MISCELÂNEA SOBRE A INTEGRAÇÃO EUROPEIA

(ed.)
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Multilevel governance of interdependent public goods in the 21st century: from national to multilevel and cosmopolitan constitutionalism?

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1. From constitutional nationalism to ‘UN multilevel constitutionalism’

In contrast to private goods produced spontaneously in private markets, the ‘non-excludable’ and ‘non-exhaustive’ characteristics of PGs entail ‘market failures’ requiring government interventions for the collective supply of ‘weakest link PGs’ (like a dike) and ‘aggregate PGs’ (like democratic peace). Since republican constitutionalism in ancient Greece, almost all states have learned through ‘trial and error’ the need for adopting national Constitutions as a necessary legal framework for democratic supply of national PGs (like rule of law, a common market). Since World War II, all 193 UN member states have also joined functionally limited treaty constitutions like the Constitutions (sic) of the International Labour Organization (ILO), the World Health Organization (WHO), the UN Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agriculture Organization (FAO); the ‘constitutional functions’ of this functionally limited ‘UN multilevel constitutionalism’ include (1) establishing multilevel governance institutions, (2) limiting their legislative, executive and dispute settlement powers, (3) regulating their collective supply of functionally limited ‘aggregate PG’ through ‘primary rules of conduct’ and ‘secondary rules of recognition, change and adjudication’, and (4) justifying the governance systems, for instance in terms of protecting labour rights and ‘social justice’ through ILO law, fundamental rights to health protection through WHO law, human rights to education, justice and ‘rule of law’ through UNESCO law, or ‘ensuring humanity’s freedom from hunger’ through FAO law. The more globalization transforms national PGs into global ‘aggregate PGs’, the more national (big C) Constitutions turn out to be ‘partial constitutions’ that can protect international PGs only in cooperation with

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\[ \text{\footnotesize\textsuperscript{2} For a discussion of the different kinds of public goods and related ‘production strategies’ see: S.Barret (2007) and E.U.Petersmann (ed, 2012).} \]

\[ \text{In: NUNES, Adriano Peclar; SIQUEIRA, Julio Pinheiro Faro Homem de (ed.). Miscelânea sobre a integração europeia. \textit{Panoptica}, vol. 10, n. 1, pp. 74-91, jan./jun. 2015.} \]
other states based on international law and institutions. Yet, due to intergovernmental power politics focusing on ‘state sovereignty’ rather than ‘popular sovereignty’, ‘individual sovereignty’ and related ‘sovereign responsibilities’, neither the UN nor UN Specialized Agencies nor the WTO have succeeded in realizing their human rights objectives and protecting other international PGs effectively. As first explained by Kantian legal theory, state-centered ‘multilevel constitutionalism’ cannot effectively protect human rights and other international PGs without additional multilevel constitutional safeguards of cosmopolitan rights and corresponding constitutional restraints on abuses of power in all human interactions at national, transnational and international levels. Power-oriented ‘Westphalian conceptions’ of international law focusing on foreign policy discretion for maximizing ‘national interests’ - without effective parliamentary control, judicial review and other constitutional restraints of intergovernmental power politics and of its often welfare-reducing effects on domestic citizens - become all too often captured by rent-seeking interest groups abusing import protection and non-transparent financial deals (eg loan agreements, concession agreements) generating ‘protection rents’ for politicians and powerful producer interests at the expense of domestic consumer welfare.

2. European ‘cosmopolitan constitutionalism’ regulates ‘collective action problems’ and protects PGs more effectively

European human rights and economic integration law confirms that citizen-oriented ‘cosmopolitan constitutionalism’ protecting cosmopolitan rights, ‘participatory democracy’, transnational rule of law and multilevel judicial remedies for the benefit of citizens across state borders – eg in the context of the European Convention on Human Rights (ECHR), European common market and competition law, international investment and commercial law and arbitration – have protected PGs in more legitimate and more effective ways than state-centered regimes prioritizing rights of governments (eg under UN and WTO law) over rights and judicial remedies of citizens. The ‘multilevel constitutionalism’ initiated by the ILO, FAO, WHO and UNESCO ‘constitutions’ failed to protect international PGs effectively (like labour rights protecting ‘social justice’, human rights to education, health protection and adequate food).

