

# Multilevel Constitutionalism for Multilevel Governance of Public Goods

Methodology Problems in  
International Law

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# *Introduction*

## From Democratic and Republican to Cosmopolitan Constitutionalism in Multilevel Governance of Public Goods

### I. OVERVIEW

**S**TATES, GOVERNMENTS AND international organizations justify themselves by their collective supply of public goods (PGs) demanded by citizens. Yet even though globalization continues to transform most national into transnational PGs, there is not a single legal monograph analysing how global PGs—like human rights, the rule of law, democratic peace, monetary stability, undistorted financial and trade systems, protection of the environment, ‘sustainable development’—can be produced more legitimately and protected more effectively in a world without ‘global democracy’.<sup>1</sup> The legal interrelationships between constitutional protection of national PGs (eg equal liberties of citizens, judicial remedies) and international legal protection of regional and worldwide ‘aggregate PGs’ (eg human rights, economic liberties, judicial remedies) are often neglected by international lawyers, for instance if UN human rights lawyers overlook that many constitutional liberties in national and European constitutional law (eg Article 2 German Basic Law, the EUCFR) go far beyond those in UN human rights law (HRL) and in common law countries committed to

<sup>1</sup> My monograph on *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford, Hart Publishing, 2012) focused on international economic law (IEL), and used economic and political theories on PGs (*res publica*) without exploring the relevance of *constitutional republicanism* for UN law and multilevel governance of PGs. This book explores concepts, theories and collective action problems of PGs more systematically (notably in ch 2, sections I–II below); it explains the relevance of democratic, republican and cosmopolitan constitutionalism for reforming international and European law and governance of transnational ‘aggregate PGs’ also beyond economic law (eg in human rights law, public health law and environmental law). The terms ‘human rights’, ‘fundamental rights’ and ‘constitutional rights’ overlap unless fundamental and constitutional rights are limited—eg in the EU Charter of Fundamental Rights (EUCFR)—to citizens or EU residents (eg Arts 42–44 EUCFR apply to EU citizens and residents, most other guarantees of the EUCFR protect the rights of everyone).

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‘parliamentary sovereignty’ rather than to ‘constitutional democracy’.<sup>2</sup> This doctrinal neglect by international lawyers and governments of the interrelationships between national, regional and worldwide protection of transnational PGs is also surprising in view of the increasing recognition that human, fundamental and constitutional rights ‘constitute general principles’ (Article 6:3 Treaty on European Union (TEU)), corresponding policy objectives and duties of multilevel governance institutions to respect, protect and fulfil human rights (eg as recognized in Article 51 of the EUCFR). The seventieth anniversary of the United Nations (UN) and the twentieth anniversary of the World Trade Organization (WTO) in 2015 prompted many citizens to ask why so many international organizations and so many UN member states fail to realize their declared policy objectives of protecting human rights, sustainable development and other PGs.

This book emphasizes that lawyers, political scientists, economists, government officials and other participants in multilevel governance of transnational PGs—even if, as in my own case, they have worked for 40 years in private and public, national and international governance institutions, and have lectured and published extensively on UN, WTO and regional governance problems and challenges—need to re-think their path-dependent, methodological premises. For instance, why does constitutionalism—withstanding its universal recognition as the most legitimate and most effective legal methodology for transforming agreed ‘principles of justice’ and the ‘law in the books’ into socially effective ‘law in action’ so as to protect human and constitutional rights of citizens—remain so neglected and opposed by diplomats and rulers in global governance institutions like the UN and the WTO? What are the policy lessons from the ‘Brexit’ referendum of June 2016, in which a majority of British voters gave up their ‘constitutional rights’ and benefits under EU law in view of their fears of immigration and their preferences for financing *national* PGs (like the National Health Service) rather than European PGs? If citizens have reasons to prioritize *national* over *transnational* PGs, can the agreed ‘principles of justice’ underlying UN, WTO and regional law be transformed into more coherent democratic legislation, administration, adjudication, international implementing regulations and ‘public reason’ that democratic citizens can accept as ‘just’ (eg in the procedural sense of being ‘justified’ by constitutional, participatory and deliberative, democratic and judicial decision-making processes)? This monograph acknowledges the non-ideal reality of ‘limited

<sup>2</sup> On my criticism of interpreting international guarantees of ‘liberties’ (eg in UN HRL and IEL) one-sidedly from the narrow perspective of ‘common law freedoms’ in Commonwealth countries with ‘parliamentary sovereignty’ (like Australia), without adequate regard to multi-level constitutional protection of much broader ‘equal freedoms’ in European constitutional law, see EU Petersmann, ‘Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston’ (2002) 13 *EJIL* 845–51.

reasonableness’ (eg of Brexit advocates’ opting for ‘rational ignorance’ towards European PGs) and of intergovernmental power politics, which often justifies a deferential stance vis-à-vis under-theorized ‘principles of justice’ recognized in modern international law. Yet enhancing the normativity of international law as a necessary instrument of multilevel protection of transnational PGs—in a non-ideal world without ‘global justice’—requires a better understanding of why respect for ‘reasonable disagreement’ on the interpretation of modern HRL and of other ‘principles of justice’ is often a pragmatic precondition for advancing necessary, political and legal ‘piecemeal reforms’ of international law and governance.

### A. Legal Methodology Problems in the Transition from Democratic and Republican to More Cosmopolitan Constitutionalism

This book argues that—due to the universal recognition of ‘inalienable’ and ‘indivisible human rights’ by all UN member states—the customary law requirement (as codified in the Preamble to and Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT)) of interpreting treaties and settling related disputes ‘in conformity with principles of justice’ and human rights, requires review of path-dependent, *power-orientated*, *citizen-orientated*, legal methodologies in the interpretation and development of international law and the judicial settlement of related disputes.<sup>3</sup> As explained in Chapter 1, democratic Constitutions and European and UN HRL—by protecting civil, political, economic, social and cultural fundamental rights, related human interests and PGs, and requiring their mutual reconciliation through democratic legislation, administration and judicial remedies in courts of justice—offer comprehensive legal frameworks for democratic deliberation and regulation of the new legal challenges of ‘globalization’, with due regard to the fundamental interests of all affected citizens and other stakeholders. Chapters 2 and 3 explain why—in order to limit the ‘disconnect’ between UN and WTO governance and national legislation, administration, adjudication and ‘public reason’ in many UN/WTO member states, and reconcile the inevitable ‘piecemeal engineering’ in fragmented legal regimes (like health law, environmental law and regional integration law)—multilevel governance of transnational PGs must be ‘connected’ more effectively by transnational democratic, republican and cosmopolitan constitutionalism. The term ‘constitutionalism’ is used here for

<sup>3</sup> Cf EU Petersmann, ‘Justifying “Fragmentation” and Constitutional Reforms of International Law in Terms of Justice, Human Rights and “Cosmopolitan Constitutionalism”’ in A Jakubowski and K Wierczynska (eds), *Fragmentation vs the Constitutionalisation of International Law. A Practical Inquiry* (London, Routledge, 2016) 163–82.

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the process of constituting legislative, administrative and judicial governance powers and of transforming constitutionally agreed rules and principles of a higher legal rank into legislation, administration and adjudication aimed at constituting, ordering and directing a people. Democratic constitutionalism focuses on the self-constitution and emancipation of a people or of its ruling elites (eg in democratic city states in ancient Greece). Republican constitutionalism aims at limiting arbitrary domination and protecting additional PGs for the benefit of citizens (like the Roman legal system in the ancient Roman republics). Cosmopolitan constitutionalism—proceeding from constitutional protection of human rights and other fundamental rights of everyone at national and international levels of governance (eg in the EUCFR)—promotes individual and democratic self-development and collective protection of transnational PGs beyond national frontiers. As illustrated by the multilevel legal and judicial protection of human and fundamental rights of citizens in European law, transnational democratic, republican and cosmopolitan constitutionalism can limit the flaws of national, single-polity perspectives, for instance by constituting, limiting, regulating and justifying multilevel governance of transnational PGs more effectively than national constitutionalism if the latter focuses on local and state polities and national boundaries without adequate protection for all human rights, externally affected interests of non-residents and of transnational legal communities committed to protection of transnational PGs. While the spread of industrial technologies beyond Europe took centuries in the past, modern information technologies have offered unique opportunities for promoting not only economic and social, but also democratic and legal development worldwide in only a few years, as illustrated by the lifting of hundreds of millions of people out of poverty in China since the 1980s and in India since the 1990s. This book argues for legally protecting ‘*cosmopolitan citizenship*’ not only as a bundle of rights and duties of all ‘citizens of the world’, but also as a status of membership in ‘overlapping’, self-governing local, national and transnational polities responsible for multilevel protection of transnational PGs that are necessary conditions for human autonomy and well-being. It suggests distinguishing between the *demos*, composed of citizens having the franchise, and a broader ‘*cosmopolitan citizenry*’, including all those who have a stake in being members of a transnational polity responsible for protecting functionally limited, transnational PGs.

Due to the transformation of national into transnational PGs, democratic, republican and cosmopolitan constitutionalism complement each other by offering synergies that—as in the story of the blind men describing an elephant depending on the different body parts they touched—enable a more coherent understanding and regulation of the collective action problems in multilevel governance of transnational ‘aggregate PGs’, for instance based on inclusive representation of all interests that are actually

affected by democratic regulation, and of the rights of all who are subject to the jurisdiction of government decisions and whose individual autonomy depends on participation in collective self-government. Transnational legal communities (eg citizens and peoples cooperating in transnational common markets) must constitute themselves as a legitimate, self-governing polity and multilevel *demoi*-cracy, rather than letting themselves be dominated by path-dependent, intergovernmental power politics that risk undermining the legal, democratic and judicial accountability of government executives vis-à-vis domestic citizens. Due to the often ‘reasonable disagreements’ on how to interpret, reconcile and prioritize human and constitutional rights (eg freedom of speech, privacy rights, economic, social and cultural rights), HRL and democratic discourse in ‘communities of rights’ need to be supplemented—as explained in Chapter 1—by theories of justice and of constitutionalism aimed at coherently clarifying indeterminate legal concepts and functional treaty regimes among states for collective protection of transnational PGs.

Following the financial crises since 2008 and the Euro-crises since 2010, the European Union (EU)—which was for a long time considered as a potential model for reforming international law—also continues to be confronted with systemic violations of the rule of law, for instance of the budget and debt disciplines in Article 126 of the Treaty on the Functioning of the European Union (TFEU) and of the ‘Schengen’ and ‘Dublin rules’ for the treatment of immigrants and refugees at the borders of the EU. The widespread perception of ‘governance failures’ in worldwide, regional and national governance institutions—as illustrated by more than one billion people living on \$1 or less per day without effective access to protection of their human rights, or by the now 65 million displaced persons and refugees triggering the biggest transnational migration crisis since World War II—is accompanied by the increasing dissatisfaction of voters with the ‘democratic deficits’ of ‘disconnected’ UN, WTO and EU governance dominated by government executives, who negotiate and ratify—and subsequently violate—international agreements on grounds of ‘political realism’ and alleged ‘national interests’. The British ‘Brexit vote’ of June 2016 to leave the EU illustrates how majoritarian governance—also in constitutional democracies like the USA and in the EU—is increasingly ‘polarized’ by emotions and interest-group politics, for instance in order to resist international migration and redistribute domestic income by violating international trade rules (eg on the rule of law, science-based ‘risk assessments’ and carbon reductions aimed at climate change prevention).

National governments in continental, resource-rich democracies (like Australia, Canada, India and the USA) operate differently from multilevel governance among democracies in vertically integrated, supranational ‘PGs organizations’ like the EU. Hence, American and European political and legal analyses of the need to adjust national legal and governance systems to

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the globalization challenges of the twenty-first century often lead to diverse policy recommendations, not to mention the different ‘world order conceptions’ of the BRICS countries (Brazil, Russia, India, China and South Africa). ‘Legal fragmentation’ (as illustrated by the ‘Grexit’ and ‘Brexit’ discussions about whether Greece and the United Kingdom should exit from EU integration) and claims to specificity of particular legal regimes (like economic law) can be considered as inevitable ‘Hegelian dialectic processes’ driving national as well as international legal systems (as discussed in Chapter 1, section III). This study emphasizes the need for ‘constitutionalization’ of ‘fast rationality’ (eg by the *homo economicus*) and of power politics through ‘constitutional mind-sets’ and ‘slow reasonableness’,<sup>4</sup> as illustrated by the ‘constitutionalization’ of European economic regulation in order to limit its politicization and instrumentalization by powerful lobbies. Responding to ‘fragmentation’ by constitutional ‘checks and balances’ can promote ‘public reason’ and convergence of diverse democratic, republican and cosmopolitan traditions of law and governance for the benefit of citizens. The laboratory of EU law also reveals tensions between varied national constitutional identities and centralized EU institutions committed to protection of under-defined European PGs (like a ‘competitive social market economy’ and ‘economic and monetary union’ pursuant to Article 3 TEU). Similarly, ‘teleological’ interpretations by the European Court of Human Rights (ECtHR) of the European Convention on Human Rights (ECHR) as a ‘living constitutional document’ have provoked criticism that judicial ‘multilevel human rights constitutionalism’ disrespects national democratic processes. Such tensions between national and multilevel constitutionalism raise difficult questions of legal methodology and conflict resolution (eg on the basis of the ‘rules of recognition’ of competing jurisdictions, or of common principles governing ‘overlapping jurisdictions’).

### **B. From ‘International Law Among States’ to Vertical ‘Integration Law’ for Multilevel Governance of Transnational Public Goods**

‘Globalization’ refers to the global movements of goods, services, persons, capital and related payments, the global recognition of human rights, international law and multilevel governance institutions, and to the closer integration of countries. It affects the daily lives of people (eg through communications, climate change, health pandemics), transforms national into international PGs, and requires far-reaching changes in multilevel

<sup>4</sup> On the difference between individual rationality and ‘reasonableness’ balancing egoist self-interests with the legitimate interests of all others, see D Kahneman, *Thinking, Fast and Slow* (London, Penguin, 2011). The universal recognition of human rights requires justifying also international law from the moral perspective of free and equal citizens rather than only from utilitarian perspectives.



governance of transnational PGs like security and the global division of labour. The more governance decisions by governmental and non-governmental organizations (NGOs) have effects beyond states, the stronger the need for coordinating and regulating multilevel governance not only in ‘horizontal relations’ among states, but also in ‘vertical relations’ among citizens, (non-)governmental and international organizations.

The adjustment pressures generated by globalization entailed structural transformations of international law and governance institutions:

1. The ‘*Westphalian international law of coexistence*’ (1648–1945) was driven by power-orientated conceptions of state sovereignty, international law and of the often ‘anarchic’ international relations. Transnational actors regulated international commercial and financial cooperation primarily through private law (*lex mercatoria*) and national ‘conflict of law rules’, and through the extension of national law to colonial territories that were demarcated through international agreements among states. Yet the changing conceptions of ‘national welfare’ led to regulatory paradigm changes (eg from ‘mercantilism’ to ‘embedded liberalism’ following World War II) that also changed foreign policies and the structures of international law.
2. In the wake of the ‘Cobden-Chevallier trade agreement’ between England and France (1860) and following World Wars I and II, the ‘*international law of cooperation*’ increasingly provided for institutionalized cooperation among states (eg in the context of the League of Nations, the UN and UN Specialized Agencies, GATT 1947 and the WTO). The only progressive decolonization, the non-democratic nature of many UN member states and the domination of intergovernmental cooperation by government executives entailed, however, that UN/WTO law and governance have often not been effectively implemented inside UN member states. UN law recognizes and protects human rights, popular self-determination, international rule of law and peaceful settlement of disputes. Yet due to the ‘domestic implementation deficits’ in many areas of UN law and governance, it has failed to protect many international PGs effectively.
3. Such ‘disconnected intergovernmentalism’ and domestic ‘legal dualism’ often impede multilevel governance of transnational PGs for the benefit of citizens and their human rights. Many UN/WTO member state governments remain unwilling to effectively constitute, limit, regulate and justify delegation of limited legislative, executive and judicial powers to multilevel governance institutions in terms of protecting rights of citizens, such as labour rights protected by the International Labour Organization (ILO, 1919), health rights protected by the World Health Organization (WHO, 1945), rights to food protected by the Food and Agriculture Organization (FAO, 1945), rights to education protected

by the UN Education, Scientific and Cultural Organization (UNESCO, 1945), and additional civil, political, economic, social and cultural rights protected by worldwide, regional and national human rights institutions and national Constitutions. The universal recognition of human rights by all UN member states increasingly challenges ‘Westphalian conceptions’ of ‘international law among sovereign states’ by alternative conceptions of an ‘international law of peoples’ (eg insisting on decolonization and democratic self-determination), ‘cosmopolitan international law’ deriving its legitimacy from human and constitutional rights of citizens (eg European common market law and HRL), and multilevel governance of transnational PGs through functionally limited ‘PGs agreements’ (eg protecting international air transport, maritime transport, postal communications and telecommunications). Especially in regional economic integration organizations like the EU and the European Economic Area (EEA), the ‘legitimacy deficits’ of the ‘international law of coexistence’ and ‘international law of cooperation’ (Friedmann) are progressively reduced by also providing for multilevel parliamentary and judicial institutions that protect human and constitutional rights of citizens. Such constitutional reforms—by empowering citizens to invoke and enforce ‘PGs treaties’ in domestic jurisdictions, rendering multilevel governance (eg of the common market among 31 EEA member states) more accountable, and by justifying international rules and institutions in terms of human and constitutional rights—can transform fragmented ‘horizontal international law among states’ into more legitimate and more powerful ‘vertical integration law’.

Such functionally limited ‘constitutionalization’ of multilevel governance of transnational PGs remains contested. Many countries continue to prioritize ‘constitutional nationalism’ based on Hobbesian conceptions of ‘international law among sovereign states’ and of international relations as power-orientated rivalries that necessitate ‘realist foreign policies’.<sup>5</sup> This study argues not only that ‘Hobbesian social contracts’—based on an assumption of human incapacity for peaceful, democratic cooperation (*homo homini lupus est*)—have become inconsistent with the universal acceptance of human rights and democratic governance principles in international law and constitutional democracies, but also that multilevel governance of transnational ‘aggregate PGs’ can be successfully ‘constitutionalized’ for the benefit of citizens and their constitutional rights, even if ‘global democracy’ or a ‘world republic’ remain *utopias*. Human rights law and corresponding duties of governments to protect transnational PGs for the benefit of

<sup>5</sup> Cf J Goldsmith and D Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ in (1999) 113 *Harvard Law Review* 1–75. The competing conceptions of international law aimed at limiting realist pursuits of national self-interests without attending to moral issues (eg Rawls’s ‘Law of Peoples’ and cosmopolitan conceptions of international law) are discussed in ch 1, sections I–III.

all ‘citizens of the earth’ (Kant) entail that international law and multilevel governance must become parts of ‘evolutionary’ or, if necessary, ‘revolutionary constitutionalization’ in order to constitute, limit, regulate and justify multilevel governance of transnational PGs. Even though national and regional HRL and constitutionalism (eg European constitutional law) depend on functionally limited, international agreements in order to protect global PGs for the benefit of citizens, such treaties among states and inter-governmental rules—in order to protect human needs and related entitlements effectively—need to be embedded more strongly into rights-based, national and regional constitutional systems. Yet path-dependent international lawyers and diplomats with ‘statist mind-sets’ continue to avoid discussing international law in constitutional terms. Hegemonic states (like China, Russia, the USA) pursuing ‘realist foreign policies’ continue to prioritize ‘national interests’; they ratify and implement far fewer UN human rights conventions and ILO labour rights conventions than, for example, the 31 EEA member states, which have been more willing to accept UN and European HRL as multilevel, constitutional restraints on foreign policy powers.

### C. ‘Multilevel Constitutionalism’ as a Functionally Differentiated, ‘Interactional’ Process of ‘Constitutionalization’

In contrast to the democratic use of ‘constituent power’ by ‘We the people’ at particular constitutional moments that gave rise to national (big ‘C’) ‘Constitutions’ (eg during the revolutionary American and French constitutionalism during the eighteenth century), European constitutional law continues to evolve dynamically in the context of functionally limited treaty regimes like the EU Treaties, the ECHR and the EEA Agreement. At both national and European levels of governance, the dynamic processes of ‘constitutionalizing’ legislation, administration and adjudication were shaped not only by democratic law-making, but also by civil society struggles, judicial clarifications of the law, and progressive development of constitutional and legal systems.<sup>6</sup> This book also argues that the increasing number of regional and worldwide ‘PGs treaties’ beyond Europe—by constituting, limiting, regulating and justifying legislative, administrative and judicial powers for multilevel governance of functionally limited, transnational PGs, and by offering

<sup>6</sup> See, eg, M Poiars Maduro, *We the Court: the European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998). Maduro’s methodological proposals of ‘contra-punctual legal techniques’ reconciling legal and judicial interpretations of overlapping legal regimes (like national, EU and EEA law) are discussed in ch 2, section V. Even though political and legal theories identify regulatory problems of international law (like the ‘borrowing’ and ‘resource privileges’ enabling non-democratic rulers to exploit their peoples), they fail to elaborate ‘constitutional approaches’ to limiting unjust international rules and institutions, as explored in this book.

incentives for democratic and judicial control of multilevel governance—contributes to the emergence of ‘multilevel constitutionalism’ for multilevel governance of PGs, for instance by limiting multilevel governance powers by individual rights and judicial remedies. Just as EU constitutional law can be better understood as a functionally differentiated process of progressive ‘constitutionalization’—giving rise, *inter alia*, to an ‘economic constitution’ (eg based on the ‘micro-economic constitution’ of the EEC Treaty and the ‘macro-economic constitution’ of the Maastricht and Lisbon Treaties) that can be distinguished from the EU’s ‘political constitution’, ‘security constitution’ and ‘foreign policy constitution’<sup>7</sup>—so is the much less developed ‘constitutionalization’ of international law and governance beyond Europe characterised by functionally differentiated treaty regimes that dynamically evolve and interact with other international and national legal regimes and common constitutional principles (eg based on the human rights obligations and judicial remedies accepted by UN member states in hundreds of national and international legal instruments).

