted in August 2022 only in exchange for numerous protectionist discriminations (like tax credits, local content requirements) favoring US industries in violation of WTO law; the Act also failed to respond to the 2022 US Supreme Court ruling limiting the regulatory powers of the US Environmental Protection Agency. Without congressional and judicial recognition of human and constitutional rights to climate change mitigation inside the USA, democratic support and judicial remedies for climate change mitigation rest much weaker inside the USA (as the world's *per capita* biggest emitter of GHG) than in Europe.

5 Conclusions: UN and WTO Governance Failures Require Plurilateral Responses

This contribution explained the successful evolution of European integration law since the 1950s as resulting from dialectic transformations of *national* into *multilevel, European constitutionalism* limiting transnational governance failures through multilevel protection of European PGs (like the ECHR, the

and the Committee of the Regions: Trade Policy Review – An Open, Sustainable and Assertive Trade Policy' COM/2021/66 final, 18 February 2021.

EUCFR, the EU common market, monetary and environmental constitutionalism). Europe's 'social market economy' promoted the social adjustments, 'human capabilities' and structural changes needed for citizen support of economic and democratic competition in open market societies. The EU's 'foreign policy constitution' (e.g. Arts 3, 21 TEU) extended constitutionalism to foreign policymaking, for instance by requiring the EU to respect and pursue domestic constitutional principles (like human rights, democracy, rule-of-law, sustainable development, compliance with UN law) also in the EU's common foreign and security policies. This 'multilevel constitutionalism' based on multilevel human and constitutional rights and democratic, judicial and regulatory remedies and institutions enabled the EU to exercise leadership for constitutional reforms of UN and WTO law and governance (e.g. by pushing for compulsory third-party adjudication in the UNCLOS, trade and investment law). Constitutionalism made EU foreign policies more transparent, reasonable and predictable. Yet, different constitutional traditions and increasing geopolitical rivalries entail that authoritarian rulers resist constitutional reforms of UN and WTO law aimed at better protecting human rights and the SDGs. Russia's wars against Ukraine, Russian threats of nuclear aggression, the US destruction of the WTO AB adjudication system, and China's suppression of human rights illustrate transnational governance failures undermining global PGs. Constitutional UN reforms (e.g. of the ineffective UN Security Council system) and WTO reforms (like compliance with Article 17 DSU) appear ever more unlikely. For instance, Pascal Lamy remained the only WTO Director-General who emphasized synergies between HRL and WTO law, and invited the Inter-Parliamentary Union to convene regular parliamentary meetings inside the WTO in order to promote democratic support and accountability of trade policies; Lamy's call for 'cosmopolitics' aimed at enhancing the legitimacy and coherence of the world trading system, of its global governance, and of its support by civil societies and 'cosmopolitan constituencies'.[33] Outside Europe, as discussed in Sections 2–4, nationalism, the difficulties of amending national Constitutions, process-rather than rights-based constitutional traditions, power politics and neo-liberal 'business capture' of economic legislation (e.g. by the US Congress) impede 'multilevel democracy' and rights-based 'multilevel constitutionalism' as policy strategies for protecting the SDGs.

33 cf Pascal Lamy, *The Geneva Consensus. Making Trade Work for All* (CUP 2013); Steve Charnovitz, 'The WTO and Cosmopolitics', in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (OUP 2005) 437.