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3 Cf E.U, Petersmann (2012), chaps II and III.
4 Cf. Petersmann (note 2), at 145 ff.

because citizens and democratic parliaments were often not effectively empowered (eg by ‘countervailing rights’ limiting abuses of executive powers through judicial remedies); political abuses of power (eg in non-democratic UN member states) were not effectively constitutionally restrained (eg through supervisory powers of UN institutions and compulsory jurisdiction of international courts of justice limiting ‘harmful externalities’ of violations of human rights). European common market and competition rules realized the PG of consumer-driven, open markets because EU citizens could directly enforce the European Union (EU) and European Economic Area (EEA) rules in domestic courts; and independent guardians of ‘community interests’ (like the EU Commission) could enforce the rules also in the EU Court of Justice (CJEU) as well as in the European Free Trade Area (EFTA) Court. The multilevel legal, democratic and judicial guarantees were linked, for instance by cooperation among national and European courts (eg based on ‘preliminary rulings’ by the CJEU) and individual access also to the CJEU, the EFTA Court and the European Court of Human Rights (ECtHR). Also the multilevel HRL in Europe can be directly enforced by self-interested citizens in national and European courts, just as international investment and commercial law and arbitration offer decentralized legal and judicial remedies aimed at protecting transnational rule of law. European integration law protects individual, constitutional and democratic diversity and subsidiarity of governance as constitutional rights and values (eg in Articles 2-5 of the Lisbon Treaty on EU). The cosmopolitan constitutionalism underlying the European treaties constituting, limiting, regulating and justifying European PGs (like the common market, transnational protection of human rights, rule of law, multilevel democratic governance) deals with the five major ‘collective action problems’ in supplying international PGs more effectively than traditional regulatory approaches focusing on ‘constitutional nationalism’ (eg in hegemonic countries like the USA, Russia and China) and state-centered ‘UN multilevel constitutionalism’. For instance:

1. The jurisdiction gap (ie the limited jurisdiction and incapacity of individual states to provide ‘aggregate PGs’ unilaterally without international cooperation) requires not only constituting, limiting, regulating and justifying intergovernmental powers for collective supply of international PGs. Democratic exercise of multilevel governance powers must also link the law of international organizations to cosmopolitan rights, parliamentary control and judicial remedies of citizens. The common market law of the EU, and its extension to EFTA countries
through the Agreement establishing the European Economic Area (EEA) as well as through bilateral free trade agreements (eg with Switzerland), illustrate diverse ‘cosmopolitan IEL approaches’ that have protected the PG of a citizen-driven, rule-based common market effectively. By contrast, free trade agreements outside Europe (such as NAFTA and ASEAN) remain subject to governmental impunity to violate international law for the benefit of powerful interest groups (including diplomats interested in excluding their own legal, democratic and judicial accountability vis-à-vis citizens), or to redistribute income among domestic citizens by discretionary ‘trade remedies’, restraints of competition and subsidies distorting non-discriminatory conditions of competition to the detriment of consumer welfare.