Hence, this study discusses ‘constitutional pluralism’ not only as ‘vertical interactions’ between international and national, but also as ‘horizontal interactions’ among functionally diverse, international and regional legal regimes acknowledging common constitutional principles. For instance, the ‘constitutionalization’ of the European common market was shaped not only by *national* constitutional guarantees of fundamental rights, democratic legislation and judicial remedies; the common treaty obligations of EU member states under GATT/WTO law also required the foundation of European common market law on a ‘customs union’ with free movement of goods (cf Articles 28 et seq TFEU) and a common commercial policy based on compliance with the GATT/WTO legal and judicial obligations of all EU member states and of the EU (cf Articles 206 et seq TFEU). ‘Multilevel constitutionalism’ is understood as ‘interactional’ and ‘relational law’ that dynamically evolves in functionally complementary, ‘horizontal’ and ‘vertical’ legal relations; for instance, national and international HRL and international economic law (IEL) often prioritize different ‘jurisprudential’ and ‘doctrinal principles’ due to the diverse democratic preferences of the countries involved and diverse regulatory priorities (eg common market freedoms and guarantees of undistorted competition in the EEC Treaty of 1957, as interpreted and developed by the European Court of Justice (ECJ) since the 1960s).<sup>8</sup> As all UN member states have accepted

<sup>7</sup> Cf K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Aldershot, Ashgate, 2010).

<sup>8</sup> Cf K Tuori, ‘The Relationality of European Constitution(s). Justifying a New Research Programme for European Constitutional Scholarship’ in U Neersgard and R Nielsen (eds), *European Legal Method—towards a New European Legal Realism?* (Copenhagen, DJOF Publishing, 2013) 23–36, 27: ‘*constitution* should be understood through the *constitutional*

‘inalienable’ and ‘indivisible’ human rights and other ‘principles of justice’ aimed at protecting citizens, the many ‘functionally different constitutions’ involve common ‘rights dimensions’, as explicitly acknowledged in the ‘constitutions’ (*sic*) establishing some UN Specialized Agencies (like the ILO, the WHO and UNESCO). Yet such ‘surface-level constitutional law’<sup>9</sup> is often not effectively transformed into ‘constitutional culture’, for instance due to the domination of UN and GATT/WTO institutions by intergovernmental power politics and ‘reasonable disagreements’ about the interactions among economic, legal, political and social constitutionalism (eg among WTO members that have not ratified—and oppose—some UN and regional human rights conventions). In regional and worldwide courts of justice, such conflicts are often reflected in conflicting claims of civil, political, economic, social and cultural rights of citizens, of corresponding duties of governments and of ‘judicial comity’ among diverse jurisdictions on how to construe common ‘constitutional principles’ (eg of rule of law, non-discrimination, necessity, proportionality, transparent governance) in different jurisdictions. Even though regional and worldwide market liberalization, market regulation and ‘economic crises’ (like the financial, monetary and debt crises since 2008) remain important driving forces of ‘constitutionalizing’ multilevel governance,<sup>10</sup> this monograph focuses on ‘constitutionalism’ in the relationships between economic and *non-economic* PGs like health law, HRL, environmental law, judicial protection of fundamental rights, democratic governance and transnational rule of law.

Chapter 1, section II explains why the customary law requirements of interpreting treaties ‘in conformity with the principles of justice’, including also ‘human rights and fundamental freedoms for all’, continue to be neglected in intergovernmental practices and judicial decisions by many international courts of justice. International judges increasingly conceive of the multilevel legal order as one big system comprising sources of law stemming from national and international sub-systems (eg as defined in Article 38 of the Statute of the International Court of Justice (ICJ Statute)), and agree on the need for ‘legal positivism’ and ‘legal realism’ in their

*relationship* which *constitutional law* establishes with a *constitutional object*, that is, either an extra-legal object of regulation or, in case of the *juridical constitution*, with law itself ... [I]n France, the constitutional revolution aimed at constituting a new socio-economic system, whereas in America, the emphasis was on reaffirming the traditional “liberties of the Englishman”.’ Tuori’s distinction between economic, juridical, political, social and security constitutions is discussed further below in section V of this Introduction.

<sup>9</sup> On the distinction between ‘surface level constitutional provisions’ and a ‘legal cultural level’ at which constitutional rules, principles and precedents are interpreted and applied, see Tuori (n 8), at 30.

<sup>10</sup> Cf Petersmann (n 1). Also J Rawls’s theory of justice later emphasized that the ‘stabilizing function’ of his proposed ‘constitutional contract’ on ‘principles of justice’ required to institutionalize ‘public reason’ (eg in a ‘basic legal structure’ protected by a Supreme Court) in order to maintain a ‘well-ordered society’; cf J Rawls, *Political Liberalism* (New York, Columbia UP, 1993).

exploration of ‘what the law is’; yet they remain reluctant to ask ‘why the law is as it is’, how interpretations of international law can be justified vis-à-vis citizens in terms of ‘principles of justice’, and whether modern HRL requires the legal rights of citizens to be taken as constitutional foundations of modern legal systems and legal methodologies. Chapter 1, section III discusses ‘legal fragmentation’ and ‘legal reintegration’ as dialectic methods for progressively reforming international and domestic legal systems. As ‘global democracy’ remains a *utopia*, and intergovernmental power politics remains a constant threat to multilevel constitutionalism, this study argues for ‘bottom-up struggles’ by civil society for cosmopolitan and republican rights and democratic and judicial remedies against the ubiquity of abuses of public and private powers in multilevel governance of international PGs. In view of the ‘relational nature’ of ‘functional constitutionalism’—ie the dependence of constitutional rules and problems on their regulatory objects and on the ‘constitutional sociology’ underlying constitutionalization processes beyond states—Chapter 2 engages in a number of case studies (eg of multilevel tobacco control aimed at protecting health rights, environmental protection aimed at protecting human rights, and transnational judicial remedies aimed at protecting transnational rule of law). These empirical case studies of ongoing constitutionalization processes confirm, *inter alia*:

- the diverse sociological preconditions for ‘constitutional reforms’ in different policy sectors (like multilevel health and environmental regulation);
- the diversity of legal methods actually used by multilevel actors;
- the changing relative importance of the various sources of law (like general principles of law) and of the related ‘rules of recognition’;
- the changing nature of ‘legal positivism’ and of ‘constitutional interpretations’ of international law (eg concerning inherent powers of international courts of justice); and
- the need to clarify the methods of treaty interpretation in view of the fact that many international treaties use deliberately indeterminate, legal concepts and ‘incomplete rules’ (like GATT Article XXIII on ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ under GATT/WTO law).

Furthermore, the customary law requirement of interpreting treaties ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (Article 31:1 VCLT) does not offer a coherent theory of how these interpretative principles and the changing paradigms of UN treaty law (eg HRL, communitarian ‘global PGs treaties’) should be applied in ‘legislative’ and ‘judicial’ interpretations of international law and related dispute settlement

procedures.<sup>11</sup> There are three basic approaches to international treaty interpretation derived from the customary law rules codified in Articles 31–33 VCLT, ie:

1. clarifying the ordinary meaning of the words used in the applicable treaty provisions ‘in their context’, which also comprises (in addition to the text, preamble and annexes) any agreements and instruments relating to the treaty, further taking into account any subsequent agreements, practices and relevant rules of international law applicable in the relations among the parties;
2. exploring the common intentions of the contracting parties as expressed in the agreement, for instance by respecting any special meaning given by the parties to a legal term and resorting, if necessary, to ‘supplementary means of interpretation’ as provided for in Article 32 VCLT; and
3. looking at the object and purpose of the agreement as agreed in its text and relevant context.

Yet as the parties to a dispute disagree on how to interpret the textual and ‘extrinsic materials of interpretation’ (like subsequent agreements, practices and relevant rules of international law), judicial interpretations often depend on clarifying the ‘jurisprudential’ and ‘doctrinal principles’ underlying the relevant treaty rules through ‘judicial administration of justice’ and due process of law. If the ‘legislative branch’ of an international organization (like the WTO) is no longer capable of adjusting the treaty rules to new regulatory challenges (like climate change prevention), judicial interpretations and dispute settlements must explain and justify their legal and judicial methodologies even more carefully and convincingly.

#### D. Need for Normative and Empirical Review of Legal Methodologies

As explained in section V of this Introduction, in order to understand the changing structures and regulatory challenges of international law and multilevel governance, this study focuses on legal methodology problems in UN,

<sup>11</sup> On these tensions between bilateral and communitarian approaches in applying international rules on treaty interpretation, treaty conflicts, ‘evolutionary’ and ‘systemic interpretations’ of ‘incomplete agreements’, see E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford, OUP 2011). On the neglect of ‘constitutional interpretations’ in WTO dispute settlement practices, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, OUP 2009) 92, 109. On the ‘systemic integration principle’ (Article 31:3(c) VCLT) complementing ‘supplementary means of interpretation’ and subsequent practice as a means of interpretation in WTO jurisprudence, see also AH Qureshi, *Interpreting WTO Agreements. Problems and Perspectives*, 2nd edn (Cambridge, CUP, 2015) 48, 145.



WTO and European law from both normative and consequentialist perspectives. Chapter 1 discusses how the universal recognition of human rights and of ‘multilevel constitutionalism’ affects not only the ‘primary rules of conduct’ in international law, but also the international and national ‘secondary rules of recognition, change and adjudication’, for instance by requiring interpretation of state-centered ‘principles of justice’ (like ‘necessity’ and ‘proportionality’) in conformity with person-centered ‘principles of justice’ (like human rights and ‘access to justice’). Chapter 2 applies economic and other consequentialist methods of social sciences for evaluating multilevel regulation of the three main types of international ‘policy externalities’:

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

Chapter 1 explains from normative and empirical perspectives why the universal recognition of human and constitutional rights (including also freedom of contract, private property rights and private arbitration) as ‘positive law’ requires ‘normative bottom-up review’ of state-centered rules and institutions from the point of view of reasonable citizens and their individual and democratic rights (eg as ‘agents of justice’, ‘constituent powers’, ‘democratic principals’ of governance agents with limited ‘constituted powers’, main economic and ‘republican actors’ in the global division of labour). ‘Human rights’, ‘rule of law’, ‘democracy’, ‘sovereignty’ and other ‘principles of justice’ (like non-discrimination, equality, necessity, proportionality) referred to in UN law and EU law remain indeterminate concepts. Their legal clarification may legitimately differ depending on the respective value premises, legal methodologies and legal contexts. The governance challenges resulting from globalization require review of path-dependent jurisprudential, doctrinal and judicial methodologies; regulators may learn more from



the multilevel, instrumental use of law in European integration than from the different experiences in federal democracies (like Australia, Canada, India and the USA).<sup>12</sup> This study uses the term ‘constitutionalism’ both for:

- a) the *normative proposition* that law and governance—in order to be accepted by citizens as legitimate and voluntarily complied with—need to be justified vis-à-vis citizens through agreed principles, rules and institutions of a higher legal rank that must be transformed into constitutional and democratic legislation, administration, adjudication, international ‘PGs treaties’ and ‘public reason’, so as to induce citizens to cooperate peacefully in the collective supply of PGs; and
- b) the ‘*six-stage constitutionalization processes*’ of law and governance by transformation of (i) agreed ‘principles of justice’ (eg in the US Declaration of Independence of 1776, the Universal Declaration of Human Rights of 1948) into (ii) constitutional, (iii) legislative, (iv) administrative, (v) judicial and (vi) international rules and institutions that protect equal rights of citizens and promote ‘constitutional mind-sets’ limiting rational egoism by ‘constitutionalizing’ law and governance.<sup>13</sup>

<sup>12</sup> Cf M Cappelletti, M Secombe and J Weiler (eds), *Integration through Law*, vols 1 and 2 (Berlin, de Gruyter, 1986), who explored lessons from the ‘American federal experience’ for European integration law; EU Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland* (Fribourg, Fribourg UP/ Boulder, CO, Westview Press, 1991) (exploring lessons from the common market regulations in the liberal 18th-century US Constitution, the 19th-century Swiss Constitution, the 20th-century post-war German Constitution and EU law for multilevel regulation of international trade). This study focuses on ‘legal integration through multilevel protection of PGs’ rather than on the ‘integration through law’ paradigm as recently revisited by D Augenstein, *Integration through Law Revisited: The Making of the European Polity* (Aldershot, Ashgate, 2012). As both European law and UN/WTO law face the challenge to protect transnational PGs more effectively for the benefit of citizens and their constitutional and human rights, global governance of PGs can learn from the European experiences of limiting the legitimacy deficits of international regulation by multilevel protection of constitutional rights, rule of law, democracy and distributive justice (eg through social rights and a ‘social market economy’). The failures of the EU projects to adopt a ‘European Constitution’ and ‘European Civil Code’ reflect the criticism that the EU commitment to ‘creating an ever closer union among the peoples of Europe’ (Art 1 TEU) no longer reflects the view of many EU citizens.

<sup>13</sup> Both propositions—a) + b)—are based on interpretations of the *positive law* of constitutional democracies (like the USA and EU member states) and of transnational ‘treaty constitutions’. The additional claim of this study—that modern constitutional democracies have a historical record of protecting PGs for the benefit of their citizens more effectively than non-democracies—is a different empirical claim. The terms ‘constitution’ and ‘constitutionalism’ are used differently in legal and political philosophies; Kant, for instance, postulated ‘cosmopolitan rights’ (eg to visit other countries and communicate with their citizens) that were expected to promote transnational cooperation among ‘cosmopolitan citizens’ and contribute to the progressive emergence of a ‘cosmopolitan constitution’; cf J Bohman and M Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant’s Cosmopolitan Ideal* (Cambridge, MA, MIT Press, 1997). My discussion of ‘principles of justice’ in international law (see ch 1) is, likewise, based on *positive international law* (eg UN human rights law) rather than on Kantian

This dynamic process of ‘constitutionalization’ may start with exceptional ‘constitutional conventions’ elaborating constitutional documents codifying ‘constitutional contracts’ among citizens in the name of ‘We the people’. ‘Constitutionalization’ and related exercises of ‘constitutive power’ may, however, also be initiated *ex post*, for instance by jurisprudence and judicial interpretations of rules that are subsequently accepted as higher constitutional law (eg EU member states, their national peoples and citizens accepting ECJ jurisprudence as clarifying constitutional principles in EU law). This is often so in less-developed countries that initially rejected human rights as ‘Western ideas’ before their own peoples insisted on adopting democratic Constitutions, ratifying UN human rights conventions and ‘constitutionalizing’ authoritarian government practices. Formalistic claims that ‘constituent power’ can only be exercised by ‘We the people’ for creating a *national Republic*, which subsequently consents to ‘international law among states’, are neither theoretically nor empirically convincing: the US Declaration of Independence (1776), for instance, justified the right to abolish unjust government by ‘certain unalienable rights of all men’ and ‘the right of the people ... to institute new government’ on universalizable grounds that were equally applicable to citizens and peoples outside the USA. The German ‘Basic Law’ (1949) and its extension to eastern German states following the fall of the Berlin Wall (1989) were adopted in the context of international agreements (eg with the Allied Powers preceding approval of the Basic Law in 1949, the 1990 German Reunification Treaty between West and East Germany) that were subsequently validated by the peoples through legitimate exercises of constitutional power. Regardless of whether the ‘international community’ is construed—like the European Community—as consisting no longer only of states but also of non-governmental and inter-governmental organizations, peoples and citizens, the universal recognition of human rights also requires exercise of legitimate ‘constituent powers’ for justifying international law (eg in the case of withdrawal from the EU pursuant to Article 50 TEU and the related termination of EU guarantees of fundamental rights in the jurisdiction concerned).

moral ‘duties of justice’ to promote ‘constitutional justice’ by setting up institutions that recognize and protect the equal status of all persons. Also, my assumption that ‘global democracy’ remains a utopia and that multilevel *governance* must be legally organized differently from *democratic governments*, is not inconsistent with the positive law argument in this study that, in the 21st century, the legitimacy of all multilevel governance institutions should be derived from respect for the ‘inalienable human rights’ of citizens and the corresponding obligations of all UN member states. As discussed in ch 1, even though European and UN human rights law also protect ‘democratic rights’, these rights have not prevented non-democratic governance in many UN member states and international institutions.

## E. Empirical Case Studies and Policy Conclusions

Chapters 1 and 2 engage in case studies of the ‘six-stage constitutionalization processes’ of transnational PGs, to examine why internationally agreed principles of justice (eg health rights protected in UN human rights law and WHO law) are so often inadequately protected in constitutional laws, democratic legislation, administration, adjudication and international regulation (eg of tobacco consumption and other health pandemics):

- Chapter 1, sections II–IV examine the impact of ‘human rights constitutionalism’ on treaty interpretation, multilevel adjudication, the ‘principles of justice’ and the ‘rules of recognition’ underlying international law.
- Chapter 1, section III uses the examples of international investment law and multilevel economic adjudication to illustrate how multilevel ‘republican constitutionalism’ can justify ‘legal fragmentation’ as an instrument for rights-based reforms and ‘reintegration’ of international investment law and related adjudication.
- Chapter 1, section IV illustrates the growing impact of democratic and ‘cosmopolitan constitutionalism’ on European integration law in order to better ‘reconnect’ citizens and the peoples as ‘constituent powers’ with the limited ‘constituted powers’ of multilevel governance institutions to protect PGs (like the EU’s common market).
- Chapter 1, section V uses the example of the EU’s ‘cosmopolitan foreign policy constitution’ to illustrate why ‘constitutionalization’ of discretionary foreign policy powers has failed if national and international courts of justice do not protect the rights of citizens and transnational rule of law.
- Chapter 1, section VI concludes that the legitimacy of international law and of multilevel governance of transnational ‘aggregate PGs’ depends on embedding constitutional democracies into multilevel republican and cosmopolitan constitutionalism, limiting ‘Hobbesian interpretations’ of foreign policy powers and ‘collective action problems’ in multilevel governance through stronger protection of constitutional rights and judicial remedies of citizens.

Chapter 2 offers additional social science analyses (eg applying economic and ‘public choice’ methods to legal analyses as proposed by ‘law and economics’) of how international law constitutes, limits, regulates and justifies multilevel governance of ‘aggregate PGs’:

- Chapter 2, sections I–II use economic and political ‘PGs theories’ for analysing multilevel trade and environmental governance of PGs.
- Chapter 2, section III examines multilevel health regulation and adjudication in the context of the WHO Framework Convention on Tobacco Control (FCTC).

- Chapter 2, section IV explains why the EU negotiations on ‘transformative’ transatlantic free trade agreements risk undermining the ‘cosmopolitan principles’ that the Lisbon Treaty prescribes for EU external relations (eg in Articles 3, 21 TEU).
- Chapter 2, section V describes how national and international courts of justice should use their ‘constitutional mandates’ to protect transnational PGs in the context of multilevel judicial protection of cosmopolitan and republican rights and remedies.

The empirical case studies proceed from ‘methodological individualism’, ie the assumptions that (i) rational individuals seek to maximize the achievement of their preferences, and (ii) the only valid source of preferences (values) is individuals.<sup>14</sup> Rational pursuit of individual self-interests by private and public actors (eg of politicians pursuing their political re-election) often conflicts with ‘public reason’ and ‘social welfare’ as defined by human rights, constitutional law and impartial adjudication limiting rational pursuit of self-interests. Moreover, the normative premises of welfare economics (eg that under perfect competition and absent transaction costs the market allocates resources efficiently) often do not exist in real-world conditions without perfect competition. Hence, ‘positive economic analyses’ of human behaviour must be supplemented by political science, legal sociology and social psychology analyses of how law and social institutions affect human behaviour. For instance, economic analyses are about efficient realization of existing preferences in certain circumstances; yet they do not offer objective standards for evaluating these preferences (eg to benefit from global economic integration) that may conflict with other preferences (eg to maintain individual and national autonomy and democratic self-governance).

Chapter 3 concludes by explaining why ‘civilizing’ and ‘constitutionalizing disconnected governance’ of transnational PGs in UN, WTO, European and national institutions requires stronger legal and judicial protection of state citizens, transnational ‘market citizens’ and ‘cosmopolitan citizens’ in multilevel PGs regimes, notably by linking the functional constitution, limitation, regulation and justification of multilevel governance institutions through international treaties to the empowering, limiting, regulatory and justificatory functions of constitutional and cosmopolitan rights (Chapter 3, section I). There are good reasons why constitutional democracies and national and international courts of justice increasingly integrate the competing conceptions of international economic regulation as (i) public international law, (ii) global administrative law, (iii) international private law, (iv) multilevel economic regulation or (v) multilevel constitutional law

<sup>14</sup> On the use of ‘law and economics tools’ for analysing international law, see J Trachtman, *The Economic Structure of International Law* (Cambridge, MA, Harvard UP, 2008).

in order to protect citizens as ‘constituent powers’, ‘democratic principals’ and ‘agents of justice’, who must hold all multilevel governance legally, democratically and judicially more accountable. Comparative ‘positive’ (ie descriptive) legal and economic analyses of competing ‘PGs regimes’ (eg national ‘PGs regimes’ in democratic and non-democratic countries, multilevel economic, health, environmental and related legal regulation and adjudication in different regional and worldwide legal regimes) confirm that the existing allocation of governmental authority does not maximize efficient protection of agreed PGs. Hence, this study also uses the historical experiences with ‘democratic, republican and cosmopolitan constitutionalism’ for advocating legal and policy changes in order to empower citizens and their democratic institutions and ‘courts of justice’ to protect more effectively equal individual liberties (eg as defined by national and international human rights and constitutional rights) and economic preferences (eg for lower prices of good quality goods and services in competitive markets). Further empirical ‘cost–benefit analyses’ and normative casestudies are needed to support the ‘constitutional hypotheses’ and policy recommendations in this study.