5.1 *Bounded Rationality: Geopolitical Rivalries as Permanent Facts*

The authoritarian 'strong man politics' in China, Russia and in the US Republican Party suggest that nationalism and hegemonic power politics will continue undermining UN and WTO law and politics by supporting market failures, governance failures and related constitutional failures. The 'Beijing consensus' imposed by the power monopoly of China's communist party[34] is not effectively constrained by China's national Constitution (e.g. as citizens cannot invoke and enforce human and constitutional rights through judicial remedies in independent Chinese courts). Similarly, Russia's President Putin and his kleptocratic oligarchs dominate Russia's police state without effective 'constitutional checks and balances'; their executive governance suspended human and democratic rights inside Russia (e.g. of the political opposition and public media) and outside Russia (e.g. ordering illegal invasions into neighboring countries, annexation and 'Russification' of occupied territories like Crimea and the Donbass in Ukraine). Totalitarian power politics – like China's secretive 'polit-bureau politics', 'surveillance capitalism', disproportionate health-lockdowns, Orwellian 'social credit systems', suppression of human and minority rights and threats of military force (e.g. in the South China sea and vis-à-vis Taiwan) – force democracies to respond by forming collective defense alliances and protecting their citizens against foreign 'weaponization' of economic interdependence. State-capitalism undermines citizen-driven market-competition, for instance by means of non-transparent business privileges, subsidies, state-owned enterprises and manipulation of non-convertible currencies. Russia's political domination of the Eurasian Economic Community, like China's political domination of bilateral 'Belt & Road agreements' on financial, trade and infrastructure networks, related Eurasian agreements on regional Asian institutions and 'China-Russia strategic cooperation' are based on power-oriented cooperation among authoritarian governments without multilateral rules and institutions protecting human and democratic rights. This focus on rulers and power-monopolies – rather than on protection of citizens through independent media and remedies – is also characteristic of many governments in former Soviet republics in Eurasia and less-developed countries (like Iran, Myanmar, North Korea, Syria) and their opportunistic conduct (e.g. in buying oil and gas from Russia undermining countermeasures against illegal aggression by Russia, abstention from UN General Assembly

34 At the Communist Party congress in November 2022, President Xi Jinping followed the example of Mao of unifying his personal control over the Party, the state and the military apparatus and of evading constitutional time limits for his concentration of personal power and his exclusion of political critics in the standing polit-bureau.

resolutions condemning Russia for its illegal invasion of Ukraine and related violations of *erga omnes* UN legal obligations like respect for democratic self-determination). The regulatory competition among neo-liberal, state-capitalist, ordoliberal constitutional and authoritarian paradigms of economic regulation undermines the UN and WTO 'world order treaties'. EU efforts at reforming the WTO appellate review system and investor-state arbitration, and strengthening environmental policies by embedding them into the WTO legal and dispute settlement system, are resisted by hegemonic power politics.[35] Human rights, democratic governance, rule-of-law and 'corporate responsibilities' remain insufficiently protected also in the legal practices of the more than 10,000 transnational corporations participating in the 'UN Global Compact' on business and human rights. The 'politicization' of the WTO trading system is likely to continue, for instance if WTO members fail to extend the 'COVID-19 waiver' and the WTO agreement on unreported fishing subsidies of June 2022 and to agree on a 'climate waiver' for CBAMs. The more authoritarian governments disregard global rules limiting 'market failures', 'governance failures' and 'constitutional failures', the stronger becomes the risk of economic disintegration, for instance between 'authoritarian alliances' (e.g. among China, Russia and other Eurasian countries), FTAs among democracies, and the non-aligned 'global south' prioritizing national development. The 'polarization politics' by populist 'strong men' promoting anti-pluralist policies contributed to the rising number of authoritarian governments (e.g. also in 'illiberal' EU member states like Hungary and Poland) and to the declining number of democracies, thereby rendering democratic leadership for protecting the SDGs more difficult. A re-election of Donald Trump as US President in 2024 could mean the end of democratic US leadership for multilateral protection of the SDGs.

5.2 *Transatlantic Leadership beyond NATO Remains Fragile*

Anglo-Saxon neoliberalism prioritizes constitutional nationalism (as illustrated by the 'Brexit') and 'process-based constitutionalism' (as illustrated by the unwritten British Constitution, the lack of references in written Anglo-Saxon Constitutions to the SDGs) rather than rights-based, multilevel constitutionalism requiring all branches of government to protect PGs (like UN HRL, regional common markets, global environmental protection).[36] Europe's multilevel constitutionalism perceives democratic constitutions as expressing dynamically evolving 'living constitutions' responding to changing regulatory challenges and needs of citizens; HRL is interpreted as requiring both

35 cf Petersmann (n 9) chs 3, 7–8.