## II. DOES MULTILEVEL GOVERNANCE REQUIRE MULTILEVEL CONSTITUTIONALISM?

This study focuses on multilevel governance of transnational ‘aggregate PGs’ in the twenty-first century, and draws lessons from the history of democratic, republican and cosmopolitan constitutionalism in Europe and North America for constituting, limiting, regulating and justifying multilevel governance of transnational PGs for the benefit of citizens. Due to this policy-orientated focus on limiting the ‘collective action problems’ in modern UN, WTO and regional governance of PGs, the study neglects other dimensions of multilevel governance (eg the evolution of state jurisdictions and authoritarian governance in past Greek, Roman, Byzantine, Ottoman, British, Soviet or American empires). In order to evaluate national and international PGs (like human rights, common markets, prevention of health pandemics and of climate change) and related legal regimes, the study combines normative, legal ‘bottom-up approaches’ with context-specific, empirical case studies. Chapter 1 explains why HRL, constitutional democracies and also UN law require justification of the legitimacy of international law and governance no longer only in terms of ‘sovereignty’ and the equality of states, but also in terms of human rights, democratic self-government and transnational rule of law for the benefit of citizens as legitimate ‘constituent powers’, ‘agents of justice’, ‘democratic principals’ of governance agents with limited ‘constituted powers’, main economic and ‘republican actors’ in multilevel governance of PG. Chapter 2 focuses on empirical case studies

of multilevel governance of ‘aggregate PGs’ like public health, regional and global markets, and protection of the environment. As the interaction between normative and empirical analyses is crucial for a better understanding of multilevel governance, the study evaluates the case studies (eg of multilevel trade and health governance in the context of UN, WTO and EU law) in the light of the normative standards of HRL and of democratic, republican and cosmopolitan constitutionalism. Chapter 3 summarizes the main policy conclusion, for instance that the transformation of national PGs into transnational aggregate PGs requires supplementing democratic and republican constitutionalism with cosmopolitan constitutionalism in order to constitute, limit, regulate and justify multilevel governance in terms of equal rights and remedies of citizens. In order to render the human rights obligations of all UN member states more effective, the increasing number of ‘international PGs treaties’ need to be ‘constitutionalized’ through democratic legislation and judicial protection of fundamental rights, empowering citizens to hold multilevel governance of transnational PGs legally, democratically and judicially accountable.

In their recent bestseller on *The Fourth Revolution—The Global Race to Reinvent the State*, two Anglo-American political analysts justify their call for a ‘fourth revolution’ on essentially utilitarian grounds:

1. the ‘*political revolution*’ during the sixteenth and seventeenth centuries justified the sovereign state on the basis of a ‘Hobbesian social contract’, transforming the civil wars among individuals (the ‘state of nature’) into governmental protection of law and order;
2. the ‘*democratic revolution*’ during the eighteenth and nineteenth centuries advocated the need for protecting equal freedoms against unjustified governmental restrictions;
3. the ‘*social revolution*’ in politics during the twentieth century aimed at protecting social welfare inside nation states and beyond (eg through labour laws, human rights and decolonization);
4. the ‘*fourth revolution*’ must ‘reinvent’ national governance and the state in the twenty-first century in response to globalization (eg global communication technologies). It needs to review the past regulatory paradigms, such as Hobbes’s ideal of authoritarian order, Mill’s ideal of a liberal state, and the ‘lost paradise’ of socialist ideals of globalizing welfare states. In order to limit majoritarian interest group politics and protect the liberty of citizens also in transnational cooperation, the two political analysts emphasize the need for ‘handing over some powers to technocrats and others to micropowers’ like local governments.<sup>15</sup>

<sup>15</sup> J Micklethwait and A Wooldridge, *The Fourth Revolution. The Global Race to Reinvent the State* (London, Penguin Books, 2014) 266 f.

Yet even though ‘this revolution is about liberty and the rights of the individual’,<sup>16</sup> the needed changes in national, regional and worldwide *legal systems* are not discussed, possibly also in view of the unpopularity of human rights discourse in ‘realist’ foreign policies of hegemonic countries.<sup>17</sup>

This book offers the first *legal monograph* exploring—from historical, legal, political and economic perspectives—the relationships between constitutional democracies, republican constitutionalism and cosmopolitan constitutionalism in multilevel governance of transnational aggregate PGs. It argues that ‘globalization’ and its transformation of many national into transnational PGs require embedding ‘democratic constitutionalism’ into multilevel republican and ‘cosmopolitan constitutionalism’, in order to constitute, limit, regulate and justify multilevel governance institutions more effectively for the benefit of citizens and their human and constitutional rights. Historically, democratic constitutionalism (since the ancient ‘Constitution of Athens’), republican constitutionalism (since the ancient Roman, Florentine and Venetian republics) and cosmopolitanism focused on different values, like democratic governance, collective supply of PGs (like Roman private law and its transformation into a *jus commune* in Europe), and the equal moral rights and duties of all human beings. Each of these approaches to ‘constitutionalism’ (eg in the sense of legal prioritization of agreed ‘principles of justice’ and their collective transformation into legislation, administration, adjudication and multilevel governance) prioritized different values (eg democratic participation of male property owners in the ancient Athenian democracy, aristocratic protection of public goods for the benefit of Roman citizens, protection of ‘inalienable human rights’) and entailed different forms of distribution of welfare gains. Following the return to humanism in the Renaissance and in ‘enlightenment philosophies’ of man (as illustrated by the focus on the dignity of man founded on man’s freedom and reasonableness in the Renaissance philosophy of Pico della Mirandola and the enlightenment philosophy of Kant),<sup>18</sup> the increasingly universal recognition of human rights entailed the emergence of ever more ‘constitutional democracies’ that protect human and constitutional rights, the rule of law and other PGs demanded by citizens in more integrated and more effective ways than non-democratic governance regimes. Yet extending ‘constitutional democracy’ beyond states has proven difficult, for instance in view of the lack of a ‘transnational *demos*’, the inadequate

<sup>16</sup> *Ibid*, 270.

<sup>17</sup> Cf J Peck, *Ideal Illusions: How the US Government Co-Opted Human Rights* (New York, Metropolitan Books, 2010).

<sup>18</sup> Cf E Cassirer, PO Kristeller and JH Randall (eds), *The Renaissance Philosophy of Man* (Chicago, IL, Chicago University Press, 1956).



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constitutional restraints of many multilevel governance institutions and the reality of intergovernmental power politics (eg in UN and WTO institutions) resisting citizen-orientated proposals for multilevel *demoi-cracy*. Also the multilevel ‘human rights constitutionalism’ based on national, regional and UN human rights conventions and functionally limited, international ‘treaty constitutions’—like the 1919 Constitution (*sic*) establishing the International Labour Organization—has failed to protect human rights effectively in many parts of the world, notably in Africa and Asia.<sup>19</sup>

### A. From ‘National Governments’ to Multilevel Governance of Global Public Goods

The term ‘governance’ (*gubernare*, meaning ‘to steer’ and ‘to regulate’) refers to the image of steering a ship (eg the ‘state ship’) and the method by which organized society directs, influences and coordinates public and private activities to supply goods and services. Even inside states with a centralized government authority controlling the state, there are many diverse forms of indirect and decentralized governance (eg through market competition, judicial litigation), centralized governance (eg through hierarchically structured governments, courts and regulatory agencies), multilevel governance (eg in federal states) and ‘mixed’ governance (eg network governance, public-private partnerships). National governments operate through rule systems, institutions, sub-delegation of powers (eg to ‘trusteeship institutions’ like central banks and international courts of justice), ‘co-optation’ of NGOs, ‘orchestration’ of decentralized supply of PGs (like international criminal justice, climate change prevention), and continuous adjustment of rules and policies in response to demands by civil society. Governance differs from government by its different performance of government functions and its coordination of social relations without a unifying authority (eg decentralized performance of information, allocation, coordination and sanctioning functions through market competition and intergovernmental network cooperation). These governance structures and processes tend to differ among policy areas, and depend on the respective constitutional and political systems of states.<sup>20</sup>

<sup>19</sup> For instance, the ‘Arab Charter on Human Rights’ (2008) and the ASEAN Human Rights Declaration (2012) have been criticized for protecting human rights only selectively without providing for effective judicial remedies, and for systemic monitoring of national implementing legislation. Also the African Court for Human and Peoples Rights—which was established by a Protocol to the African Charter on Human and Peoples Rights (in effect since 1986)—came into being only in 2004 and delivered its first judgment on the merits only in 2009.

<sup>20</sup> Cf EU Petersmann, ‘Framework of Analysis: Towards Multilayered Governance in Monetary Affairs’ in T Cottier, RM Lastra and C Tietje (eds), *The Rule of Law in Monetary Affairs* (Cambridge, CUP, 2014) 434–61.



Also in democratic states with a central government authority representing the ‘nation state’ as a legal person under international law, governance remains a ‘multilevel task’ involving citizens (eg as ‘constituent powers’, ‘democratic principals’ and ‘agents of justice’), legislative, executive and judicial governance institutions with delegated ‘constituted powers’, and diverse ‘third party intermediaries’ (like political parties, the media, business, trade unions and other NGOs) participating in indirect and decentralized forms of governance. ‘Principal-agent theories’ emphasize that ‘delegation’ of governance powers (eg to legislative, executive and judicial institutions, independent regulatory agencies)—even if necessary for enhancing the ‘governance capacities’ of the ‘governors’ through use of decentralized information, specialized expertise, additional resources and credible commitments (eg to avoidance of inflation through central bank autonomy)—entails ‘principal-agent problems’ (eg of limited *ex ante* and *ex post* control of governance ‘agents’ by their ‘principals’, diverging goals of agents, choices among alternative governance modalities); they require legal regulation in order to limit ‘agency costs’ and ‘governance failures’. Due to globalization, not only do the levels of legal regulation, ‘government dilemmas’ (eg security risks) and multilevel forms of governance continue to multiply, for instance in view of the enhanced capacities of citizens to circumvent national regulations (say, through the Internet, by means of relocating business to ‘tax havens’ for purposes of tax avoidance, relocation of polluting production abroad to countries with less stringent environmental regulations), but also the substantive regulatory challenges change, for instance due to the globalization of production through global supply chains of goods and services, and the increasing move from trade liberalization to international regulatory cooperation on economic and non-economic issues. Globalization may increase the regulatory autonomy of non-governmental actors (like transnational corporations (TNCs)), but it limits the regulatory autonomy of states and their democratic governance. The more transnational PGs (like the global division of labour) are regulated through international treaties rather than through national legislation, the more difficult becomes inclusive, democratic participation in multilevel governance, regulation and rule implementation. The 2007 Lisbon Treaty responded to the multilevel governance challenges by committing the EU to ‘strict observance of international law’ and ‘protection of its citizens’ and their human rights in the external relations of the EU (Article 3 TEU). Yet the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada was negotiated from 2009 until September 2014 in almost complete secrecy. The public fears of intergovernmental interest group politics have increased civil society opposition to the EU–US Transatlantic Trade and Investment Partnership (TTIP) since 2013; this induced the EU Commission to announce, in 2015, a new ‘transparency strategy’ for international economic agreements, so as to enhance parliamentary and democratic support

of such ‘PGs treaties’. The complaints raised in the ‘public consultations’ of EU citizens—eg of inadequate accountability of ‘insiders’ (like commercial arbitrators in secretive investor-state arbitration), ‘information asymmetries’ disadvantaging ‘outsiders’ (like taxpayers affected by investor-state arbitration), and risks of corruption (eg in order to be included in ‘stakeholder meetings’ with treaty negotiators so as to obtain ‘strategic information’ and influence rule-making)—forced the EU’s political institutions to change their legal positions in the CETA and TTIP negotiations on investor-state dispute settlement (ISDS). Parliamentary *ex post* consideration of draft agreements secretly elaborated among governments during many years of negotiations (eg US ‘fast track procedures’ allowing for only ‘yes’ or ‘no’ votes) is increasingly criticized as coming too late for effective democratic involvement.

The more parliamentary democracy reveals itself as being ineffective in multilevel governance of global PGs without a single *demos*, the more the supplementary forms of constitutional, participatory and deliberative democracy must be extended beyond state borders. As discussed in Chapter 2, empirical evidence confirms that *multilevel republican* and *cosmopolitan constitutionalism*—by empowering citizens through civil, political, economic, social and cultural rights and remedies to hold multilevel governance institutions legally, democratically and judicially accountable—have protected PGs more effectively (eg in European economic and constitutional law and HRL, international commercial and investment law and arbitration, international criminal law) than path-dependent forms of inter-governmental power politics.

## **B. Constitutional Principles of Conferral, Subsidiarity, Proportionality and Justice**

National and international societies enable individuals to increase their welfare through mutually beneficial cooperation and the creation of organizations (eg private firms, states and international organizations). From this economic perspective, national and international markets and legal systems emerge from interactions among utility-maximizing individuals, firms and governments exercising, coordinating and limiting their respective freedoms and power through welfare-enhancing contracts and agreements establishing institutions (eg property rights, governance institutions, judicial and state jurisdictions) so as to facilitate transactions and the efficient achievement of preferences. For instance, private and public actors (eg states as mediators of private and public interests) negotiate international rules, institutions and transfers of authority in order to maximize the participants’ net gains (eg ‘Kaldor-Hicks efficiency’ resulting from economies of scale and scope).

Reasonable actors are likely to prefer international rules only in sectors and at efficient ‘subsidiary levels’ of regulation that enhance their individual

welfare, for instance by mitigating collective action problems in collective supply of PGs by redistributive measures. Public choice theory emphasizes that—as organizations have no rationality of their own—government actors (politicians, bureaucrats) are likely to maximize their own interests (eg in political support, limited accountability) rather than the reasonable preferences of the citizenry. Yet even if government officials aim at maximizing their own ‘political welfare’ rather than ‘public welfare’ (say, in terms of general consumer welfare or voter welfare), and international trade, financial, environmental and tax regulation are influenced by the political search for domestic policy coalitions, the search for efficiency remains an important objective. Domestic politics and inadequate constitutional restraints and accountability may explain why politicians favour economically sub-optimal rules, for instance subsidies and reciprocally agreed rather than unilateral trade liberalization, in order to please domestic lobbies and strengthen domestic political coalitions through reciprocal export opportunities that induce domestic export industries to politically support domestic politics for import liberalization. Constitutional and economic theories postulate that—as states are instruments for promoting the welfare of their citizens—reasonable citizens will engage in transnational cooperation and delegate powers to international institutions only subject to principles of conferral (ie limited delegation of power to restrict individual rights), subsidiarity (ie delegation of powers to restrict individual freedoms only to the extent necessary for achieving individual preferences more efficiently) and proportionality (eg authorization of only least-restrictive governmental measures that avoid disproportionate restrictions of equal rights of citizens). Article 5 TEU explicitly incorporates these national constitutional principles into EU law:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties ...

As discussed in Chapter 1, the principles of conferral, subsidiarity and proportionality pertain to the need for *constitutional justice* and *distributive justice* that must be distinguished from questions of *commutative* and *corrective justice* and of *equity* in relations among individuals, peoples and states.

This study argues that adjusting national constitutionalism to the reality of multilevel governance requires integrating the complementary republican, democratic and cosmopolitan constitutional traditions into new kinds of ‘multilevel constitutionalism’ with due respect for the legitimate reality of ‘constitutional pluralism’, as illustrated by the very diverse forms of European integration law (as discussed in Chapter 2) based on:

- ‘multilevel constitutional *demoi*-cracy’ (eg among the 28 EU member states);
- more deferential forms of ‘multilevel cosmopolitan democracy’ respecting the ‘dualist constitutional traditions’ in some of the member states of the EEA (like the Nordic EEA member states Iceland and Norway);
- respect for ‘direct popular democracy’ in Switzerland (whose population rejected membership of both the EU and the EEA); and
- authoritarian forms of governance in some other member states of the Council of Europe and of its ECHR, like Turkey and Russia.

Similar to the experiences inside constitutional democracies, multilevel republican and cosmopolitan constitutionalism can compensate ‘democracy deficits’ in UN, WTO and regional governance by committing multilevel governance agents to republican PGs (like the rule of law), corresponding cosmopolitan rights (like individual judicial remedies) and to respect for diverse democratic preferences (eg to withdraw from EU membership pursuant to Article 50 TEU). Even if—as inside the EU—‘democratic principles’ (as defined in Articles 9–12 TEU) have become legally protected in regional integration law, additional constitutional commitments to specific PGs (as defined in numerous EU treaty provisions) and to cosmopolitan rights (eg as protected in the EU Charter of Fundamental Rights and in the jurisprudence of EU courts) can render multilevel governance of PGs more legitimate and more effective. Empirical comparisons of Europe’s functionally limited ‘multilevel republican constitutionalism’—for example, for the common market of the 31 EEA member states, the monetary union among 19 Eurozone member states, and the ‘area of freedom, security and justice’ among the 28 EU member states—seem to confirm the proposition of this study that protecting democratically defined, transnational ‘aggregate PGs’ in terms of democratic, republican and cosmopolitan rights can set incentives for ‘republican support’ by citizens and for holding multilevel governance institutions more accountable for ‘market failures’ (eg challenged through decentralized enforcement of common market and competition rules by private economic actors and citizens in domestic and European

courts) as well as for ‘governance failures’ (eg challenged by citizens in national and European courts).

Yet constitutional principles of distributive, commutative, corrective justice and equity remain contested in multilevel governance of PGs (eg due to discrimination of former colonies in the post-World War II Bretton Woods and GATT practices). The universal recognition of human rights and the needed ‘institutionalization of public reason’ in the twenty-first century require ‘constitutional’ treaty interpretations and stronger judicial protection of individual rights of citizens—as ‘agents of justice’, ‘constituent powers’, ‘democratic principals’, and main economic and republican actors—in multilevel governance of PGs, as discussed in Chapter 1. While some global institutions have become more representative of the global changes in governance systems (like the G20 and the WTO), reforms of others (like the UN Security Council, IMF governance institutions) have been prevented by the self-interests of ‘insiders’ to share their veto powers with ‘outsiders’.<sup>21</sup> The challenge of also ‘constitutionalizing’ public-private partnerships in multilevel governance (eg the ‘corporate social responsibilities’ and human rights obligations of non-governmental actors) requires functionally limited ‘republican’ and ‘cosmopolitan’ constitutionalism in order to empower citizens to hold multilevel governance institutions more accountable. Even where such constitutional reforms have been prevented by power politics (eg in the UN Security Council), there is a need for pragmatic ‘piecemeal responses’ to the legitimacy deficits in multilevel governance, as illustrated by the decentralization of global governance tasks (eg by means of humanitarian interventions by regional security systems) and by the ‘transparency initiatives’ in European governance, as discussed in Chapter 2. European constitutionalism suggests that the ‘micro-economic common market constitution’ of the EU and the EEA and the ‘multilevel human rights constitution’ of the ECHR were more successful in protecting equal rights of citizens and the rule of law across state borders than efforts at constitutionalizing the EU’s ‘monetary constitution’ and ‘security constitution’.<sup>22</sup> Also in UN and WTO governance, constitutionalization of specific decision-making institutions (like the ICJ and the WTO Appellate Body) has been easier to achieve than that of the ‘macro-dimensions’ of global governance (like democratic participation of citizens and parliaments in multilevel governance and its democratic control and accountability).<sup>23</sup> Since there is no single

<sup>21</sup> For instance, the amendments of the Agreement establishing the IMF providing for larger voting rights of China and other developing countries were approved by the US Senate only in December 2015.

<sup>22</sup> Cf K Tuori, *European Constitutionalism* (Cambridge, CUP, 2015) ch 5.

<sup>23</sup> Cf C Carroll and E Bécault, ‘Global governance and the challenge of diversity’ in J Wouters *et al* (eds), *Global Governance and Democracy. A Multidisciplinary Analysis* (Cheltenham, Elgar, 2015) 191–225.

*demos* legitimating global governance arrangements, this study argues in favour of bottom-up approaches to improving democratic participation and accountability in global governance, so as to limit the democratic deficits of political representativeness in intergovernmental rule-making and bring multilevel governance closer to the citizens and to affected stake-holders.

### C. From National to Multilevel Constitutional Restraints of Governance

The plurality of private and public, national and transnational legal orders and legally constituted governance authorities inside and beyond states raises the question of how multilevel, overlapping governance powers (eg to restrict the freedom of citizens and other actors) can be legally justified, coordinated and controlled so as to limit abuses of power and promote voluntary compliance with rules and ‘rulers’ that are recognized as legally and morally ‘legitimated’. This study avoids exploring utopias like ‘global constitutionalism’ and ‘global democracy’. It proceeds from the *normative premise*—as empirically confirmed by the history of republican and democratic constitutionalism—that the universal recognition of human rights (eg in national Constitutions and UN law) calls for citizen-driven ‘discourse justifications’ of law and governance and ‘bottom-up struggles’ for extending the ‘trias’ underlying constitutional democracies (ie human and constitutional rights, rule of law, democratic governance) to multilevel governance of transnational ‘aggregate PGs’ (like the world trading system) in order to justify international law and institutions vis-à-vis citizens. European integration law confirms that republican, democratic and ‘cosmopolitan constitutionalism’ can also succeed in ‘constitutionalizing’ *multilevel governance* of transnational PGs like the European common market. The Lisbon Treaty provisions on ‘democratic principles’ (Articles 9 et seq TEU) illustrate the need for supplementing parliamentary democracies by multilevel participatory, deliberative and representative, democratic governance and cosmopolitan rights beyond state borders, with due respect for the constitutional principles of conferral, subsidiarity, proportionality and the rule of law (cf Article 5 TEU). The EU’s ‘cosmopolitan foreign policy constitution’ (eg based on Articles 2, 3, 21 TEU and the EUCFR) extends the same constitutional principles to the EU’s external relations; yet it has failed to effectively ‘constitutionalize’ most external agreements of the EU, with the notable exception of the EEA. Chapters 1 and 2 argue that this ‘constitutional failure’ is due to ‘governance failures’ of EU institutions, such as:

- their non-compliance with ‘strict observance of international law’ (as required by Article 3 TEU) and with judicial protection of the rule of law (as required, for example, by Articles 2, 19 and 21 TEU);

- their authoritarian ‘disempowerment’ of EU citizens in international trade and investment agreements, by intergovernmental exclusion of private rights and remedies (contrary to the Article 3 TEU requirement of ‘protection of its citizens’ in EU external relations);
- the non-transparent and non-inclusive ‘executive dominance’ in external relations that often circumvents effective parliamentary, democratic and judicial control;<sup>24</sup> and
- the decreasing legitimacy and ‘democratic support’ by EU citizens of certain EU practices, such as EU import restrictions on bananas in violation of GATT/WTO obligations (1992–2012), persistent violations of EU budget and debt disciplines by some Eurozone member states since 2010, and, more recently, treatment of foreign migrants and asylum seekers in violation of the ‘Schengen’ and ‘Dublin rules’ agreed among EU member states.

From the perspective of national and European ‘constitutionalism’ (eg in the sense of national and European constitutional restraints on governance powers so as to protect the EU’s constitutional ‘values’ as defined in Article 2 TEU), such ‘constitutional failures’ reflect inadequate ‘constitutionalization’, for instance in the sense of ineffective transformation of national and EU ‘constitutional principles’ into multilevel legislation, administration, and judicial and democratic protection of human and constitutional rights of EU citizens. How should reasonable citizens—as ‘democratic principals’ of all multilevel ‘governance agents’—respond to such ‘constitutional’ and ‘governance failures’ in order to better protect the agreed ‘constitutional principles’, ‘policy objectives’ and PGs demanded by them? Why has the WTO legal and trading system proved to be so ‘resilient’ (eg as illustrated by its more than 500 WTO dispute settlement procedures since 1995), in spite of the failure of WTO members to conclude their Doha Round negotiations since 2001? As international legal regimes may not offer clear solutions to unforeseen crises (like the fiscal and debt deficits of Euro-member states triggering the ‘Euro crises’ since 2010), which properties and features of multilevel legal regimes facilitate speedy adjustment measures and problem-solving? Are private law systems more flexible (eg due to their decentralized incentive structures) and national public law systems more capable of speedy adjustments than public international law regimes based on state consent

<sup>24</sup> For instance, the EU’s non-compliance with ‘strict observance of international law’ and ‘dis-empowerment’ of citizens in free trade agreements have only rarely been challenged by national parliaments and the European Parliament. A recent example of the European Parliament rejecting EU Commission proposals for violating WTO obligations related to the disapproval—on 28 October 2015—of a draft regulation giving EU member states the power to ban the use of genetically modified food ingredients even if such genetically modified organisms (GMOs) had been approved by the EU’s risk-assessment procedures.



and veto-powers? What are the legitimate powers of courts of justice to clarify and develop indeterminate principles (like ‘fair and equitable treatment’ requirements in international investment law) and incomplete rules of international law, even against the will of individual states, for instance on the basis of ‘principles of justice’ (like transparent exercise of public authority) that are part of the domestic legal systems of the states concerned?

#### D. Normative and Empirical Hypotheses and Five Policy Propositions of this Study

In order to limit ‘governance failures’ and protect equal rights of citizens and PGs more effectively beyond national borders, this study calls for stronger ‘republican’ and ‘cosmopolitan’ constitutionalism in constituting, limiting, regulating and justifying regional, UN and WTO governance of transnational PGs. There is vast sociological evidence supporting the normative hypothesis of this study that globalization requires ‘embedding’ constitutional democracies into multilevel republican and cosmopolitan constitutionalism protecting transnational PGs by empowering citizens, national parliaments and courts of justice to hold multilevel governance institutions more legally, democratically and judicially accountable. For instance:

- As discussed in Chapter 1, the ‘principles of justice’ underlying UN law (eg in terms of human rights) are not effectively transformed into UN and WTO governance and institutions.<sup>25</sup> Human rights law also protects individual and democratic diversity, and the legitimate reality of ‘constitutional pluralism’ at national and international levels of governance (eg diverse ‘*demos*-cracies’ in the governance of regional common markets in Africa, Europe and Latin America). Yet HRL requires ‘constitutionalizing’ the ‘disconnected UN/WTO governance’ in order to limit abuses of powers, protect rights of citizens more effectively, and justify multilevel governance vis-à-vis citizens as ‘agents of justice’ and ‘democratic principals’ of all governance institutions.
- As discussed in Chapter 2, multilevel governance of PGs must learn from ‘comparative institutionalism’ by empirically exploring why certain ‘PGs regimes’ (such as the compulsory WTO dispute settlement system) have succeeded in protecting transnational PGs more

<sup>25</sup> On the distinction between ‘principles’ (for maximizing values through a process of weighing and balancing against competing principles) and ‘rules’ (characterized by ‘if-then-commands’ which, if applicable, prescribe a precise conduct), see R Alexy, *A Theory of Constitutional Rights* (Oxford, OUP 2002) 44 ff; M Scheinin, ‘Core Rights and Obligations’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford, OUP 2013) 532–35.



effectively than other treaty regimes. Parliamentary control of the ‘executive dominance’ in intergovernmental, worldwide institutions is likely to remain ineffective; hence, cosmopolitan constitutionalism is a necessary substitute for enabling citizens and courts of justice to hold multilevel governance institutions more legally, democratically and judicially accountable. Empirical evidence confirms that ‘cosmopolitan PGs regimes’—like international commercial, investment, human rights, criminal law and adjudication, the WHO FCTC, regional common market law in the EU and in the EEA—protect transnational rule of law and equal rights of citizens more effectively (eg through multilevel judicial protection of cosmopolitan rights in regional common markets, free trade areas and human rights courts) than ‘disconnected UN/WTO governance’ excluding rights of citizens to hold governments accountable by invoking and enforcing UN/WTO rules in domestic courts.

- Chapter 3 concludes that law—as an instrument of social regulation and ‘legal culture’ whose social effectiveness (the ‘law in action’) depends on the voluntary acceptance of the ‘law in the books’ by citizens, peoples, states, intergovernmental and non-governmental actors as being a ‘justified’ and ‘reasonably coherent *legal system*’—must learn from the history of civil society struggles for ‘republican constitutionalism’ since the ancient Athenian democracy and Roman republic more than 2,400 years ago. The progressive ‘constitutionalization’ and ‘socialization’ of legal systems offers important policy lessons for limiting ‘collective action problems’ in multilevel governance of PGs. Contrary to claims by ‘radical pluralists’ that ‘no coherent normative practice arises from the assumptions on which we identify international law’,<sup>26</sup> republican and democratic constitutionalism succeeded not only in ‘constitutionalizing’ national and European legal systems (like EU common market law and HRL); they also laid the foundations for the post-war emergence of multilevel ‘cosmopolitan constitutionalism’ (eg multilevel commercial, trade and human rights law and adjudication) that empowers citizens and courts of justice to support transnational rule of law and ‘socializes’ international legal practices for the benefit of citizens by institutionalizing ‘public reason’ and multilevel protection of human, economic and constitutional rights.<sup>27</sup>

<sup>26</sup> M Koskenniemi, *From Apologia to Utopia: The Structure of International Legal Argument* (Cambridge, CUP, 2005) 69.

<sup>27</sup> This policy conclusion is in line with the recent studies of how the ICJ has contributed to the convergence and strengthening of international law as a unitary legal system; cf M Andenas and E Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge, CUP, 2015).

This study proceeds from the constitutional insight—as already observed in Tocqueville’s analysis of *Democracy in America*<sup>28</sup> and advocated much earlier by ‘republican constitutionalism’—that individual rights and local, republican institutions are to liberty what primary schools are to education and science: they empower people to develop republican virtues and to actively participate in republican governance, for instance by holding government agents accountable for their failures to protect PGs and by offering citizens ‘countervailing rights’ against abuses of power and judicial remedies enabling ‘struggles for justice’. This Introduction and Chapter 1 draw lessons from the historical civil society struggles—from the ancient Greek constitutional democracies and Roman ‘constitutional republicanism’, up to the American and French ‘human rights revolutions’ during the eighteenth century and the post-war recognition of human rights by all UN member states—for transforming the ancient communitarian forms of democratic and republican governance into modern ‘human rights constitutionalism’ for democratic supply of national PGs. The main claim of this monograph is that—due to globalization and its transformation of most national PGs into transnational aggregate PGs—national constitutionalism must be transformed into ‘multilevel constitutionalism’, empowering citizens through cosmopolitan rights to hold multilevel governance institutions more accountable for their failures to protect PGs effectively. The ‘domestic implementation deficit’ is one of the main weaknesses of UN and WTO law; promoting stronger rule of law requires interdisciplinary methodologies in multilevel governance research, as recalled in the famous statement by US Justice Louis Brandeis that ‘a lawyer who has not studied economics and sociology is very apt to become a public enemy’; economic resources and incentives, democratic deliberation and persuasion, and republican constitutionalism as a systemic, inclusive approach to ‘socializing’ and ‘constitutionalizing’ multilevel governance of PGs are of crucial importance for rendering UN, WTO and regional governance of PGs more effective and more legitimate.

The remainder of this Introduction summarizes the main *five propositions* that are elaborated in this legal study, but which continue to be neglected by lawyers and diplomats, even though they explain many of the ‘failures’ in UN and WTO governance. It concludes (in section V) with an overview of the legal methodology challenges of moving from ‘constitutional nationalism’ for collective supply of national PGs to functionally limited, multilevel constitutionalism, constituting, limiting, regulating and justifying multilevel

<sup>28</sup> Cf A de Tocqueville, *Democracy in America*, vol II (JP Mayer ed, London, Fontana Press, 1994 reprint of the 1840 edn) 63.

governance of transnational 'aggregate PGs' more effectively and more coherently for the benefit of citizens.

*Proposition 1: Globalization Requires Extending Democratic, Republican and Cosmopolitan Constitutionalism to Multilevel Governance of Public Goods*

Since the ancient, democratic Constitution of Athens (eg as discussed by Plato and Aristotle) and the republican Constitution of ancient Rome (eg as discussed by Polybius and Cicero), the evolution of law and politics in Europe has been influenced by civil society struggles for improving democratic and republican constitutionalism in order to protect PGs for the benefit of citizens. Modern globalization transforms *national* into *transnational* PGs, whose collective supply depends on international law and institutions. This study explains why the more the 'collective action problems' in multilevel governance of transnational 'aggregate PGs' change, the more national Constitutions reveal themselves as partial, incomplete Constitutions that can protect ever more transnational PGs for the benefit of citizens only by complementary use of multilevel republican and cosmopolitan constitutionalism limiting international law and justifying multilevel governance for the benefit of citizens. Designing such rules and institutions requires reviewing state-centered legal methodologies and taking into account the historical lessons from 'republican constitutionalism' that democratic and cosmopolitan rights of citizens to participate in constitutional, representative, participatory and deliberative 'republican governance' are of constitutional importance for holding governments legally, democratically and judicially more accountable for effective protection of PGs like human rights, the rule of law, democratic governance and limitation of 'market failures' as well as 'governance failures'.

While political and legal PGs theories have been discussed in Europe for more than 2,000 years, economic PGs theories are more recent; integrating political, legal and economic PGs theories and designing multilevel, democratic governance of transnational 'aggregate PGs' remains neglected due to the complexity of their 'horizontal' as well as 'vertical' interdependencies and legally fragmented evolution (eg of monetary, financial, trade, investment, environmental, health, legal, security and human rights regimes at national, regional and worldwide levels of governance). Hence, the first proposition of this study remains very general: globalization requires adjustments to local and national, democratic and republican constitutionalism in order to promote more effective, multilevel governance of transnational 'aggregate PGs' for the benefit of all citizens, whose inalienable human rights, reasonableness, conscience and 'public reason' are the primary sources of democratic legitimation of law and governance in the twenty-first century.

*Proposition 2: Human Rights Require Embedding Multilevel Governance of Public Goods into Multilevel Democratic, Republican and Cosmopolitan Constitutionalism*

Most international treaties for collective supply of ‘aggregate PGs’ (like treaties establishing the UN and UN Specialized Agencies, UN human rights treaties) use indeterminate legal concepts and ‘incompletely theorized’ rules and principles. The customary law rules on interpreting treaties and settling related disputes ‘in conformity with the principles of justice and international law’, including ‘human rights and fundamental freedoms for all’ (as recalled in the Preamble to and Article 31 of the VCLT), require clarification of the relevant ‘contexts’ and ‘principles of justice’ in order to promote ‘public reason’ and justify legal and judicial decisions more coherently, especially whenever the text, context, object and purpose of the applicable treaty provision remain ambiguous and contested. The fragmented evolution of PGs regimes means that national and international governance institutions and courts of justice often fail to justify coherently the mutual delimitation of:

- state-centered ‘principles of justice’ underlying international rules among states;
- citizen-centered ‘principles of justice’ underlying transnational private and commercial law and also HRL; and
- transnational ‘principles of justice’ (eg governing concession contracts between states and foreign investors and other transnational ‘private-public partnerships’) so as to protect citizens beyond national frontiers as holders of ‘inalienable’ and ‘indivisible human rights’ more effectively.

Also academics and legal practitioners often do not distinguish the different rationalities of these three diverse, yet complementary—international, inter-personal and transnational – dimensions of multilevel regulation, for instance in international investment law<sup>29</sup> and in other fields of IEL.<sup>30</sup> The ‘principal-agent problems’ in these different dimensions of multilevel governance—ie that citizens as ‘constituent powers’ delegate only limited ‘constituted governance powers’ that remain constrained by ‘rights retained by the people’ (cf Amendment IX to the US Constitution)—remain unduly neglected in research on governance of international PGs. Similarly, the path-dependent ‘Hobbesian assumption’ that justice and legal order depend

<sup>29</sup> Cf JW Salacuse, *The Three Laws of International Investment. National, Contractual, and International Frameworks for Foreign Capital* (Oxford, OUP, 2013).

<sup>30</sup> Cf Petersmann (n 1), ch I.

on authoritarian government powers and ‘top-down regulation’, prompt UN and WTO governance to neglect alternative, more decentralized and more citizen-orientated ‘optimal policy’ instruments that are more consistent with the human rights obligations of all UN member states. Many of the ‘regulatory deficits’ of constitutional democracies in ancient Greece, republican constitutionalism in Italian city republics and ‘human rights constitutionalism’ since the eighteenth century are re-emerging in the multilevel governance of international PGs since World War II, due to the latter’s domination by government executives without adequate ‘constitutional checks and balances’. They require:

- adjusting traditional conceptions of ‘constitutional democracy’ (eg by protecting parliamentary, representative, participatory and deliberative democratic rights in multilevel governance across national frontiers); and
- extending ‘republican constitutionalism’ to multilevel governance of transnational PGs on the basis of ‘cosmopolitan constitutionalism’ protecting the ‘constituent powers’ of citizens, limiting the ‘constituted powers’ of multilevel governance institutions, and regulating and justifying multilevel governance in more accountable and responsible ways.

Hence, *proposition 2* of this study is that—similar to the historical struggles for ‘republican constitutionalism’ for protection of national PGs, which resulted in progressively stronger, constitutional safeguards of human and constitutional rights, the rule of law and democratic empowerment of citizens inside many national republics (notably in Europe and North America)—transnational PGs also can be protected most effectively on the basis of cosmopolitan rights of citizens, judicial protection of transnational rule of law, and ‘participatory’ and ‘deliberative democracy’ empowering citizens to fight for more effective protection of transnational PGs.

The following section of this Introduction briefly recalls the structural ‘globalization challenges’ and explains *propositions 1* and *2* in more detail. Section IV summarizes *propositions 3–5*, which respond more specifically to the ‘constitutional adjustment challenges’ of multilevel governance of PGs. Section V gives an overview of legal methodology problems in multilevel governance of transnational ‘aggregate PGs’. Chapter 1 elaborates these legal methodology problems (eg the need for redefining the international ‘rules of recognition’ of UN law) from the point of view of citizens. It explains why the universal recognition—by all UN member states—of human rights as an integral part of positive international law justifies and requires ‘constitutional’ interpretations and adjudication in multilevel governance of transnational PGs, in order to strengthen international law as an instrument of multilevel regulation of PGs that must be justified in multilevel governance by coherent ‘principles of justice’ for justifying the

‘primary rules of conduct’ and interpreting the ‘secondary rules of recognition, change and adjudication’. Chapter 2 illustrates how worldwide and regional treaties constituting, limiting, regulating and justifying multilevel governance of PGs often fail to effectively regulate the ‘collective action problems’ of multilevel governance due to their domination by government executives that prioritize rights of states, diplomatic privileges and ‘disconnected UN/WTO governance’, without adequate accountability vis-à-vis citizens. Chapter 2 also explores the legal sociology questions of how the UN and WTO ‘law in the books’ can be transformed more effectively into ‘law in action’, for instance by bringing the ‘Washington consensus’ underlying the legal practices of the IMF, the World Bank Group, the General Agreement on Tariffs and Trade (GATT 1947) and the WTO into conformity with the ‘Geneva consensus’ underlying the law of the ILO, the WHO and of UN human rights bodies at Geneva. Chapter 2 uses the multilevel judicial invocation and enforcement of the 2003 WHO FCTC and the EU negotiations of transatlantic free trade agreements (FTAs), with Canada and the USA as case studies, to illustrate the need for stronger ‘republican’ and ‘cosmopolitan’, constitutionalism empowering citizens to hold multilevel governance institutions more legally, democratically and judicially accountable for their frequent failures to protect transnational PGs for the benefit of all citizens.

Chapter 3 concludes that citizens—as universally recognized subjects of ‘inalienable’ human rights and ‘democratic principals’ of multilevel governance agents with limited ‘constituted powers’—should respond to the obvious governance failures by continuing their civil society struggles for stronger protection of ‘republican constitutionalism’ so as to hold UN, WTO, EU and other regional governance institutions more accountable for interpreting international treaties for collective supply of international PGs for the benefit of citizens. Local and national republicanism for collective supply of national PGs has become progressively more effective through democratic constitutionalism protecting parliamentary, representative, participatory and deliberative democratic self-governance of citizens. Similarly, multilevel governance of transnational ‘aggregate PGs’ must be rendered more effective through cosmopolitan rights and remedies of citizens as legal subjects of modern international law. Citizen-orientated ‘cosmopolitan constitutionalism’ based on ‘constitutional interpretations’ of international ‘PGs regimes’ (like EU common market law) tends to be resisted by many diplomats and government executives interested in maintaining their foreign policy discretion and limited legal, democratic and judicial accountability vis-à-vis citizens; yet diplomatic claims that UN and WTO governance should remain ‘member-driven’ rather than ‘citizen-driven’—ie defining states and their diplomatic representatives as the ‘masters of treaties’ and ‘principals’ in UN/WTO governance—are inconsistent with the rights of citizens as ‘constituent powers’, ‘democratic principals’ and ‘agents

of justice' in multilevel governance of PGs in the twenty-first century. Constitutional and legal methodologies explain why responses to such global governance challenges—like 'legal fragmentation' of IEL, HRL and related adjudication in order to introduce legal reforms at national and regional levels of governance that are opposed in worldwide UN/WTO governance systems—depend on the value premises applied by governments, legislators, judges and NGOs in interpreting and designing international law and institutions, and in settling related disputes. Law as an instrument of social regulation must not only be justified by empirical social sciences (eg competition, environmental and social laws and policies) in order to limit abuses of power, and 'market failures' as well as 'governance failures'. Law and governance must also remain justifiable in terms of coherent 'principles of justice', so that citizens voluntarily comply with law as a matter of justice and republican virtue. As 'principles of justice' are about 'discursive justification' of law and governance through democratic discourse and 'due process of law', with due respect for different 'contexts of justice' (like procedural, distributive, corrective, commutative justice and equity)—rather than about 'objective truths' that elude human beings in view of their limited 'cognitive capacities'—this study is essentially about *methodological legal problems* of multilevel governance of transnational 'aggregate PGs'. Legal methodology problems continue to be neglected and need to be addressed in order to reform the 'disconnected' and often ineffective UN/WTO governance of transnational PGs. The book concludes that person-centered 'cosmopolitan constitutionalism' is often more appropriate for civilizing and constitutionalizing fragmented UN, GATT, WTO and regional legal regimes than one-sidedly state-centered, power-orientated intergovernmentalism that risks undermining constitutional, representative and deliberative democracy.

### III. WHY 'GLOBALIZATION' REQUIRES CONSTITUTIONALIZING MULTILEVEL GOVERNANCE OF PUBLIC GOODS FOR THE BENEFIT OF CITIZENS

Why is it that—as postulated in *propositions 1* and *2*—the fact of 'globalization' requires the complementing of national with multilevel constitutionalism (eg in the sense of extending the principles, rules and governance institutions constituting national democratic legal orders to multilevel governance of 'aggregate PGs')? Since ancient times, 'realist conceptions' of law (eg as advocated by Machiavelli and Hobbes) as power-orientated instruments of social regulation (eg for limiting abuses of power, 'market failures' and 'governance failures') have been challenged on the ground that voluntary rule compliance depends on justifying law and governance not only on utilitarian grounds (like peaceful order), but also by 'principles of



justice' that citizens understand and support. Yet even though all modern legal systems refer to 'principles of justice' for rationalizing legal rules, such principles are also criticized for reflecting subjective values and being capable of manipulation, such as in the case of:

- the 'legal idealism' advocated by ancient philosophers like Plato and Aristotle, analysing legal systems from the point of view of justice as an eternal ideal;
- 'legal theologies' criticizing positive law systems from the justice perspective of Christian, Jewish or Islamic interpretations of God's law; and
- diverse natural law schools like ancient Stoic theories of natural law or Rousseau's advocacy for a 'social contract' restoring the natural freedoms and equality of human beings.

#### A. How to Justify Law and Governance vis-à-vis Citizens?

The common dilemma of such diverse theories of justice is their insistence on the need for supplementing *empirical* justifications of law (differing, *inter alia*, in their respective conceptions of human beings as rational egoists or reasonable human beings) with 'meta-physical' (ie non-empirical), *normative* justifications of law; citizens should not only respond to law and governance as 'rational utility maximizers', but actively support the collective supply of PGs (like human rights, the rule of law, public order and social welfare) as a matter of justice and of republican virtue. Plato, in his *Republic*, famously proposed that rule by philosophers or philosophizing by rulers were the most important changes necessary and sufficient for making the 'good city' based on harmony and unity (also within the souls of citizens) a reality. As knowledge of the good implied being good, only philosophers could grasp the order and harmony they found in external reality, once they had succeeded in leaving the human condition of 'life in a dark cave'.<sup>31</sup> It was only in his later book on *The Laws*, following Plato's tragic adventures with political tyranny in Sicily, that Plato acknowledged the need for embedding authoritarian governance pursuing ideal 'principles of justice' into a 'mixed constitution' based on division of powers, legislation and rule of law, also protecting free discussion about the human and political virtues that citizens needed to develop.

<sup>31</sup> Plato's cave allegory explaining the 'human condition' is narrated by Socrates in book VII of Plato's *The Republic*.