36 cf notes 4 and 5 above and related text.

democratic legislators and the judiciary as 'constitutional guardians' to interpret and develop laws and policies responding to citizen demand for protecting PGs.[37] Conflicting regulatory and foreign policy conceptions were the main reason for the long-standing failures of the Transatlantic Partnership cooperation since 1990.[38] The 'Brexiters' pursue a 'Singapore at Thames' as a deregulated competitor for the EU with more restrained judicial powers; like former US President Trump, they assert national sovereignty to disregard international agreements (like the EU-UK Brexit Agreement of 2020) and European adjudication. Business-driven economic regulation and related 'regulatory capture' are today more restrained inside the EU (e.g. due to its public financing of political election campaigns) than in the USA, where business-financed presidential and congressional elections often lead to appointment of business leaders (like US President Trump, his Secretary of Commerce W.Ross), business lobbyists (like USTR R.Lighthizer, his deputy USTR D.Shea) and congressmen financed by business interests (like coal, steel, cotton, tobacco, gun and pharmaceutical lobbies). The Biden administration temporarily settled some of the EU-US trade disputes (e.g. over subsidies for aircraft makers Airbus and Boeing, European digital taxes on US tech groups, the US Section 232 tariffs on EU aluminum and steel). The Transatlantic Trade and Technology Council did, however, not prevent the illegal trade discrimination in the 2022 Inflation Reduction Act (e.g. in favor of producing electric vehicles and their batteries in the USA); it may also prove incapable of preventing re-introduction of discriminatory US steel tariffs if the EU should not accept the US proposals for imposing 'carbon tariffs' on 'dirty steel products' produced in China. NATO cooperation remains strong in implementing countermeasures against Russia's illegal wars of aggression. Yet, it is uncertain whether China's long-standing support for dictatorships (like Iran, Myanmar, North Korea, Russia)

37 Fishkin and Forbath (n 5) similarly argue for 'affirmative constitutional obligations' (21–23) of both legislative and judicial institutions to prevent oligarchic domination of the US economy resulting in socially unjust inequalities and failures to protect PGs, as they were recognized during most periods of US constitutionalism (like the early Republic, the post-civil war reconstruction and the New Deal legislation, when 'constitutional economic order hinged on a governmental duty to assure decent work and livelihoods, collective bargaining, social insurance, and other social goods to all Americans', 254–55). Yet, progressive arguments using 'living constitutionalism' for advocating political reforms as being constitutionally required remain challenged by US conservatives using 'originalist constitutional interpretation' for opposing such reforms. Given the Supreme Court's conservative view of the US Constitution and the difficulties of amending the US Constitution, US advocates of the SDGs often avoid constitutional interpretations and human rights arguments in support of the SDGs.

38 See the chapter by Fahey.

and Chinese military aggression against Taiwan will promote common transatlantic countermeasures similar to those introduced against Russia's military aggression. The lack of US trade policy leadership (e.g. through concluding transatlantic and transpacific FTAs updating trade rules among democracies) will inevitably increase the relative power of 'authoritarian alliances' like the Shanghai Cooperation Organization as the world's largest regional economic and security organization in terms of territory and population. Europe remains a regional rather than global power in view of its military, economic and technological dependencies on the USA.

5.3 *Plurilateral Protection of SDGs Depends on Democratic Bottom-up Constitutionalism*

As democracies cannot trust totalitarian power politics, they increasingly resort to pluri-or unilateral policy responses and collective countermeasures. The EU's multilevel constitutionalism, UN HRL and the recognition of affirmative constitutional duties to protect PGs (like protection of the environment) remain driven by multilevel constitutional, participatory and deliberative democracy as protected in Articles 9–12 TEU. The defense of democracy in Ukraine against Russia's illegal aggression illustrates how rule-of-law and the survival of democracies may require 'democratic wars of independence' based on active citizenship[39] and defense alliances among 'militant democracies'. As the current health, environmental, economic, food, migration and security crises were provoked by governance failures, democracies and the EU have good reasons to base their foreign policies on defending democratic constitutionalism, as prescribed in Arts 3 and 21 Lisbon Treaty. For instance, the EU has introduced new regulations for

- screening foreign investments inside the EU;
- limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
- avoiding 'carbon leakage' through unilateral EU carbon border adjustment measures;
- EU 'anti-coercion measures' providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
- EU 'sustainability sanctions' in response to foreign violations of labor rights, human rights and of sustainable development commitments;

39 cf Jon Alexander and Ariane Conrad, *Citizens: Why the Key to Fixing Everything is All of Us* (Canbury Press 2022).