Plato's disciple Aristotle expanded the empirical and normative research into individual and political, natural and conventional justice by analysing and comparing more than 160 city constitutions, so as to discover the most successful rules for transforming natural justice into positive law guided by principles of distributive, commutative, corrective justice and equity.<sup>32</sup> The Aristotelian claim that justice was both natural (eg one form of justice being complete virtue in an individual) and conventional (eg city republics constituting justice in the polity by regulating power relations and distributing to each citizen what was due to him in view of his particular human capacities) illustrated an early recognition of legal methodology problems, notably the need for constitutional limitations of legislation and of discretionary regulation based on principles of natural justice as a virtue of individuals as related to others. The happiness of individuals remained subordinated to the happiness of the city as the highest end of politics and to the law demanding justice (understood as complete virtue).<sup>33</sup> The proper end of Aristotelian politics was the happiness and virtuous actions of the citizens, rather than their individual protection from harm or Plato's prioritization of the happiness of the city as a whole (instead of the happiness of individual citizens). This social and political conception of the person also explains the ancient neglect of individual rights protecting the individual against state authorities. Aristotle's empirical research distinguished just and unjust constitutions, depending on whether the rulers protected the common good (thereby enabling just individuals to act as just citizens in a virtuous city) or only their own good. But the justice of the constitutional structure of the polity was, for Aristotle, a matter of fairness to individual citizens, rather than a matter of natural rights.<sup>34</sup> The historical success of the constitutions of Athens and Sparta was seen as empirical evidence that republican constitutionalism and 'virtue politics' could improve social cooperation and republican virtues, even if the socio-anthropological reality of individual, 'rational egoism' might not change.

<sup>32</sup> Aristotle's writings about justice are found chiefly in the fifth book of the *Nicomachean Ethics* and the third book of his *Politics*; on Aristotle's use of comparative constitutional and institutional research, see C Rowe, 'Aristotelian Constitutions' in C Rowe and M Schofield (eds), *Greek and Roman Political Thought* (Cambridge, CUP 2005) 366 ff.

<sup>33</sup> On this Aristotelian conception of justice being exercised by persons playing their proper role in a political community and ensuring proper concern for the happiness of the other members of the community (ie individuals as social and political human beings who can live a just and self-sufficient life only in a community), see J Roberts, 'Justice and the Polis' in Rowe and Schofield (eds) (n 32) 344 ff.

<sup>34</sup> This interpretation remains contested; cf FD Miller, *Nature, Justice and Rights in Aristotle's Politics* (Oxford, OUP, 1995).

## B. Value Pluralism Underlying Democratic and Republican Constitutionalism

In his *Politics*, Aristotle described Athenian democracy in the following terms:

The basis of a democratic state is liberty; which, according to the common opinion of men, can only be enjoyed in such a state—this they affirm to be the great end of every democracy. One principle of liberty is for all to rule and be ruled in turn, and indeed democratic justice is the application of numerical not proportionate equality; whence it follows that the majority must be supreme, and whatever the majority approve must be the end and the just. Every citizen, it is said, must have equality, and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme. This, then, is one note of liberty which all democrats affirm to be the principle of their state. Another is that a man should live as he likes. This, they say, is the mark of liberty, since, on the other hand, not to live as a man likes is the mark of a slave. This is the second characteristic of democracy, whence has arisen the claim of men to be ruled by none, if possible, or, if this is impossible, to rule and be ruled in turns; and so it contributes to the freedom based upon equality.

Such being our foundation and such the principle from which we start, the characteristics of democracy are as follows: the election of officers by all out of all; and that all should rule over each, and each in his turn over all; that the appointment to all offices, or to all but those which require experience and skill, should be made by lot; and that no property qualification should be required for offices, or only a very low one; that a man should not hold the same office twice, or not often, or in the case of few except military offices; that the tenure of all offices, or of as many as possible, should be brief; that all men should sit in judgment, or that judges selected out of all should judge, in all matters, or in most and in the greatest and most important ...; that the assembly should be supreme over all causes, or at any rate over the most important, and the magistrates over none or only over a very few.<sup>35</sup>

According to Constant's famous essay on 'The Liberty of the Ancient and the Liberty of the Moderns' (1819), the 'ancient liberties' in the Greek and Roman republics protected democratic participation in the rule of the public sphere rather than individual rights and freedoms in the private and social sphere (like 'negative liberties' left to the rule of the private will).<sup>36</sup> While

<sup>35</sup> Aristotle, *Politics and The Constitution of Athens* (S Everson (ed), Cambridge, CUP, 1996) 154 f (para 1317b); Aristotle enumerates other characteristics of democracy, like payment for services.

<sup>36</sup> Cf P Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford, Clarendon Press, 1997) 18. Pettit argues for a 'communitarian character of freedom as non-domination', recognizing that 'the freedom of a community is as basic a notion as the freedom of individuals' (at 275).

the ancient Greeks emphasized democracy and the need for legal philosophy justifying law and governance (eg based on Aristotelian ‘principles of justice’ and ‘virtue politics’), the republican tradition is often said to have more of a Roman character and to have focused more on PGs like the Roman legal system, its—compared with Greek constitutionalism—more complex ‘constitutional checks and balances’, and its development and codification by professional jurists.<sup>37</sup> Roman republicanism was aristocratic rather than democratic, and differed from Greek republicanism in many ways (eg the central role of the Roman Senate, aristocratic election procedures, and appointment of officers through elections rather than by lot).<sup>38</sup> This study argues that the democratic and republican heritage of European states—since the ancient city republics in Greece and Italy—remains an important theoretical and empirical-political source of knowledge for justifying civil society advocacy, designing citizenship rights for collective supply of PGs, and ‘democratizing’ not only *national republics* but also *multilevel governance* (eg UN, WTO and regional governance) of transnational PGs, like common markets in federal states and regional communities like the EU and its EEA with European Free Trade Area (EFTA) states.<sup>39</sup>

Following the Kantian ‘enlightenment revolution’, demonstrating the relativity of all human cognition (eg in terms of time, space, causality of human reasoning, subjectivity of human senses) and the need for respecting human autonomy (‘dignity’) and reasonableness (eg the ‘categorical imperative’ of protecting maximum equal freedoms and legitimate diversity of individual conceptions of a ‘good life’ and ‘truth’), social contract and constitutional theories of law emphasized the need for justifying positive law not only as facts (eg in terms of authoritative issuance and social effectiveness of rules), but also in terms of reasonable ‘principles of justice’ (eg as explained by social contract theories) and historical processes of justification (eg in terms of Hegelian claims of dialectic transformation of legal

<sup>37</sup> *Ibid*, 283 ff. On the Roman republic as the common property of the public, see Cicero, *The Republic and the Laws* (Oxford, OUP 1998) 19. For a ‘neo-Athenian’ interpretation of republicanism emphasizing the need for democratic elections and participatory democracy (which were also part of the Roman Constitution), see M Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, Harvard UP, 1996).

<sup>38</sup> For detailed comparisons, see Rowe and Schofield (eds) (n 32); and U Wessel, *Geschichte des Rechts in Europa. Von den Griechen bis zum Vertrag von Lissabon* (Munich, Beck, 2015), eg at 20–53 ff.

<sup>39</sup> Cf M Van Gelderen and Q Skinner, *Republicanism: A Shared European Heritage*, 2 vols (Cambridge, CUP, 2002). On the diverse legal traditions of republicanism and the disagreement on whether the core values of republicanism should be defined in terms of liberty (non-domination), republican virtues of active citizenry finding self-realization in political participation and collective supply of PGs, communitarianism, social and political equality, or deliberative democracy, see S Besson and J Luis Marti (eds), *Legal Republicanism: National and International Perspectives* (Oxford, OUP, 2009). These historical controversies are left open in this study.

systems through public reason).<sup>40</sup> Arguably, the most important result of these continuing debates about legal philosophy is the universal recognition of ‘inalienable’ and ‘indivisible human rights’ and of national Constitutions (written or unwritten) by—today—almost all UN member states. In the twenty-first century, human rights have become the most important ‘people-centered’ discourse on justice and the most legitimate ‘legal source’ for justifying law and governance vis-à-vis citizens, with due respect for the reality of ‘constitutional pluralism’ due to the diverse democratic preferences and constitutional traditions of peoples.<sup>41</sup>

### C. Need for Embedding Constitutional Democracies into Multilevel Republican and Cosmopolitan Constitutionalism

As discussed in Chapter 1, the more UN human rights treaties are implemented through multilevel regional and national human rights guarantees and judicial remedies, the more ‘human rights constitutionalism’ requires review of the rules of recognition, change and adjudication in international legal practices. Modern constitutional democracies in Europe and North America have progressively limited past ‘market failures’ and ‘governance failures’ by integrating democratic, republican and cosmopolitan constitutionalism, as illustrated by the multilevel judicial protection by national and European courts of the human rights guarantees of the ECHR and of the EUCFR, with due respect for national ‘margins of appreciation’ in different national constitutional contexts. Yet beyond the EU and the EEA, the legal and political relevance of the diverse democratic, republican and cosmopolitan traditions for designing multilevel governance of transnational ‘aggregate PGs’ for the benefit of citizens in response to the modern ‘globalization’ of formerly national PGs continues to be neglected. Citizens of the EU increasingly criticize the EU crises resulting from persistent disregard by EU member states and EU institutions for the ‘rule of law’ as defined by national parliaments in EU treaties (eg the Eurozone crises related to violations of the agreed budget and debt disciplines of the Lisbon Treaty; immigration and terrorism crises have related to persistent violations of the Schengen und Dublin rules on controlling immigration).

The less people are self-sufficient in a globally interdependent world, the more they depend on economic, legal and social cooperation for collective

<sup>40</sup> On the relevance of Kantian legal theory for justifying ‘cosmopolitan constitutionalism’ and multilevel regulation of IEL, see Petersmann (n 1), ch III.

<sup>41</sup> On human rights advocacy and ‘legal construction’ of human rights at local, national, transnational and international levels, see K Nash, *The Political Sociology of Human Rights* (Cambridge, CUP, 2015).

supply of transnational PGs like consumer welfare, public health, food security, climate change prevention, democratic peace, transnational rule of law and political security. Both on empirical as well as on normative grounds, the democratic, republican and cosmopolitan traditions of empowering citizens to develop their ‘republican virtues’ and exercise republican rights remain of crucial importance not only in the emerging ‘global network society’, so as to induce citizens, for instance:

- to participate in multilevel economic governance;
- to hold multilevel governance institutions legally, democratically and judicially accountable; and
- to limit the ubiquity of abuses of public and private power and violations of the rule of law.<sup>42</sup>

Republican, democratic and cosmopolitan constitutionalism also refute claims that ‘law is incapable of providing convincing justifications to the solution of normative problems’.<sup>43</sup> Related claims that ‘no coherent normative practice arises from the assumptions on which we identify international law’<sup>44</sup> are inconsistent with the universal recognition of human rights and of international organizations like the EU that protect community interests (eg in legal and judicial protection of fundamental rights, welfare-enhancing common markets, a European ‘social market economy’ and other PGs) and limit abuses of power politics advocating outdated ‘Westphalian conceptions’ of ‘international law among sovereign states’. Yet the current crises in EU law and governance (eg regarding the ‘Brexit’ referendum of June 2016, the Dublin rules on immigration, debt and unemployment problems in the EU’s monetary union, political extremism and terrorism) also show that ‘constitutionalization’ of law and governance in the EU remains a perennial challenge due to inadequate transformation of human rights, the rule of law, democracy and other ‘principles of justice’ into multilevel government practices and ‘republican virtues’ of EU politicians and citizens.

Chapter 1 explains why the universal recognition of human rights continues to transform the ‘Westphalian community of states’ into a global community, including citizens, peoples, (non-)governmental and

<sup>42</sup> Cf JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ, Princeton UP, 1975) (emphasizing, eg, at 67, that the republican ideal of cultivating and exercising individual virtues remains central to the collective supply of PGs as explained by Aristotle and Cicero). For a classical explanation of the importance of the four cardinal virtues (prudence, justice, courage and temperance) for citizenship as a public office that is essential for protecting PGs, and of the different forms of representing citizens (eg by monarchy, aristocracy or democracy) that risk being transformed into tyranny, oligarchy and ochlocraty if citizens lack ‘civic virtues’, see Cicero, *De officiis*; cf Rowe and Schofield (eds) (n 32), 477, at 505 ff.

<sup>43</sup> Cf Koskeniemi (n 26) 69.

<sup>44</sup> *Ibid.*

international organizations as legal subjects of international law. The related methodological challenges of multilevel governance require a ‘republican philosophy’ of international law (notably of its ‘rules or recognition’) justifying the constitution, limitation and regulation of multilevel governance of transnational ‘aggregate PGs’ in terms of citizen-orientated, ‘constitutional’ and ‘cosmopolitan principles of justice’ and rights of citizens rather than only of states. Chapter 1 argues that the text, context and objectives of UN law are sufficiently open-ended and justify ‘constitutional interpretations’, for instance of the ‘rules of recognition’ as defined in Article 38 of the ICJ Statute. As most international agreements use indeterminate legal terms and regulate transnational relations in incomplete ways, the Preamble to the VCLT recalls that ‘disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law’, especially if the text, context, object and purpose of the applicable treaty provisions remain indeterminate and have to be clarified in conformity with the legal principles underlying incomplete treaty rules. The proposed paradigm shift in interpreting the ‘rules of recognition’ of international law (as codified in Article 38 of the ICJ Statute) aims at reinterpreting state sovereignty and state consent from the perspective of democratic consent and the human and constitutional rights of citizens and ‘republican responsibilities’ for multilevel governance of PGs. National, regional and also worldwide courts of justice increasingly acknowledge that interpreting international law requires doctrinal and judicial justifications, which must no longer one-sidedly focus on state-centered ‘Westphalian justice’ governing ‘international law among sovereign states’. Yet due to the domination of UN/WTO institutions by government executives and their ‘path-dependent legal reasoning’ prioritizing state sovereignty and ‘member-driven governance’ as defined by diplomats, most UN and WTO lawyers continue to neglect this impact of HRL on the ‘rules of recognition’ governing modern HRL and IEL. Whereas national courts in democracies decide in the name of ‘the people’ and act as guardians of human rights and constitutional democracy, the more limited mandates and ‘applicable law’ of UN, WTO and regional courts—created by treaties among states with under-theorized ‘principles of justice’—render the legitimacy of international court judgments, and the role of international judges as ‘guardians of the fundamental rights of the individual’,<sup>45</sup> more contested.

Modern ‘republican constitutionalism’ and the adoption of national Constitutions by almost all UN member states resulted from 2,500 years of political deliberations and practical experiences with collective supply of

<sup>45</sup> Cf H Krunke, ‘Courts as protectors of the people: constitutional identity, popular legitimacy and human rights’ in M Scheinin, H Krunke and M Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Cheltenham, Elgar, 2016) 71–93.

local PGs since the ancient city republics in Greece, Roman republicanism, Renaissance republicanism (eg in Italian and Hanseatic city republics) and ‘Enlightenment republicanism’ (eg since the American and French ‘human rights revolutions’ in the eighteenth century). The major ‘political inventions’ emerging from these political ‘trials and errors’ were the need for ‘mixed constitutions’ at local and national levels of governance that combine *mono-*, *oligo-* and *democratic* structures of political governance. The ‘checks and balances’ among multilevel legislative, executive, judicial powers and regulatory agencies also protect decentralized, participatory and deliberative governance methods (like economic markets, democratic politics, constitutional rights, judicial litigation). Human rights law requires recognition of citizens as ‘constituent powers’ that must hold abuses of public and private ‘constituted powers’ legally, democratically and judicially accountable.<sup>46</sup> One-sidedly nationalist focus on protecting individual and communitarian liberties inside states as the main concern of republicanism risks impeding the transformation of most national PGs into international PGs (like the international monetary, financial, trading, development, environmental, legal, communication and security systems) that no government, no single state and no national legal system can secure unilaterally in the global economy of the twenty-first century.

Hence, Chapter 2 argues that protecting republican constitutionalism in multilevel governance of transnational ‘aggregate PGs’ also requires stronger cosmopolitan rights and multilevel ‘checks and balances’, enabling citizens to hold multilevel governance institutions legally, democratically and judicially more accountable. Politically determined *state borders* impose territorial and jurisdictional rather than moral limits on government policies vis-à-vis individuals and communities that increasingly cooperate beyond state borders with other individuals and communities in collectively supplying transnational PGs (like protection of ‘inalienable’ human rights and transnational rule of law). Chapter 2 explains how the legal, political and economic interdependencies between local, national, regional and worldwide rules and institutions entail ‘knowledge gaps’, ‘governance gaps’ and other ‘collective action problems’ in multilevel governance of ‘aggregate PGs’. It argues that the path-dependent paradigms of ‘state sovereignty’ and ‘executive dominance’<sup>47</sup> in multilevel UN, WTO and regional governance

<sup>46</sup> For a historical overview, see A Riklin, *Machtteilung. Geschichte der Mischverfassung* (Darmstadt, Wissenschaftliche Buchgesellschaft, 2006). Most advocates of republicanism continue to neglect the need for extending ‘rights-based republican governance’ to multilevel governance of transnational PGs; due to globalization, republican governance of PGs is no longer possible without international law and multilevel governance institutions.

<sup>47</sup> Cf EA Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford, OUP, 2010).



need to be limited by stronger constitutional and democratic ‘checks and balances’ so as to extend rights-based ‘republican governance’ to transnational rights of citizens to participate in multilevel governance of transnational ‘aggregate PGs’. This is of particular importance for global ‘economic network governance’ influenced by millions of economic actors in diverse jurisdictions, as illustrated by ‘global supply chains’, Internet governance and financial market regulations coordinating the autonomous actions of producers, investors, traders and consumers all over the world. The legal dimensions of ‘collective action problems’ in multilevel governance of transnational ‘aggregate PGs’ continue to be neglected in legal research. Empirical use of *comparative institutionalism* (eg comparing the diverse UN and WTO multilevel governance institutions) and normative use of the lessons from *republican* constitutionalism can contribute to reducing the ‘research gap’ in the legal and political literature on multilevel governance of international PGs. Even though republican governance of PGs has been discussed by political philosophers since the ancient Athenian democracy in 500 BC, there is—surprisingly—not a single, multidisciplinary legal monograph elaborating a coherent legal theory for how citizens, peoples, governments and states can collectively provide transnational ‘aggregate PGs’ demanded by citizens in the new context of a globally integrating world, where PGs regimes interact both ‘horizontally’ and ‘vertically’. This study hopes to induce more academic, political and legal research on how human and constitutional rights of citizens can be protected more effectively in multilevel governance of transnational PGs.

#### IV. CONSTITUTIONAL FAILURES OF ‘DISCONNECTED’ UN, WTO AND EU GOVERNANCE

Chapter 1 challenges the prevailing ‘realist conceptions’ of international law from the perspective of the constitutional insight that human rights and other agreed ‘principles of justice’ cannot become effective unless they are transformed into democratic legislation, administration, adjudication and international ‘PGs regimes’ that protect constitutional and cosmopolitan rights of citizens to engage in mutually beneficial cooperation across frontiers, and to hold multilevel governance agents legally, democratically and judicially accountable for their failures to protect PGs for the benefit of all citizens. In his recent book on *World Order*, Henry Kissinger claims that the Westphalian order ending the 30-year war in Europe (killing almost one-third of Europe’s population) remains the scaffolding of the international order as it now exists.<sup>48</sup> He defines world order as ‘the

<sup>48</sup> H Kissinger, *World Order* (New York, Penguin Press, 2014).

concept held by a region or civilization about the nature of just arrangements and the distribution of power thought to be applicable to the entire world'. He admits that power is a necessary but insufficient tool of government; for any successful world order rests on a 'balance between legitimacy and power': the legitimacy of 'a set of commonly accepted rules that defines the limits of permissible action'; and a 'balance of power that enforces restraint where rules break down'. This dual concept of world order based on power and legitimacy prompts Kissinger—like most UN and WTO diplomats—to prioritize 'realist respect' for the UN principle of state sovereignty over the 'idealism' underlying the universal recognition of human rights and corresponding, governmental 'duties to respect, protect and fulfil human rights'. Most realists concede that governmental failures to protect human rights and other PGs do not justify foreign interventions unless they produce harmful externalities abroad, threatening essential interests of foreign states and peoples (eg Al Qaeda's attacks inside the USA on 11 September 2001 justifying US destruction of Al Qaeda's headquarters in Afghanistan). Yet World War II and the Holocaust demonstrated that avoiding systemic, worldwide risks of intergovernmental power politics requires limiting national sovereignty and power-orientated security policies by human rights and multilevel protection of PGs through international law and organizations. Political realists—including Kissinger's policy recommendations for protecting 'world order'—often unduly neglect the 'human rights revolution' and the economic, social and environmental challenges in the twenty-first century, which require 'constitutionalizing' multilevel governance of transnational PGs in order to empower citizens to struggle for stronger protection of their human rights and transnational rule of law. Even if the 'European model' of multilevel 'judicial constitutionalization' of EU law, EEA law and of European HRL cannot be repeated by worldwide courts (like the ICJ, the Law of the Sea Tribunal, the International Criminal Court, the WTO Appellate Body), the case studies in Chapters 1 and 2 suggest that multilevel judicial cooperation among national and international courts beyond Europe can clarify and protect cosmopolitan rights and judicial remedies of citizens, and thereby promote transnational 'republican constitutionalism'.

### **A. Why 'Cosmopolitan Foreign Policies' are No Longer Unrealistic Utopias**

Chapters 1 to 3 refute—on both normative as well as empirical grounds—the prevailing wisdom of UN and WTO diplomats that state-centered power politics, 'member-driven top-down governance' and 'constitutional nationalism' are more 'realistic' than citizen-orientated, 'bottom-up governance' of international PGs based on multilevel legal and judicial protection of

rights of citizens. The empirical case studies discussed in Chapters 1 to 3—like EU and EEA law, HRL and IEL, UN environmental conventions, the WHO FCTC and ‘transformative transatlantic FTAs’—confirm the normative need for ‘cosmopolitan foreign policies’, empowering citizens to invoke and enforce international treaty regimes. Regional free trade area, customs union and environmental agreements in Europe and North America, regional human rights treaties in Europe and Latin America, international commercial law, intellectual property law and investment treaties, international criminal law and consular treaties protecting individual rights across national frontiers, all have been supported by citizens and courts of justice as more legitimate and more effective protection of PGs (like transnational rule of law, respect for human and constitutional rights in the implementation of UN Security Council ‘smart sanctions’) than ‘disconnected governance’ based on intergovernmental rules that treat citizens as mere legal objects and—due to ‘diplomatic *fiat*’—are not enforceable inside countries. ‘Cosmopolitan treaty regimes’—like the common market law of the EU and of the EEA, regional human rights conventions in Europe and Latin America, multilevel competition rules, international investment and commercial law and arbitration—have often succeeded in limiting abuses of powers and in promoting the inclusive ‘public reason’ necessary for collective supply of PGs. Human rights law and constitutional democracies suggest that treating citizens as legal subjects—rather than as mere legal objects of UN and WTO law, without individual rights to hold governments legally, democratically and judicially accountable (eg by invoking and enforcing precise and unconditional UN/WTO rules in domestic courts)—should be recognized as a *legal requirement* of the human rights obligations of all UN member states that is fully consistent with ‘political realism’ aimed at protecting citizens against abuses of power.

In constitutional democracies, citizens and people are the legitimate holders of ‘constituent powers’; they delegate only limited powers to international organizations. The ineffective implementation of UN HRL inside many UN member states suggests that stronger democratic and cosmopolitan rights of citizens are essential for holding multilevel governance institutions more accountable for their frequent failures to protect human rights and other international PGs for the benefit of citizens. In view of the resistance by many governments against citizen-orientated reforms of global UN and WTO agreements, it is mainly through citizen-driven ‘fragmentation’ of treaty regimes (eg by means of regional human rights treaties, thousands of trade, investment and double-taxation agreements) and incremental judicial reforms (eg based on ‘judicial rebalancing’ of public and private interests in interpreting the ‘exception clauses’ in trade, investment and human rights agreements) that international law continues to be progressively transformed for the benefit of citizens and their constitutional rights.

Modern constitutional democracies (like the EU and EEA member states) have become successful by integrating the different democratic, republican and cosmopolitan traditions of constitutionalism in the context of functionally limited, multilevel constitutionalism. This study concludes that the necessary limitation of the existing 'implementation deficits' in UN/WTO governance of transnational PGs likewise requires extending 'republican' and 'cosmopolitan' constitutionalism, so as to empower citizens to insist on more effective legislative, administrative and judicial implementation of UN/WTO rules and transnational rule of law. This empirical as well as normative policy conclusion is based on 'constitutional premises' and 'policy propositions' that remain contested; as outlined in *propositions* 3–5 below, they need to be clarified in order to improve multilevel governance of PGs.

*Proposition 3: Multilevel Economic Governance Can be  
'Constitutionalized' Beyond Supranational EU Law  
and the More Deferential EEA Law*

All national democracies have experienced how institutionalizing human rights through democratic, legislative, administrative and judicial institutions for the protection of PGs demanded by citizens requires some form of 'constitutionalism' that constitutes, limits, regulates and justifies limited government powers for the benefit of citizens. In constitutional democracies, citizens—in order to hold 'constituted powers' legally, democratically and judicially accountable—delegate only limited legislative, executive and judicial powers to separate branches of government and regulatory agencies, and limit such powers by the rights and judicial remedies of citizens and other constitutional and institutional 'checks and balances'. Due to globalization, national Constitutions have turned out to be 'partial constitutions' that can no longer unilaterally secure the supply of many transnational 'aggregate PGs' demanded by citizens without increasing use of international law for constituting, limiting, regulating and justifying multilevel governance institutions protecting transnational PGs. In order to collectively protect such PGs, national constitutionalism—as the historically most legitimate and most effective method for supplying national PGs demanded by citizens—needs to be complemented by multilevel 'republican governance' of transnational aggregate PGs. Arguably, the multilevel constitutional and legal regulation of the EU's common market and its multilevel, democratic governance through EU law and EU institutions—like the EU Commission, the EU Council, the EU Court of Justice (CJEU), the European Parliament, the EU Central Bank and other independent EU regulatory agencies—for the benefit of more than 500 million EU citizens, are empirical illustrations of the political feasibility of extending functionally

limited, ‘multilevel constitutionalism’ to multilevel governance of transnational PGs enhancing the constitutional rights and economic welfare of citizens beyond state borders. The more deferential, constitutional and legal regulation of the extension of the EU common market to EFTA states by means of EEA law, or to third states by customs union agreements (with Turkey) and bilateral FTAs (eg with Switzerland), illustrates the political reality of ‘constitutional pluralism’. Are similar, functionally limited approaches to ‘constitutionalization’ of multilevel governance of PGs also possible beyond European democracies?

As illustrated by the WTO membership of ‘illiberal states’ (like China and Russia), authoritarian governments asserting ‘Hobbesian principles of justice’ and hegemonic foreign policies also recognize their national self-interests in rules-based, multilevel governance of the global economic division of labour. Their participation in multilevel commercial, trade, investment and Internet regulation, and in its multilevel judicial enforcement (eg through WTO dispute settlement rulings, commercial, investment and Internet arbitration), demonstrates their willingness to submit to functionally limited, multilevel ‘economic constitutionalism’ based on judicial protection of cosmopolitan rights and transnational rule of law. Due to the rational self-interests of citizens and governments in mutually beneficial economic cooperation across national frontiers, the ‘constitutionalization’ of citizen-driven, transnational *economic cooperation* has also proved to be possible among governments that strongly reject *political integration*, as illustrated by the functionally limited economic integration in Europe during the 1950s (eg based on the 1951/52 European Coal and Steel Community and the 1957/58 European Economic Community), in spite of the French rejection of proposals for a European Political and Defence Community. The now almost 600 regional FTAs and additional ‘plurilateral trade agreements’ (PTAs, eg on government procurement, information technologies, financial and telecommunications services) among WTO members confirm the political feasibility of progressive ‘bottom-up reforms’ through ‘legal fragmentation’ (eg FTAs and PTAs) if worldwide legal reforms are blocked. The increasing recognition of individual rights and common constitutional principles in multilevel economic, environmental, Internet governance and human rights regulation illustrates the transition from a ‘community of states’ to a global community of citizens, peoples, governmental and non-governmental institutions, with more complex, multilevel rights and obligations.

Comparative research of the creation of common markets in federal states and of their dynamic legal evolution confirms that decentralized, legal and judicial accountability mechanisms have proved to be of crucial importance for limiting ‘market failures’ as well as ‘governance failures’ in the creation of national and regional common markets not only in Europe, but

similarly in economic and legal integration in the Americas, Africa and Asia.<sup>49</sup> 'Cosmopolitan rights' protecting citizens across national frontiers—like human rights, EU citizenship rights, rights of free movement of persons beyond state borders (eg due to liberalization of services), multilevel EU parliamentarianism and recognition of transnational rights of migrants (eg to take up employment and receive social security benefits while residing in another common market member country)—are no longer 'unique European experiments' in rights-based, regional common markets and integration law. Their 'enabling', 'legitimizing', 'enforcement' and 'republican functions' (eg as decentralized means for limiting implementation deficits of PGs regimes), and their often 'derivative nature' (eg common market freedoms and investor rights linked to state citizenship rather than to human rights), are increasingly also recognized in African, Latin American and Central American integration regimes.<sup>50</sup> This study's advocacy for 'cosmopolitan interpretations' of UN and WTO law acknowledges the continuing necessity for states, their centrality in international law and the need for inter-state treaties for multilevel governance of PGs. Yet 'horizontal' conceptions of international law focusing on the 'sovereign equality of states' and on the 'balance of power' between sovereign states must be complemented by 'constitutional checks and balances' protecting constitutional, democratic and cosmopolitan rights of citizens vis-à-vis the ubiquity of abuses of foreign policy powers in UN, WTO and other international institutions neglecting protection of human rights and other PGs, for example on the ground that 'statesmen' should keep moral considerations separate from foreign policies. The 'Brexit' referendum of June 2016 illustrates that—even in constitutional democracies—multilevel constitutionalism risks being reversed by democratic majority decisions.

<sup>49</sup> Cf G Anderson (ed), *Internal Markets and Multilevel Governance: The Experience of the EU, Australia, Canada, Switzerland and the US* (Oxford, OUP, 2012); Petersmann (n 12); this book explained why the constitutional legitimacy of multilevel economic regulation could be enhanced by interpreting the multilevel guarantees of equal freedoms, non-discrimination, rule of law and access to justice in national, regional and worldwide economic law in mutually coherent ways for the benefit of citizens and their constitutional rights in domestic legal systems. Such 'mutually consistent interpretations' promote the legal and judicial accountability of multilevel governance agents that are often inadequately controlled by citizens, civil society, parliaments and courts of justice, and which fail to effectively protect PGs demanded by citizens).

<sup>50</sup> On the increasing recognition of transnational economic, labour, social and political citizenship rights (eg in the EU, the EEA, the Andean Community, MERCOSUR, the Central American Common Market, the Economic Community of West African States, the Gulf Cooperation Council) and of regional parliamentary institutions, see C Closa and D Vintila, *Supranational citizenship rights in regional integration organizations* (Florence, EUI, 2015) (unpublished manuscript on file with the author). On the related problems of 'plural citizenship', see PJ Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York, NYU Press, 2016); PJ Spiro, *Beyond Citizenship: American Identity after Globalization* (Oxford, OUP, 2008).

Also, WTO law illustrates the advantages of recognizing private and public non-state actors at sub-national and supra-national levels of governance (like Hong Kong, Macau, Taiwan, regional organizations like the EU) as increasingly important legal subjects of multilevel governance of PGs. The ‘constitutional functions’ of such WTO rules for peacefully reintegrating legally separate customs territories—like China, Hong Kong, Macau and Taiwan as separate WTO members, using WTO and FTA rules for progressively re-creating a single ‘Chinese common market’—are recognized outside Europe too.<sup>51</sup> The *Decision on Advancing the Rule of Law in China*, adopted by the fourth plenary session of the 18th Communist Party of China Central Committee meeting on 23 October 2014, aims at promoting law and the independence of judicial review from local political influences (eg by central financing of national and local courts). China’s Trade Minister, in an article on ‘Strengthening Trade Policy Compliance and Promoting Rule of Law in China’ of 31 December 2014, explicitly acknowledged the linkages between China’s compliance with WTO rules and dispute settlement rulings, including systemic checks of the ‘WTO compliance’ of national and local trade regulations, with the broader promotion of the rule of law in China.<sup>52</sup> The legal and institutional ‘checks and balances’ among legislative, executive and judicial governance powers in WTO law aim at limiting trade politics by ‘rule of law’, in conformity with the approval of WTO agreements by national parliaments in WTO members. Some WTO agreements also recognize rights of private actors like holders of intellectual property rights (protected by the WTO Agreement on trade-related intellectual property rights (TRIPS)), pre-shipment inspection companies (protected by the WTO Agreement on Preshipment Inspections), or foreign companies participating in government procurement tendering procedures and protected by the WTO Agreement on Government Procurement. The WTO requirements for legislative and administrative good-faith implementation of WTO law and for its judicial protection inside domestic legal systems too, serve to ‘ensure the conformity of laws, regulations and administrative procedures’ with WTO obligations (Article XVI:4 WTO Agreement) so as to provide ‘security and predictability to the multilateral trading system’ (Article 3:2 Dispute Settlement Understanding of the WTO (DSU)). China’s ‘rule of law’ strategy, however, does not seem to limit the ‘primacy of communist

<sup>51</sup> On the autonomous WTO memberships of the four customs territories of China, Macau, Hong Kong and Taiwan—and on their incentives for peaceful reduction of the economic and legal divisions of China as a single sovereign country, eg due to rules-based FTAs progressively recreating a common market—see CH Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution* (Leiden, Nijhoff, 2012).

<sup>52</sup> Cf G Yang, ‘China in the WTO Dispute Settlement: A Memoir’ in (2015) 49 *Journal of World Trade* 1–18.



party politics'; even though China continues to comply with WTO rules and WTO dispute settlement rulings, China's Constitution and judiciary do not effectively limit the political powers of the Communist Party and its 'rule by law' (eg using police powers and criminal proceedings for sanctioning political dissenters).<sup>53</sup> Moreover, while China effectively implements some of its other international legal obligations (eg to limit tobacco consumption and other health pandemics in conformity with the FCTC)<sup>54</sup>, it does not effectively implement its human rights commitments, labour law and certain other international legal obligations (eg under the UN Convention on the Law of the Sea).<sup>55</sup>

*Proposition 4: Effective 'Constitutionalization' of Functionally Limited 'Treaty Constitutions' Depends on Republican Rights of Citizens and Their Multilevel Judicial Protection*

Following the American and French human rights revolutions of the eighteenth century, national constitutionalism has become progressively accepted by most UN member states as the most legitimate and most effective method of governance for constituting, limiting, regulating and justifying government powers for the collective supply of PGs. Yet even though international treaties assume ever greater 'legislative functions' for collective supply of transnational PGs, many UN member states do not effectively transform ('constitutionalize') 'PGs treaties' through democratic legislation, administration and judicial remedies protecting PGs and rights of citizens. Only a few UN Specialized Agencies have been established through functionally limited (small 'c') 'treaty-constitutions' (*sic*) that explicitly link their respective multilevel governance of international PGs—for instance, in the ILO, the WHO, FAO and UNESCO—to corresponding human rights, such as labour rights and human rights to protection of health, food, education and rule of law, that are protected by legal and/or judicial remedies. Yet with the exception of the 'tri-partite' composition of the ILO institutions (by representatives of governments, employers and employees), all UN institutions are dominated by intergovernmental decision-making without effective democratic participation and accountability vis-à-vis citizens. They fail to provide for effective 'republican rights' and remedies for the effective

<sup>53</sup> On the lack of judicial independence, see Z Tong, 'A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case' in (2010) XLIII *Suffolk University Law Review* 669–79.

<sup>54</sup> Cf LA Jacobs, 'Global Tobacco Control Law and Trade Liberalisation: New Policy Spaces?' in D Drache and LA Jacobs (eds), *Linking Global Trade and Human Rights. New Policy Space in Hard Economic Times* (Cambridge, CUP, 2014) 131, at 140–43.

<sup>55</sup> Cf L Biukovic, 'Is There Space for Human Rights Linkages in China's Trade and Investment Network?' in Drache and Jacobs (eds) (n 54) 274–97; and PB Potter, 'Human Rights and Social Justice in China' in Drache and Jacobs (eds) (n 54) 299–316.

enforcement of transnational PGs regimes. Chapters 2 and 3 criticize the ‘disfranchisement’ of citizens and inadequate democratic and judicial accountability mechanisms in UN/WTO law—and increasingly also in EU external relations law, due to pursuit of bureaucratic self-interests without effective democratic control—as being contrary to the ‘democratic imperative’ that citizens must be recognized as ‘constituent powers’, democratic principals and legal subjects of democratic law on protection of PGs.

Human rights law suggests that, in the twenty-first century, international law also derives its constitutional legitimacy from protecting equal rights of citizens and individual ‘access to justice’ for reviewing abuses of power. As discussed in Chapter 2, the multilevel restriction of tobacco supply and consumption through the FCTC in the context of the WHO—by linking tobacco control to human and constitutional health rights, judicial remedies and multilaterally agreed ‘best practices’ for the implementation and coordination of tobacco regulation in the WHO, WTO and regional organizations like the EU—confirms the experience of regional trade and investment agreements that republican rights and related ‘principles of justice’ (like public health protection) can be enforced most effectively ‘bottom-up’, by empowering individuals and economic actors to invoke and enforce multilevel economic and health regulations in domestic courts. Chapters 1 to 3 also discuss the more recent ICJ jurisprudence on protecting human rights and other individual rights (eg to receive consular assistance pursuant to Article 36 of the 1963 Vienna Convention on Consular Relations); similar to the multilevel judicial protection of human and constitutional rights by the CJEU, the EFTA Court and the ECtHR in cooperation with national courts, this jurisprudence confirms that multilevel constitutionalism at regional and worldwide levels of governance can become more effective and more legitimate by empowering citizens through individual rights and judicial remedies.

Regional IEL, HRL and related jurisprudence by national and regional courts of justice illustrate the legal methodology problems of ‘republican interpretations’ and multilevel judicial protection of cosmopolitan rights of citizens. Even though most citizens continue to exercise their *civil* and *political rights* in local communities, the worldwide division of labour and globalization of communications increasingly induce citizens to exercise their *economic, social* and *cultural rights* by participating in the global economy (eg as consumers and producers of traded goods and services) and in the emerging global society resulting from global communication networks, international migration, transnational citizenship rights and other civil society cooperation beyond national frontiers. For example:

- as consumers of foreign goods (such as food, medicines, books, newspapers, automobiles) and services imported from abroad (eg music, films, news, medical services);

- as users of global communication networks (eg telephone, Internet and television services) cooperating through NGOs;
- as tourists, migrants and workers travelling abroad (eg in response to arrangements by transnational corporations and regional FTAs); or
- as investors, depositors, shareholders or workers in international banks and other transnational corporations (TNCs),

citizens constitute functionally limited, transnational communities supporting transnational PGs (like the elaboration of international human rights, environmental, criminal law and other 'PG treaties').

All related economic and social transactions are subject to multilevel governance and multilevel legal regulation (eg of the Internet, global supply chains) that affect the individual lives of billions of people. The regulatory capacity of individual nation states not only declines due to globalization; it also increasingly depends on participation in multilevel governance institutions for the collective supply of transnational 'aggregate PGs'. Even though UN and WTO agreements focus on the rights and obligations of governments, national and international courts of justice are increasingly confronted with claims of citizens to interpret indeterminate, incomplete and under-theorized UN and WTO provisions not only as legal constraints on governments, but also as corresponding rights of citizens (eg to legal and judicial remedies). Republican constitutionalism calls for empowering domestic citizens and 'compliance communities' (like the international trading community participating in and benefitting from the global division of labour) to assume 'republican responsibilities' for 'legal socialization' and domestic implementation of transnational PGs regimes. This study argues on both normative and factual grounds that—just as human rights, the rule of law and democratic self-governance are recognized inside constitutional democracies as mutually complementary 'pure PGs' (eg in the sense of being non-excludable and non-exhaustible for the benefit of domestic citizens) that are necessary for protecting 'human dignity' (eg in the sense of human reasonableness, conscience and autonomy)—multilevel governance of transnational PGs must also be protected and justified vis-à-vis citizens in terms of these very same constitutional principles, in order to limit 'market failures' and 'governance failures' and legitimise law and governance, so that they are voluntarily supported by citizens.

*Proposition 5: 'Constitutional Justice' Justifies 'Constitutional' Treaty Interpretations and Adjudication in Order to Protect Rights of Citizens to PGs and Accountability of Governments*

As discussed in Chapter 1, modern theories of justice justify respect for equal freedoms as the 'first principle of constitutional justice' in very diverse (eg moral, procedural and substantive) ways. Problems of treaty

interpretation and adjudication arise if the parties construe existing rules and principles in mutually conflicting ways. If interpretation of treaty provisions on the basis of their text, context, object and purpose remains unclear or disputed, the customary rules of treaty interpretation (as codified in the VCLT) require settling ‘disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law’ (Preamble VCLT). Legislative, administrative or judicial clarification of the applicable treaty provisions in conformity with the legal principles underlying treaty rules may also be required if general legal concepts (like national treatment, most-favoured-nation treatment, ‘fair and equitable treatment’, human rights, democracy, rule of law) were left indeterminate and incompletely regulated. Yet there is often no agreement among the 193 UN member states and their citizens on how to define the ‘principles of justice’ mentioned in numerous treaties (eg the UN Charter, human rights treaties); also, the ‘balancing’ of state-centered principles (like state sovereignty) and person-centered principles (like human rights and democratic sovereignty) in national Constitutions and in the jurisprudence of national and international ‘courts of justice’ often remains contested. This study uses the distinction of ‘four stages of legal theory’ by the American legal philosopher Ronald Dworkin, in order to develop a coherent methodology for clarifying the legal interrelationships among different principles and incomplete rules of multilevel regulation:

- At the *semantic stage* of law, many legal terms remain indeterminate ‘interpretive concepts’ that may be used by different actors with different meanings.
- At the *jurisprudential stage*, multilevel regulation (eg of the economy and health protection) requires justification in terms of ‘principles of justice’ (eg state-centered versus cosmopolitan, constitutional or global administrative law conceptions of IEL) and elaboration of a convincing theory of ‘rule of law’ that citizens can accept as legitimate.
- At the *doctrinal stage*, the ‘truth conditions’ have to be constructed of how particular fields of law-making and administration (eg competition rules based on economic theories of undistorted competition) can best realize their values and justify their practices and ideals (eg insisting on competition, environmental and social law limiting ‘market failures’ as a pre-condition of a well-functioning ‘social market economy’ as required by EU law).
- *Judicial administration of justice* must apply, clarify and enforce the law in concrete disputes by independent and impartial rule clarification that institutionalizes ‘public reason’ and protects equal rights and social peace.<sup>56</sup>

<sup>56</sup> Cf R Dworkin, *Justice in Robes* (Cambridge, MA, Harvard UP, 2006) 9 ff.