– EU emergency powers for responding to supply chain problems (as they emerged during the COVID-19 and energy crises); and
– stronger EU anti-subsidy and emergency export control regimes.[40]

Similarly, the failures of the WTO 'single undertaking'-and consensus-practices prompt ever more WTO members to conclude plurilateral 'club agreements' like

– FTAs and similar preferential trade agreements (e.g. under Article XXIV GATT);
– 'critical mass agreements' like the 1996 WTO Information Technology Agreement, which was initially negotiated among 29 WTO members and progressively extended on a most-favored nation basis covering now 97% of world trade in information technology products among 83 countries; and
– other plurilateral agreements like the WTO Government Procurement and Aircraft Agreements.

Constitutionalism suggests embedding CBAMS into broader 'GHG reduction clubs' making market access conditional on, *inter alia*, agreed 'green product standards', agreed procedures for calculating 'embedded carbon' in products and equivalence of diverse GHG reduction policies, reductions of fossil fuel subsidies, agreed rules for renewable fuel subsidies, and the elimination of tariffs on environmental goods and services, with due respect for the WTO principles of special and differential treatment of less-developed countries and the environmental law principle of common but differentiated responsibilities.[41] Just

40 cf Alan Hervé, 'European unilateralism as a tool for regulating international trade: a necessary evil in a collapsing multilateral system' *Fondation Robert Schuman* (28 March 2022) <https://www.robert-schuman.eu/en/european-issues/0626-european-unilateralism-as-a-tool-for-regulating-international-trade-a-necessary-evil-in-a>accessed28August 2023.

41 On the problems of linking diverse CBAM systems see the various contributions to the symposium on 'Taxing, Regulating, and Trading Carbon' (2022) 116 AJIL Unbound 191. Arguably (as explained in the chapter by J. Flett), the EU's CBAM is justifiable under GATT Article XX, a (EU protection of the human right to climate change mitigation), XX, b (health protection), XX, d (a non-discriminatory EU emission trading system) and XX, g (non-discriminatory conservation of exhaustible natural resources) as well as under the heading of Article XX GATT (EU leadership for reducing GHG emissions through a non-discriminatory emission trading system multilaterally agreed among EU and EFTA states); it does not violate the Paris Agreement (e.g. on 'common but differentiated responsibilities'), which the EU continues to support and which does not limit sovereign rights under Article XX GATT. Following a G7 initiative for promoting 'carbon clubs' in June 2022, trade ministers representing more than 50 WTO members launched an initiative for promoting trade-related climate mitigation rules in January 2023.

as the multilaterally agreed trade restrictions in the UN Convention on Trade in Endangered Species and in the Montreal Protocol and Basel Convention on Transboundary Movement of Hazardous Wastes were never challenged in WTO dispute settlement proceedings, multilaterally agreed GHG reduction clubs, 'environmental goods agreements', newly agreed subsidy rules and fossil fuel disciplines should set incentives for plurilateral cooperation with 'critical mass membership' promoting non-discriminatory treatment without free-riding. Consensus on a 'package deal' and 'grand bargain' might require a broader 'WTO sustainability agenda' on how to promote the broader policy objectives of a 'circular economy' (e.g. reducing waste and plastic pollution by re-cycling), sustainable agriculture (e.g. addressing bio-diversity, water and food security issues), greening of transport services, the 'blue economy' (like over-fishing, ocean pollution) and a 'just transition' assisting less-developed countries through financial and technical assistance.

The diversity of governmental and private company pledges of GHG reductions also calls for promoting civil society incentives for active participation in decentralized monitoring of market failures (like pollution harms) and governance failures (like non-implementation of GHG pledges). Enhancing synergies between human and legal rights to protection of the environment can strengthen democratic and judicial remedies and citizen participation. Arguably, an effective 'circular economy' (e.g. avoiding harmful externalities) requires 'circular constitutional democracies' empowering citizens to challenge pollution externalities through equal rights, democratic and judicial remedies. As prices of internationally traded goods often do not reflect their environmental and social costs, the UN and WTO sustainable development goals must factor in the pollution costs, human and labor rights, and the 'planetary boundaries' to promote social welfare, just as neo-liberal 'shareholder conceptions' of company goals must be replaced by more inclusive 'stakeholder conceptions' and 'social corporate responsibilities'. This requires not only stronger reporting requirements of companies on their environmental, social and governance (ESG) performance. The 'constitutional politics'-and 'constitutional economics'-methodologies argue more broadly that constitutional democracies can remain effective only if the human and constitutional rights of citizens are protected by democratic legislation, administration and adjudication protecting rule-of-law and empowering citizens. Even if Europe's multilevel constitutionalism has no equivalent outside Europe, the transformation of *national* into *transnational 'aggregate PGs'* (like the SDGs) requires extending national constitutionalism to transnational governance of PGs. History suggests that such constitutional reforms require perennial struggles of citizens for collective protection of human rights limiting abuses of power.