Dworkin convincingly criticized the ‘conservative bias’ of too many legal positivists claiming, like Professor Hart, that ‘the existence and content of law can be identified by reference to the social sources of law’<sup>57</sup> without reviewing path-dependent, traditional legal practices in the light of ‘principles of justice’ as reflected in constitutional laws.<sup>58</sup> Yet even though ‘principles of justice’ are integral parts of modern national and international legal systems, their legal definition risks being influenced—or even manipulated—by subjective value premises.<sup>59</sup> Since Aristotle, procedural, distributive, corrective, commutative justice and equity continue to be recognized as diverse ‘spheres of justice’ in the design of legal and dispute settlement systems (eg, for ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ pursuant to GATT Article XXIII). Post-colonial IEL also includes ‘principles of transitional justice’ based on preferential treatment of less-developed countries (eg, in Part IV of GATT and in the dispute settlement system of the WTO), as well as ‘cosmopolitan principles of justice’ based on the universal human rights obligations of all UN member states. In contrast to the ‘freedoms of the ancient’ (Constant), which protected only limited freedoms of a privileged class of male property owners (eg in the republican constitutions of Athens and Rome 2,500 years ago), modern constitutional democracies and international law proceed from ‘inalienable’, equal human rights, constitutional rights and judicial remedies of citizens as preconditions for ‘constitutional justice’.<sup>60</sup>

The ‘rules of recognition’ discussed in Chapter 1, and the ‘collective action problems’ in multilevel governance of the different kinds of ‘aggregate PGs’ discussed in Chapter 2, confirm that legal and judicial clarification of the relationships between state-centered ‘principles of justice’ (like the UN Charter principles of ‘sovereign equality of states’ and ‘rule of law’ among states) and citizen-orientated ‘principles of justice’ (like human rights and democracy) remains the central problem in the interpretation and judicial enforcement of multilevel economic and health regulations. From the point of view of moral and legal cosmopolitanism underlying modern HRL and also increasing parts of IEL, the state-centered UN and WTO governance fails to protect ‘cosmopolitan justice’ and international PGs effectively for the benefit of citizens. The multilevel governance of the world trading system and of other PGs (like public health) requires more coherent legislative, administrative, judicial and international legal protection of cosmopolitan

<sup>57</sup> Cf HLA Hart, *The Concept of Law*, 2nd edn (Oxford, OUP, 1994) 269.

<sup>58</sup> Cf R Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’ in (2004) 24 *OJLS* 1.

<sup>59</sup> Cf M Sornarajah, ‘Introduction’ in AD Mitchell, M Sornarajah and T Voon (eds), *Good Faith and International Economic Law* (Oxford, OUP 2015) 1.

<sup>60</sup> Cf EU Petersmann, ‘Human Rights, International Economic Law and “Constitutional Justice”’ (2008) 19 *EJIL* 769–98.

rights and other ‘principles of justice’, empowering citizens and domestic courts to insist on more effective implementation of UN and WTO legal commitments. This study focuses on the central ‘constitutional challenge’ of the twenty-first century, ie whether the needed ‘constitutionalization’ of UN, WTO and regional governance institutions is feasible in spite of the diversity of national legal and governance systems; and how it can be promoted by ‘republican’ and ‘cosmopolitan’ constitutionalism in view of the inevitable limits of parliamentary control of multilevel governance in UN, WTO and regional institutions. For instance, as discussed in Chapter 1, do the major nine UN human rights conventions and their implementation in regional and national HRL offer adequate ‘universalizable principles of justice’ for protecting the equal freedoms and human rights of citizens in multilevel governance of transnational PGs? As human rights also protect individual and democratic diversity, national Constitutions differ from each other, depending on the democratic preferences, resources and historical experiences of the people concerned. Does UN HRL require national constitutional democracies to be complemented by multilevel ‘cosmopolitan *demosi*-cracy’ that recognizes citizens not only as holders of ‘inalienable’ and ‘indivisible’ human rights, but also as ‘UN and WTO citizens’ and ‘democratic owners’ of all multilevel governance institutions for the collective supply of PGs, thereby complementing national constitutional and citizen rights by transnational cosmopolitan rights and responsibilities? How can person-orientated, ‘constitutional interpretations’ and adjudication be promoted in state-centered UN and WTO governance?

So far, UN and WTO governance eludes effective parliamentary, democratic and constitutional control; human rights and general consumer welfare are not effectively protected in UN law, and are not even mentioned in GATT/WTO law. How can the ‘constitutional functions’ of UN and WTO guarantees for protecting equal freedoms, non-discriminatory treatment, transnational rule of law and individual access to justice for citizens inside and beyond national borders be rendered legally more effective in view of the self-interests of governments to limit their legal, democratic and judicial accountabilities for not effectively implementing UN and WTO rules, for instance by invoking power-orientated justifications of ‘freedom of manoeuvre’<sup>61</sup> of politicians to violate UN and WTO obligations that

<sup>61</sup> Even though the Lisbon Treaty prescribes ‘rule of law’ (Art 2 TEU) and ‘strict observance of international law’ (Art 3 TEU) for all EU institutions, the term ‘freedom of manoeuvre’ continues to be used by both the political EU institutions and the EU Court of Justice (eg in Joined Cases C-120 and C-121/06 P, *FIAMM* [2008] ECR I-6513, para 119) as the main justification for their disregard of legally binding UN conventions, WTO rules and WTO dispute settlement rulings. On the legal inconsistency of justifying this interpretation by the ‘institutional balance’ between the political and judicial EU institutions see ch 2, sections IV and V.

parliaments approved for the benefit of citizens? Even where UN and WTO agreements are incorporated into domestic legal systems for the benefit of citizens (as in EU law), they do not effectively restrain multilevel governance failures due to the inadequate protection of UN and WTO law inside most domestic legal systems. As discussed in Chapter 1, EU constitutional law, the European Parliament and the CJEU have failed to protect EU citizens against persistent violations by political EU institutions of the constitutional requirement of ‘strict observance of international law’ and of ‘protection of citizens’ (Article 3 TEU) in conformity with their constitutional rights, eg as defined in the EUCFR and in the ‘cosmopolitan foreign policy constitution’ of the EU (cf Articles 3, 21 TEU). Also, in most Anglo-Saxon democracies outside Europe, governmental treatment of citizens as mere objects of intergovernmental UN and WTO regulation—without rights and effective remedies to invoke and enforce UN and WTO rules in domestic courts—continues to be justified by government executives as a requirement of ‘political realism’. The domination of UN and WTO governance by governments interested in accommodating political interest groups in exchange for political support (eg for re-election of politicians) entails that the governmental self-interests in preventing domestic courts from also acting as agents of the *international* order (eg in the sense of Scelle’s *dédoublement fonctionnel*)<sup>62</sup> prevail over the ‘constitutional functions’ of UN and WTO law to protect transnational rule of law and other rules-based, transnational PGs for the benefit of citizens beyond national boundaries.

#### V. LEGAL METHODOLOGY: NEED FOR EMBEDDING CONSTITUTIONAL DEMOCRACIES INTO MULTILEVEL REPUBLICAN AND COSMOPOLITAN CONSTITUTIONALISM

Law can be divided into three diverse fields:

- first, law as an *instrument of multilevel regulation of social relations* through private and public, national and international law-making, administration, adjudication and other forms of social regulation (eg as discussed by legal philosophy, jurisprudence and empirical legal doctrines about ‘law and economics’);
- secondly, law as a *legal and institutional system* based on ‘primary rules of conduct’ and ‘secondary rules’ of recognition, change and enforcement (eg as discussed by legal theory); and

<sup>62</sup> Cf A Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’ (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 153–88.



- thirdly, law as *legal culture*, transforming the ‘law in the books’ into ‘law in action’ as social facts and compliance with legal rules (eg as analysed by legal sociology).

As a socially agreed effort at subjecting human conduct to the governance of ‘just rules’, law is voluntarily complied with by law-abiding citizens only to the extent of a ‘reflective equilibrium’ in the relevant moral, political and legal communities that the legal rules and governance can be justified vis-à-vis citizens in terms of their underlying ‘principles of justice’, like ‘inalienable human rights’ and constitutional agreements on the ‘inner morality of law’.<sup>63</sup>

As discussed in Chapter 1, section II, modern international and European law explicitly recognize this need for justifying the legal coherence and legitimacy of law and governance in terms of ‘principles of justice’ so as to promote continuous congruence between the ‘law in the books’ and the social ‘law in practice’. Hence, the three functions of law as (i) an instrument of social change, (ii) a coherent legal system of ‘primary’ and ‘secondary rules’ and principles, and (iii) a legal culture based on reciprocal interactions between citizens and multilevel governance institutions must complement each other. Also the legitimacy and effectiveness of international law and of multilevel governance of transnational ‘aggregate PGs’ (like rule of law) depend on their interactions with domestic legal practices of citizens complying with the international rules as a matter of ‘justice’ (as discussed in Chapter 1, section II) and of democratic self-governance.<sup>64</sup> The empirical

<sup>63</sup> On the democratic premise of citizens as ‘free and equal persons’ due to their ‘two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought and inference connected with these powers)’, rendering persons free and capable of individual and democratic self-legislation, see J Rawls, *Political Liberalism* (n 9) 19, 310 ff. As empirical data on *how the world is* do not tell us *how the world should be*, moral, political and legal norms need to be justified by a ‘reflective equilibrium’ justifying the normative propositions in terms of their underlying ‘principles of justice’, as discussed in ch 1, section II. On the ‘two moralities of duty and of aspiration’, the ‘inner morality of law’ and related procedural and substantive ‘rule of law criteria’, see LL Fuller, *The Morality of Law*, rev edn (New Haven, CT, Yale UP, 1969).

<sup>64</sup> On the moral and sociological need for constructing law ‘bottom up’ by involving all citizens and actors concerned in the making, administration and adjudication of (inter)national rules, see J Brunée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, CUP, 2010) 86: ‘Interactional law only emerges when shared understandings become fused with a “practice of legality”, rooted in Fuller’s eight criteria of legality and embraced by a community of practice that adheres to those criteria in day-to-day decision-making’. On Fuller’s ‘inner morality of law criteria’ as constitutive elements of ‘legality’ and the rule of law, see Fuller (n 63) 197–200. On the interrelationships between these eight principles of *generality* (law must take the form of general rules), *publicity* (law must be published), *clarity* (law must be comprehensible and not overly vague), *consistency* (laws must not contradict one another), *feasibility* (it must be possible for people to comply with the law), *constancy* (law must not change too rapidly), *prospectivity* (law cannot be retroactive) and *congruence* (law must be administered and enforced as it is written) with human rights law, see D Luban,

fact that the intergovernmental ‘management’ of UN and WTO rules remains so often ‘disconnected’ from domestic legislators, administrators, courts, citizens and non-governmental actors—as illustrated by the more than 500 WTO disputes since 1995 over alleged non-compliance with WTO legal obligations, and by the frequent lack of effective, domestic implementation of many UN and WTO legal obligations (eg in many African countries)—reveals the major ‘constitutional problem’ of UN and WTO governance of international PGs: if citizens and civil society fail to understand international rules and to support their implementation in domestic legal systems in order to protect transnational PGs through coherent multilevel regulation, the rules cannot realize their declared objectives (like ‘providing security and predictability to the multilateral trading system’ pursuant to Article 3:2 DSU). The large number of international disputes (eg in the WTO and investment arbitration) also illustrates that many governments disagree on how the often vaguely drafted international rules should be interpreted and implemented in domestic legal systems. Such disagreements—both among the state parties to international agreements and among citizens over their rights vis-à-vis government agents with limited, delegated powers—reduce the reciprocity and effectiveness of multilevel regulation of transnational PGs, for instance by lending themselves to claims that WTO rules and dispute settlement rulings may be ‘disregarded’ if ‘efficient breaches’ of WTO law enhance ‘national welfare’ as defined by trade politicians.<sup>65</sup> The ‘public consultations’ of EU citizens in 2014 revealed widespread civil society criticism of investor-state arbitration rules in the FTAs of the EU (eg with Canada); this politically forced the EU institutions to suggest radical reforms of these investment rules and procedures for the CETA and Transatlantic Trade and Investment Partnership (TTIP) with the USA.<sup>66</sup>

The term ‘legal methodology’ is used here as the ‘best way’ for identifying the ‘sources’ of legal systems, the methods of legal interpretation, the ‘primary rules of conduct’ and ‘secondary rules of recognition, change and adjudication’, the relationship between ‘legal positivism’, ‘natural law’ and

‘The Rule of Law and Human Dignity: Re-examining Fuller’s Canons’ (2010) 2 *Hague Journal of the Rule of Law* 29.

<sup>65</sup> On the inconsistency of such ‘anti-legal’ claims with WTO law (eg the WTO requirements of ‘good faith compliance’ and termination of illegal measures), see J Jackson, ‘International Law Status of WTO DS Reports: Obligation to Comply or Option to “Buy Out”?’ (2004) 98 *AJIL* 109 ff.

<sup>66</sup> On these interdependencies between ‘legal orders’, related ‘interpretative communities’, ‘social legal fields’ and communities of citizens demanding changes in international investment law, see J Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus’ (2015) 109 *AJIL* 761–805. On the EU proposals for new investor-state adjudication, see A Reinisch, ‘The EU and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court’ in Centre for International Governance Innovation, *Investor-State Arbitration Paper No 2* (Waterloo, Ontario, March 2016).

‘social theories of law’, and the ‘dual nature’ of modern legal systems. The etymological origins of the word methodology—ie the Greek word *metabodos*, referring to ‘following the road’—suggest that globalization and its transformation of most national PGs into transnational ‘aggregate PGs’—like human rights, rule of law, democratic peace and mutually beneficial, international monetary, trading, development, environmental, communication and legal systems promoting ‘sustainable development’—require new legal methodologies in order to enable citizens and peoples to increase their social welfare through global cooperation.<sup>67</sup> All three different dimensions of law—as (i) a normative ordering of social cooperation, (ii) a coherent legal system of ‘primary rules of conduct’ and ‘secondary rules’ of recognition, change and adjudication, and (iii) social facts (‘living law’) based on ‘legal socialization’ and compliance by legal subjects with legal rules and principles—need to be reviewed from the perspective of globalization, the changing context of legal systems, and the instrumental function of law as ‘social engineering’ and ‘just ordering’ of social relations. For instance:

- the traditional European legal distinctions between private law (subdivided into regulation of persons, things and actions, contract law, property law, family law and inheritance law), national public law (subdivided into constitutional law and administrative law) and international law are increasingly challenged by the emergence of transnational law and multilevel regulatory systems driven no longer only by states, but increasingly also by non-governmental and international actors, as illustrated by transnational regulation of the Internet (*lex digitalis*) and of global ‘sports law’;
- the new ‘legal pluralism’ based on *functional* rather than only *territorial* legal sub-systems (eg WTO membership admitting not only states but also sub- and supranational customs territories like Hong Kong and the EU) entails conflicts of jurisdiction that challenge the boundaries and cultures of national, transnational and international legal and judicial systems, and related legal pre-conceptions (*Vorverständnis*) of legal actors;<sup>68</sup>
- as the ‘collective action problems’ of the diverse kinds of ‘pure’ or ‘impure’ PGs tend to differ depending on their diverse regulatory

<sup>67</sup> Pure ‘PGs’ (like sunshine, clean air, inalienable human rights) tend to be defined by their non-rival and non-excludable use that prevents their production in private markets. Most PGs are ‘impure’ in the sense of being either non-rival (eg ‘club goods’) or non-excludable (like common pool resources). Economic, political and legal ‘PGs theories’ are discussed below in ch 2, sections I–II.

<sup>68</sup> For case studies of competing jurisdictions of national, European, international and arbitral courts, see, eg N Lavranos, *Jurisdictional Competition. Selected Cases in International and European Law* (Groningen, Europa Law Publishing, 2009).

contexts,<sup>69</sup> Chapter 2, sections I–IV engage in empirical case studies and also discuss international relations theories that focus on *states* (like realism, institutionalism, functionalism)—or on individual and non-governmental actors in order to disaggregate the black box of ‘states’ (like ‘public choice’, constitutional or other constructivist theories)—so as to explain the choices of *political actors*.<sup>70</sup>

Chapter 1 argues that the emerging ‘multilevel human rights constitution’ based on national, regional and UN HRL, requires a ‘new philosophy of international law’ that focuses on the human and constitutional rights of citizens, and on the corresponding duties of all multilevel governance agents to respect, protect and fulfil human rights and other PGs. From this ‘constitutional perspective’, Chapter 1 criticizes the frequent disregard for human rights and for related, constitutional ‘principles of justice’ in the interpretation of the ‘rules of recognition’ of international law as defined in Article 38 of the ICJ Statute. Chapter 2 emphasizes the need for

- *sociological legal approaches* (eg aimed at promoting rule compliance by making governance agents more legally and judicially accountable);
- *comparative institutionalism* (eg comparing the relative effectiveness of the law and governance practices of FTAs and of different international organizations); and
- *constitutional approaches* aimed at limiting ‘collective action problems’ by extending cosmopolitan and ‘republican constitutionalism’ to the constitution, limitation, regulation and justification of multilevel governance institutions.

Empirical case studies (eg of multilevel trade, tobacco and health regulation in the WHO, WTO and EU) are used for illustrating how stronger cooperation—in conformity with the ‘consistent interpretation’ and

<sup>69</sup> For instance, while ‘best-shot PGs’ (like the invention of pharmaceuticals against global diseases) may be promoted unilaterally through private-public partnerships in a single country, transnational ‘aggregate PGs’ may require universal participation of states in a worldwide ‘global administrative law regime’ (like the Universal Postal Union) or ‘constitutional regime’ (like multilevel legal and judicial protection of transnational rule of law and human rights).

<sup>70</sup> On ‘realist challenges’ of international law (eg by the BRICS) and of the ‘idealism’ associated with inter-war legal and political scholarship, and the emergence of alternative political science conceptions of international law (notably ‘liberalism’, ‘institutionalism’ and ‘constructivism’) overcoming realism’s hostility to international law by explaining the mutual advantages of international rules and institutions and ‘legal constructivism’, see JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge, CUP, 2014). The ‘*status quo* bias’ of American international relations theories and their frequent neglect of UN and WTO law and adjudication are often criticized by Europeans as ‘an American crusade’ aimed at justifying hegemonic US power politics without offering convincing strategies or leadership for collective supply of many international PGs (like transnational rule of law and protection of human rights, climate change prevention) beyond national US interests.

‘integration’ requirements of customary international law (eg as codified in Article 31:3(c) VCLT)—among multilevel governance institutions and protection of cosmopolitan rights through multilevel judicial remedies can strengthen ‘republican constitutionalism’ for multilevel supply and protection of transnational PGs.

Exploring the five propositions outlined in sections II and IV, ie

1. the ‘globalization challenge’;
2. related ‘constitutional adjustment challenges’;
3. ‘constitutional’ and mutually ‘consistent interpretations’ in multilevel governance based on ‘common constitutional principles’ underlying multilevel regulation of PGs;
4. transnational ‘socialization’ of law through ‘republican constitutionalism’, with due regard to the changing context of multilevel regulation; and
5. ‘cosmopolitan constitutionalism’ protecting rights of citizens as ‘constituent powers’ beyond state borders vis-à-vis multilevel governance institutions with limited, ‘constituted powers’,

raises numerous legal methodology questions. For instance, *propositions* 3–5 are discussed by using the 65 years of ‘trial and error’ in European integration as policy lessons for extending ‘republican’ and ‘cosmopolitan’ constitutionalism to multilevel governance of transnational PGs in the external relations of the EU. Yet governments in Africa, the Americas and Asia rightly insist on the legitimacy of ‘constitutional pluralism’: the constitutional mandate of the Lisbon Treaty (eg in Articles 3 and 21 TEU) to ‘export’ the EU’s constitutional values in the EU’s external agreements with third countries may not reflect the democratic preferences and ‘public reason’ of peoples outside Europe; it has been criticized (eg by non-democratic rulers) as Euro-centric ‘cultural imperialism’, and has supported civil society struggles abroad against abuses of power (eg invoking the ‘human rights clauses’ in EU agreements with African countries as justification for the ‘Arab Spring’).

#### **A. Lessons from European Integration Law for Multilevel Governance of Global Public Goods?**

European integration law emerged in the 1950s based on the pragmatic ‘Jean Monnet method’, as reflected in the ‘Schuman Declaration’ of 1950 proposing the creation of a functionally limited European Coal and Steel Community (ECSC):

Europe will not be made all at once ... It will be built through concrete achievements, which first create a *de facto* solidarity. The gathering of the nations of

Europe requires the elimination of the age-old opposition of France and Germany ... The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.<sup>71</sup>

This pragmatic, functionally limited policy paradigm illustrates the ‘normative force’ of certain social realities, such as the human conflicts resulting from ‘fast rational egoism’ and only ‘slower, reasonable human thinking’.<sup>72</sup> It was modified by the enlargement of the ECSC through the European Economic Community (EEC) Treaty of 1957, implementation of which was influenced by the German *ordo*-liberal conception of a common market with supranational competition rules. *Ordo*-liberalism aimed at limiting ‘market failures’, as well as government failures, through a multilevel ‘legal community’ based on transnational rule of law and constitutional ‘checks and balances’ (eg by the EC Court of Justice), as explained by Hallstein (the first President of the EEC Commission) and Müller-Armack (Germany’s chief negotiator of the EEC Treaty).<sup>73</sup> European economic integration based on the EEC Treaty confirmed the ‘functional spill-overs’, which Jean Monnet (as President of the ECSC High Authority) had expected from prioritizing *economic* integration over *political* and *defence integration* (as rejected by the French National Assembly in the 1950s).

Another ‘paradigm shift’ emerged from the ‘judicial transformation’ of the EEC Treaty, resulting from judicial interpretation of the ‘common market freedoms’ and other EEC Treaty provisions (eg on gender equality) as fundamental economic and social rights of citizens to be protected by national and European courts of justice. Due to the increasing invocation of EU rules by citizens in domestic courts, European integration law no longer evolved only as ‘international law among sovereign states’; it was progressively transformed into multilevel constitutional law (eg based on principles of legal primacy, direct effect and direct applicability of EU rules), protecting ever more civil, political, economic and social fundamental rights of citizens and other ‘constitutional principles’ derived from the common constitutional traditions of EEC member states and codified today in the EUCFR.<sup>74</sup>

Subsequent amendments and enlargements of the EC Treaties continued the ‘twin ideas of integration and of pluralistic, participatory federalism’.<sup>75</sup>

<sup>71</sup> Full text in *EC Bulletin* 5-1980, 14–15.

<sup>72</sup> Cf Kahneman (n 4).

<sup>73</sup> Cf W Hallstein, *Europe in the Making* (London, Allen, 1972).

<sup>74</sup> Cf P Pescatore, *The Law of Integration* (The Hague, Sijthoff, 1974); G di Federico, *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument* (Dordrecht, Springer, 2011).

<sup>75</sup> M Cappelletti, ‘Foreword’ in Cappelletti, Seccombe and Weiler (eds) (n 12), vol 1, book 1, at VIII.

This expansion was both substantive, for instance by launching and progressively establishing the European Monetary and Economic Union on the basis of the 1992 Maastricht Treaty, and geographical, due to the progressive extension of the common market to (now) 28 EU member states, and additional, associated EFTA states' joining the common market through the EEA Agreement with the EU. The dynamic evolution of European integration law reflects the potential, progressive 'constitutionalization' of multilevel economic governance more clearly than the less distinct efforts at 'constitutionalizing' worldwide institutions and multilevel governance outside Europe, for example through compulsory jurisdiction for third-party adjudication of disputes among 164 WTO members, including sub-national (like Hong Kong, Macau and Taiwan) and supra-national WTO members (like the EU), and multilevel judicial governance based on cooperation among national, regional and WTO dispute settlement systems. It remains contested which policy lessons may be learnt for functionally limited UN and WTO governance from the dynamic transformations of European integration law. For instance:

- The 1951 ECSC and 1957 EEC Treaties among (initially) six member states were progressively transformed—notably through judicial interpretation of the common market freedoms and competition rules as fundamental rights of citizens—into a micro-economic 'ordo-liberal economic constitution' that protected non-discriminatory conditions of competition among economic actors in the common market, equal fundamental rights and transnational rule of law.<sup>76</sup>
- The 1992 Maastricht Treaty changed this 'economic constitution' by adding a 'macroeconomic monetary constitution' for the progressive elaboration of a European Monetary Union.
- The 1997 Amsterdam Treaty provisions on a common 'area of freedom, security and justice' initiated an additional 'security constitution' that was progressively extended by additional security policy coordination (notably following 9/11).
- The 2007 Lisbon Treaty commitments to protecting human rights, democratic governance, 'strict observance of international law' and active EU participation in multilevel UN and WTO governance of transnational PGs laid the foundations for a 'cosmopolitan foreign policy constitution' (cf Articles 3 and 21 TEU), as discussed in Chapter 1, section V.
- The Eurozone crisis measures adopted since 2010 transform and 'constitutionalize' multilevel economic governance of the now 19 Eurozone member countries, thereby 'fragmenting' the European Economic

<sup>76</sup> Cf K Tuori and K Tuori, *The Eurozone Crisis* (Cambridge, CUP, 2014) 5 ff.



and Monetary Union among all EU member states. Even though the role of courts in macro-economic policy coordination remains more limited than in micro-economic common market regulation, Eurozone crisis measures were increasingly challenged both in the CJEU<sup>77</sup> and the national courts. The ‘OMT decision’ of 14 January 2014 by the German Constitutional Court<sup>78</sup>—initiated, *inter alia*, by constitutional complaints from some 36,000 German citizens who invoked their ‘right to democracy’ (Article 38 German Basic Law) and the democratic and judicial accountability of German government institutions to control the monetary policy powers of the European Central Bank (ECB)—requested a preliminary ruling from the CJEU on, *inter alia*, the question of whether the decision of the ECB Governing Council of 6 September 2012 on purchases of government bonds of over-indebted Eurozone member countries in ‘secondary money markets’ exceeded the limited monetary policy powers of the ECB. The judgment by the CJEU of 16 June 2015 specified the legal conditions (eg following from the constitutional principle of proportionality) under which the ECB decision on the OMT programme could be construed as being consistent with the limited ECB competences and the TEU prohibition of monetary financing of budgets. The final judgment by the German Constitutional Court of 21 June 2016<sup>79</sup> concluded that—if these conditions formulated by the CJEU in its judgment of 16 June 2015 and intended to limit the scope of the OMT programme are met—the constitutional rights of the complainants are not violated, as the ECB decision on the OMT programme did not ‘manifestly’ exceed the limited competences of the ECB. Even though the Constitutional Court expressed ‘serious objections’ to the reasoning in the judgment of the CJEU, it accepted the restrictive interpretations in that judgment as still remaining within the mandate of the CJEU under Article 19 TEU.

- The dynamic evolution of European HRL—as codified in the ECHR and in the EUCFR, and progressively clarified through the human rights jurisprudence of the CJEU, the EFTA Court, the ECtHR and national courts, the incorporation of the common constitutional principles of EU member states into EU law and the EU accession to the ECHR—illustrates how the integration of HRL and IEL has strengthened protection of civil, political, economic, social and cultural rights in all

<sup>77</sup> Cf Case C-370/12, *Pringle v Ireland*, judgment of 27 November 2012, EU:C:2012:756, and Case C-62/14, *Gauweiler et al v Germany*, judgment of 16 June 2015, EU:C:2015:400. For a detailed analysis of these judgments, see V Borger, ‘Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*’ (2016) 53 *CML Rev* 139–96.

<sup>78</sup> On this decision (2 BvR 2728/13 of 14 January 2014) see the special issue of the *German Law Journal* 2014, 107–382.

<sup>79</sup> 2 BvR 2728/13; cf Press Release No 34/2016 of 21 June 2016.

28 EU member countries and associated EFTA countries by promoting a new, transnational human rights culture. The EUCFR's integrated, innovative conception of dignity rights, liberty rights, equality rights, solidarity rights, citizen rights and of guarantees of 'access to justice' differs from the fragmented protection of human rights in separate UN human rights conventions; it proves that 'integrating HRL and IEL' can *strengthen* the constitutional foundations and enforcement of human rights in and beyond IEL. Chapter 1 argues more generally that 'integration law' respecting constitutional rights of citizens (like EU and EEA law) has empirically proven to be more powerful and more effective than 'fragmentation law' based on the sovereign freedom of states to regulate transnational PGs without reference to human rights and other person-orientated 'principles of justice' (like GATT law).

## B. From 'Economic Citizenship' and State Citizenship to 'Cosmopolitan Citizenship' in Multilevel Governance of Public Goods?

The rights-based, citizen-orientated conception of European integration law confirms that democracy and collective supply of PGs through republican constitutionalism depend on empowering citizens and civil society to assume responsibility for their common interests in PGs like common markets and rule of law. Without such rights-based incentives, transforming formerly authoritarian states (eg in Eastern Europe, Africa and many Asian countries) into constitutional democracies has proved difficult. The European historical experience with citizen-driven struggles for republican constitutionalism confirms the policy conclusion of this study that—just as *objective principles* and *institutions of justice* (eg courts of justice) can become effective only if citizens and government officials also practise justice *subjectively* as a republican virtue—democracy depends on democratic virtues of citizens; legal protection of constitutional, participatory and deliberative democracy must complement parliamentary, representative democracy and institutionalize 'public reason' so as to enhance the democratic capabilities of governance institutions for collective supply of PGs.

As explained by Dworkin, the adverse impact of the ideological antagonism in American society on the decreasing capacity of the US Congress to reach agreement among Republicans and Democrats on legislative compromises, reflects decreasing 'democratic virtues' to respect legitimate 'constitutional pluralism'.<sup>80</sup> The civil, political, economic, social and cultural human rights protected by HRL aim not only at empowering citizens to

<sup>80</sup> Cf R Dworkin, *Is Democracy Possible Here?* (Princeton, NJ, Princeton UP, 2006).

realize their individual and democratic self-development with due respect for different ‘contexts of justice’ (eg respect for the rights of refugees and economic migrants in European integration); they also reflect republican and democratic ‘duties to the community’, as recognized in Article 29:1 of the Universal Declaration of Human Rights (UDHR), for instance duties to respect the equal rights and personal privacy of citizens (eg their family lives, freedom of religion), and to protect political, economic, social and cultural rights against ‘market failures’ as well as ‘governance failures’ like under-supply of PGs. As discussed in Chapter 1, section II, the republican ‘principles of justice’ defined in national Constitutions and in numerous treaties cannot become effective without recognition of human rights to justification of governmental restrictions on individual rights; arguably, neglect of the governmental duties to justify PGs in terms of equal rights and welfare of citizens is the main cause of the current crises in European integration (eg the majoritarian ‘Brexit request’ to terminate the rights and benefits of British citizens under EU law and their participation in collective protection of European PGs). ‘Republican virtue politics’ and judicial ‘administration of justice’ must protect ‘rights ethics’ and a corresponding ‘responsibility ethics’ for collective protection of PGs, just as ‘inalienable’ and ‘indivisible’ civil, political, economic, social and cultural human rights require legal and judicial ‘balancing’ in order to promote overall coherence of legal systems.

Chapter 2 argues that the one-sided domination of UN/WTO governance by government executives—without effective parliamentary, democratic and judicial control by citizens and civil society institutions—is a major reason for many ‘collective action problems’ in multilevel economic and health governance (eg welfare-reducing trade protectionism, the global ‘tobacco epidemic’ that killed 100 million people during the twentieth century). The recognition and justification—in some treaty constitutions (*sic*) establishing UN Specialized Agencies—of health rights (eg in the WHO constitution), labour rights (eg in the ILO Constitution) and food rights (eg in the law of the FAO and its World Food Convention) reflect the insight that individual rights to protection of PGs (eg health rights) can set incentives for more inclusive, more coherent and more accountable protection of PGs (like public health), for instance by empowering citizens to challenge ‘market failures’ (like the sale of toxic tobacco products) and related governance failures in domestic courts. Legal history and social anthropology confirm that—as human beings have to earn a living in order to survive (*homo laborans*), and strive for social recognition in their professional lives (*homo faber*)—rights-based and citizen-driven contract law, property law, economic law (eg regulating money and trade), tort law and criminal law have been essential elements of national and international legal systems since ancient times. Such legal rules hold individuals legally accountable for what a morally indifferent *homo economicus* may perceive as ‘efficient breaches’

of the law. Similarly, the more individuals depend on political cooperation for the collective supply of PGs (*homo politicus*), the more must the reasonable self-interests of citizens in collective supply of PGs be protected through democratic and republican rights (*homo ordinans*). Legal anthropology and sociology can help to design rules and institutions so as to make law and governance socially more effective. For instance, the legal prioritization of economic integration and economic rights in European integration before World War I and following World War II was driven by reasonable self-interests of citizens in protecting the PG of a mutually beneficial division of labour beyond state borders through FTAs, European common market law and GATT/WTO law.

Just as European economic market integration has created incentives for complementary ‘policy integration’ (eg for social integration of foreign workers and their families into host states),<sup>81</sup> so does the acceptance by all five UN Security Council veto powers of rights-based commercial, trade and investment law with compulsory jurisdiction for the peaceful resolution of transnational economic disputes offer empirical evidence for the ‘Jean Monnet method’ of using mutually beneficial economic cooperation for creating *de facto* solidarity and progressive ‘spill-over effects’ promoting legal and policy integration. By protecting the ‘direct applicability’ of treaty rules by citizens and their legal enforceability through domestic courts (eg of individual trading rights, investor rights, intellectual property rights and human rights) in the internal and external relations of European states, citizens were empowered to act as transnational, legal subjects, ‘agents of justice’ and ‘democratic guardians of the rule of law’, in conformity with republican traditions of participatory citizen rights in multilevel governance of PGs. By transforming state citizenship into a ‘dual citizenship’ of the EU and of its member states (cf Articles 9–12 TEU; Articles 18 et seq TFEU), and also empowering EU citizens through the EUCFR, the ‘democratic deficit’ resulting from the lack of a ‘European demos’ was partly compensated for by the granting of rights to EU citizens that they had never enjoyed before in European history. Yet EU law also reflects ongoing power struggles and systemic treaty violations by governments; for instance, the EU’s ‘cosmopolitan foreign policy constitution’ is often circumvented, due to the lack of effective judicial remedies for holding EU governments accountable for disregarding ‘strict observance of international law’ (Article 3 TEU) and for ‘disempowering’ EU citizens (eg by explicitly excluding private rights and judicial remedies in FTAs concluded by the EU since 2006).

This study argues that the necessary ‘constitutionalization’ of multilevel governance of international PGs beyond Europe should follow the lessons

<sup>81</sup> Cf M Dougan, NN Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Oxford, Hart Publishing, 2012).

from European integration by complementing state citizenship with multilevel legal protection of functionally limited cosmopolitan and republican rights, thereby inducing citizens to assume responsibility for multilevel governance of economic and political ‘aggregate PGs’. Transnational ‘economic citizen rights’ to participate and be protected in the global division of labour—similar to human rights vis-à-vis multilevel governance institutions—assume increasing importance for the individual and social welfare of citizens. European Union common market regulations avoid one-sided, libertarian conceptions of economic freedoms by also protecting civil, political and social rights, related responsibilities and the social needs of EU market participants. Similarly, international investment law increasingly changes in response to civil society demands to balance private and public interests more comprehensively by interpreting private property and investor rights in conformity with all other human rights obligations of the home and host states of the investor.<sup>82</sup> The need for such legal and judicial ‘balancing’ is now recognized by all European courts, as illustrated by the CJEU case law holding that the judicial presumption of a ‘reasonably well-informed and reasonably observant and circumspect consumer’ does not apply in contexts where the health risks of products are not sufficiently evident (eg due to tobacco addiction and other cognitive constraints on vulnerable consumers).<sup>83</sup> Constitutional and fundamental rights of citizens specify and strengthen governmental duties to regulate ‘market failures’ as well as ‘government failures’, for instance by protecting consumers against their individual weaknesses, cognitive constraints and bounded rationality so that public health protection can ‘take precedence over economic considerations’.<sup>84</sup> Yet governmental limitations of economic and other human freedoms require legal justification (cf Article 114:3 TFEU) and must remain subject to judicial review at the request of adversely affected citizens and other market actors.

### C. ‘Methodological Pluralism’ and the Need for ‘Constitutional Coherence’ of Public Goods Regimes

One major constitutional challenge of the twenty-first century is that neither citizens and civil society nor national parliaments effectively control multilevel governance of international PGs in worldwide and regional organizations.

<sup>82</sup> Cf PM Dupuy, F Francioni and EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford, OUP, 2009).

<sup>83</sup> On this jurisprudence see JU Franck and K Purnhagen, *Homo Economicus, Behavioural Sciences and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis*, EUI Working Papers Law 2012/26, at 8 f, 14, 16, 18, 20.

<sup>84</sup> Case C-183/95 *Affish* [1997] ECR I-4315, para 43.

Responding to this challenge requires ‘republican constitutionalism’ based on cosmopolitan citizenship rights, enabling citizens to assume responsibility for holding multilevel governance institutions accountable for complying with international PGs regimes that parliaments approved for the benefit of citizens. As discussed in Chapter 3, the ‘empowering functions’, ‘limiting functions’, ‘regulatory functions’ and ‘justificatory functions of cosmopolitan rights’ are—both on normative grounds and in view of empirical evidence—essential for transforming ‘disconnected UN/WTO governance’ dominated by government executives into legally more connected and constitutionally more constrained governance protecting rights of citizens and peoples. The coordination of multilevel economic and health governance through WTO and WHO rules empirically confirms the normative proposition that multilevel ‘integration law’ embedded into constitutional, representative, deliberative and participatory democratic structures and judicial remedies can render multilevel governance of transnational ‘aggregate PGs’ more effective. European Union law, EEA law, international investment, commercial, Internet law and regional HRL likewise empirically confirm that multilevel judicial protection of cosmopolitan rights (eg human rights, EU and EEA common market rights, investor rights, commercial freedoms of contract and arbitration, Internet domain names) can transform ‘disconnected, multilevel governance’ into more effective and more legitimate ‘integration law’ protecting civil, political, economic and social rights of citizens beyond state borders. Like the construction of a multi-storied house accommodating diverse people under a common roof,<sup>85</sup> and similar to the ‘plywood principle’ (ie using complementary layers of wood reinforcing one other), the collective construction of transnational ‘aggregate PGs’ (like human rights and rule of law) must build on local, state, federal, regional and global levels of legal and political protection using mutually coherent ‘constitutional principles’ and ‘intermediate PGs’ that enable diversity and protect the overall legal, political, social and economic consistency and resilience of multilevel regulation and governance.

This dependence of multilevel governance of PGs on overall legal coherence is also emphasized in the ‘rule of law assistance programs’ provided by the UN for almost 150 member states.<sup>86</sup> The UN ‘Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ of 24 September 2012 emphasized the systemic importance of ‘an international order based on the rule of law’

<sup>85</sup> Cf T Cottier, ‘Towards a Five Storey House’; in C Joerges and EU Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford, Hart Publishing, 2011) 495–532.

<sup>86</sup> Cf *Strengthening and Coordinating UN Rule of Law Activities. Report of the Secretary-General, A/67/290*, 10 August 2012.

as an ‘indispensable foundation for a more peaceful, prosperous and just world’: ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing and ... belong to the universal and indivisible core values and principles of the United Nations’.<sup>87</sup> The annual reports by the UN Secretary-General on ‘The rule of law at the national and international levels’ define the ‘rule of law’

as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>88</sup>

Yet as explained in a *Report on the Rule of Law* by the European Commission for Democracy through Law (Venice Commission), the legal provisions referring to the rule of law in UN law, European law and national legal systems—even if confirming that the rule of law is ‘a fundamental and common European standard to guide and constrain the exercise of democratic power’—tend to remain very general;<sup>89</sup> for instance, as discussed in Chapter 1, section V and Chapter 2, section IV, EU institutions also use intergovernmental agreements to exclude individual rights and judicial remedies of citizens; and EU courts continue to condone persistent violations of GATT/WTO obligations by EU institutions, to the detriment of European citizens adversely affected by illegal import restrictions (eg of bananas, hormone-fed beef, genetically modified organisms).

Is this study’s acknowledgement of the need for ‘constitutional’ and ‘methodological pluralism’ consistent with the five legal and policy propositions set out above for ‘constitutionalizing’ multilevel governance of transnational PGs? Just as HRL and ‘constitutionalism’ protect individual and democratic diversity, and require respect for the reality of ‘constitutional pluralism’, so must legal methodologies respect the reality of ‘methodological pluralism’ (eg in designing diverse kinds of ‘human rights constitutionalism’ and justifying ‘theocratic’ conceptions of law in some Muslim countries).<sup>90</sup>

<sup>87</sup> UN Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels of 24 September 2012, A/RES/67/1, paras 1, 5.

<sup>88</sup> Cf *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels. Report by the Secretary-General, A/66/749*, 16 March 2012, para 2. The same definition was used in many previous reports by the UN Secretary-General (eg *The rule of law and transitional justice in conflict and post-conflict societies*, Doc S/2004/616 of 23 August 2004).

<sup>89</sup> Cf *Report on the Rule of Law* (Venice, Venice Commission, 2011) 14.

<sup>90</sup> Cf EU Petersmann, ‘JIEL Debate: Methodological Pluralism and its Critics in International Economic Law Research’ (2012) 15 *JIEL* 921–70.



Chapter 1 argues that—in view of the universal recognition of ‘inalienable’ human rights by all UN member states—‘principles of justice’ and ‘democratic constitutionalism’ must be discursively justified by citizens as ‘agents of justice’. The universal commitment to respect for ‘human dignity’ (eg in terms of ‘reason and conscience’ as universally recognized in HRL) entitles individuals and peoples to conceive of themselves as autonomous authors and addressees of ‘constitutional contracts’, ‘democratic self-government’ and legitimate law. This study hopes to contribute to the global discourse on how to interpret the existing yet under-theorized ‘principles of justice’ in international law (eg UN HRL) and multilevel adjudication. Its analysis of UN and WTO governance of ‘aggregate PGs’ remains selective, for instance by focusing on ‘constitutional problems’, ‘collective action problems’ and the limited, yet important contribution of the EU’s external relations law and policies to ‘republican constructivism’ in reforming UN and WTO law and governance.<sup>91</sup> It is written from the perspective of a German constitutional lawyer who practised European and international law for more than 35 years in German, European, UN, GATT and WTO legal and political governance institutions, and who benefitted from teaching IEL in numerous universities in Africa, the Americas, Asia and Europe. Discourse theories insist on the ‘justificatory equality’ of all reasonable citizens affected by the collective ‘construction’ and discursive justification of ‘constitutional contracts’ and ‘principles of justice’. Hence, economists, political scientists and lawyers with different professional and academic experiences are likely to favour different worldviews and methodologies. Mutual criticism, public debate and respect for ‘reasonable disagreement’—rather than a Platonic search for ‘philosopher kings’—offer the best way for improving the ‘human condition’, for instance by overcoming stumbling blocks (such as the ‘Brexit referendum’ of June 2016) like a ‘happy Sisyphus’ (Camus). The ‘dignity’ of human beings ‘endowed with reason and conscience’ (Article 1 UDHR) and their ‘inalienable human rights’ justify not only the republican demand of not being dominated by arbitrary power in the search for a ‘good life’ and PGs; the human right to individual self-determination also requires democratic justification of governance on the basis of general and reciprocal ‘principles of justice’ that can be shared by all citizens affected and participating in democratic debates on equal terms. ‘Practical’ and ‘public reason’ justifying law and governance institutions must remain subject to constant review and critique in the relevant democratic,

<sup>91</sup> On this role of the EU as a ‘policy exporter’ shaping the international legal order, see more generally G Falkner and P Müller (eds), *EU Policies in a Global Perspective. Shaping or Taking International Regimes* (London, Routledge, 2014); D Kochenov and F Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (Cambridge, CUP, 2014).

republican and ‘cosmopolitan communities’ in order to morally justify respect for the law. As explained in Chapter 1, international lawyers focusing one-sidedly on path-dependent, state-centered ‘Westphalian principles of justice’ should review their value premises and accept their moral responsibility for justifying their frequent neglect of the customary law requirement to interpret treaties and settle related disputes ‘in conformity with the principles of justice’, including ‘human rights and fundamental freedoms for all’.<sup>92</sup>

<sup>92</sup> On the controversial question of the relevance of theories of justice for a self-enforcing, constitutional democracy for justifying modern international law see, eg, T Hinton (ed), *The Original Position* (Cambridge, CUP, 2015), Introduction and ch 12. While J Rawls’s ‘Law of Peoples’ focused on the limited question of what kind of principles of justice should guide liberal peoples in their international relations (eg with non-liberal societies and ‘outlaw regimes’ living in separate states that are neglecting the mainly domestic causes of the welfare of peoples), the remainder of this book argues that the fact of globalization (including also universal recognition of human rights by all UN member states) has rendered Rawls’s view of the separateness of states outdated; human rights and related ‘principles of justice’ have become the most important justifications also of international institutions, and collective supply of most PGs requires multilevel, republican and cosmopolitan constitutionalism for limiting abuses of public and private powers through multilevel protection of PGs vis-à-vis all affected citizens.