In a globalized 'world on fire', reasonable citizens must recognize themselves as human beings with cosmopolitan responsibilities rather than only as national citizens of this or that state. Without such a cosmopolitan 'Sisyphus morality' and stronger leadership from constitutional democracies, realizing the SDGs remains a *utopia*.

Even if preference heterogeneity requires second-best strategies for protecting the SDGs, the EU countries should continue challenging protectionist discriminations as those in the 2022 US Inflation Reduction Act and those applied by authoritarian WTO members. Continued EU leadership for reforming WTO third-party adjudication and investor-state arbitration remains necessary for protecting the SDGs, human rights and non-discriminatory conditions of competition – at least in the external relations of the EU. If plurilateral cooperation among like-minded countries – rather than global economic integration also among geopolitical rivals – should become the new security policy paradigm, UN and WTO governance will become even less capable of protecting the SDGs. The entry into force, on 1 January 2022, of the Regional Comprehensive Economic Partnership (RCEP) between China and 14 Asia-Pacific countries, and its regulatory competition with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[42] illustrates how Asian countries – similar to African countries participating in the Pan-African FTA, American countries participating in regional FTAs in Southern, Central and North America, and European countries participating in the EU, EFTA, EEA and external FTAs with third countries – remain determined to protect the advantages of rules-based, liberal trading systems, notwithstanding increasing challenges of the WTO system. The lack of provisions on labor rights and environmental protection in the RCEP agreement, as in most bilateral 'Belt & Road' agreements concluded by China, illustrates China's lack of leadership for the human rights and environmental dimensions of the SDGs. By involving domestic democratic institutions, non-governmental actors (like business and 'green cities'), science-based regulatory agencies and epistemic communities, democratic support and 'checks and balances' can be enhanced.[43] The UN's

42 The CPTPP is an FTA between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam, which entered into force in 2018 after US President Trump withdrew the USA in spite of the earlier signing of the agreement by the Obama administration.

43 See Chapters 4 and 5; on the problematic relationships between democratic and 'stakeholder governance': Harris Gleckman, *Multistakeholder Governance and Democracy. A Global Challenge* (Routledge 2018); Liliana B Andonova, Moira V Faul and Dario Piselli (eds), *Partnerships for Sustainability in Contemporary Global Governance* (Routledge 2022).

'constitutional governance model' and Europe's multilevel constitutionalism are reminders that – without empowering citizens through human and democratic rights, parliamentary and judicial protection of transnational rule-of-law, and transnational democratic cultures – transnational rule-of-law, social justice and other PGs are unlikely to be effectively protected for the benefit of all citizens. As explained by the 'paradox of freedom', they risk being eroded by abuses of public and private power.[44]

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44 Loughlin's criticism (e.g. on pp 150, 162, 186ff, 194–202) of the 'rights revolution', 'judicial revolution', and of 'invisible constitutions' protecting a new 'constitutional legality' undermining his conception of representative democracy neglects that – in multilevel governance of global PGs among diverse 'demoi-cracies' in the 21st century – globalization renders judicial clarification and enforcement of transnational constitutional restraints on power-oriented inter-governmentalism indispensable for rules-based protection of PGs – provided diverse traditions of 'democratic constitutionalism' based on human rights and democratic governance of free and equal world citizens are respected. This need for rules-based reconciliation of private and democratic autonomy based on agreed constitutional principles (like subsidiarity, proportionality, rule-of-law) requires also strengthening human rights and multilevel, democratic constitutionalism in international economic law. Human rights and judicial remedies empowering citizens set incentives for 'participatory' and 'deliberative democracy' limiting the 'rational ignorance' of many citizens towards global PGs and challenging the insufficient parliamentary control of distant, worldwide governance organizations.

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