2. The governance gap (ie the inability of most intergovernmental organizations to regulate and govern the collective supply of international public goods democratically and effectively) requires new forms of multilevel constitutional, legislative, administrative and judicial commitments and institutions for collective protection of human rights and other PGs. In contrast to ‘constitutional nationalism’ (as illustrated by the ‘hegemonic international law’ conceptions of most UN Security Council members) and to power-oriented ‘UN multilevel constitutionalism’, European cosmopolitan constitutionalism empowers not only governments but also citizens, parliaments, functionally limited regulatory agencies (like multilevel competition authorities and central banks), national and international courts of justice. The focus of ‘cosmopolitan empowerment’ on extending the ‘constitutional trias’ of human rights, rule of law, and democratic self-government to multilevel governance — rather than on foreign policy discretion and intergovernmental power politics - prioritizes constitutionally restrained, and democratically more legitimate problem-solving capacities (eg through European networks of competition authorities subject to multilevel protection of individual rights and judicial remedies) that can mobilize more effectively democratic support for peaceful economic integration and political cooperation (eg through ‘participatory’ and ‘deliberative democracy’ complementing the inadequate control of ‘intergovernmentalism’ by national parliaments).

3. The incentive gap (ie the inherent temptation of free-riding in the collective supply of international PGs whose costs and benefits are distributed unevenly) requires making ‘common but differentiated responsibilities’ for private and public, national and international actors more effective. Financial and technical assistance for poor countries (eg if they provide transnational environmental services by protecting tropical forests that are of global importance for bio-

diversity and carbon-reduction), or WTO provisions for capacity-building and trade facilitation assisting less-developed countries (LDCs) in participating in world trade and in implementing WTO obligations, illustrate how legal and financial incentives for private and public participation in the supply of international PGs may assist in limiting ‘governance failures’ and promoting equitable sharing of adjustment costs. The limited incentives for LDCs to make use of the power-oriented GATT dispute settlement system were successfully reduced by the WTO provisions for legal assistance for LDCs (cf. Article 27 DSU) and by the establishment of a separate Advisory Center on WTO Law assisting developing countries in WTO dispute settlement proceedings and in implementing WTO obligations. The European experiences with financial redistribution (e.g. by EU regional, structural and development funds), capacity-building and ‘human rights conditionality’ illustrate how citizen-oriented ‘community law’ and rights-based ‘integration law’ can transform power politics by cosmopolitan rights, development assistance and rule of law. The focus of the WTO ‘Development Round’ on assisting the majority of less-developed WTO member countries to benefit from trade and from welfare-increasing trade regulation has been a necessary, yet insufficient incentive for promoting participation of LDCs in the consensus-practice of the WTO. The continuing disagreement on how to maximize the gains of LDCs from trade illustrates the need for limiting consensus-based WTO negotiations by more legal flexibility for ‘plurilateral trade agreements’ among ‘coalitions of the willing’. As ‘human development’ depends on respect for human rights, and democratic control of foreign policy powers cannot remain effective without transnational rule of law, cosmopolitan rights and judicial remedies are indispensable incentives for citizens to assume their democratic responsibilities for their economic and democratic self-development in a globally interdependent world.

4. The participation gap (ie the need for inclusive consensus-building mobilizing democratic support and participation in collective supply of PGs) requires empowerment of citizens by cosmopolitan ‘access rights’ to public goods, legal and institutional protection of ‘deliberative governance by discussion’, institutionalized leadership (e.g. by international organizations with mandates for initiating rule-making for global public goods) and financial assistance for ‘capacity building’ by ‘coalitions of the willing’ so that all relevant public and private actors cooperate in the collective supply of interdependent ‘aggregate PGs’. As in HRL and European economic law, multilevel governance must be promoted by insisting on

‘responsible sovereignty’ based on ‘duties to protect’ human rights and other public goods, international duties of cooperation (e.g. among national governments and international organizations, national and international courts) and promotion of ‘regulatory competition’ through plurilateral agreements among ‘alliances of the willing’. WTO law encourages ‘competing liberalization’ at worldwide and regional levels, as illustrated by the increasing recourse to free trade areas, customs unions and preferential agreements among LDCs as ‘second best’ policies in the absence of worldwide consensus on concluding the Doha Round negotiations. Transnational economic and environmental PGs are crucially dependent on private stake-holder participation, for instance by private industries developing product, production and consumer protection standards, industrial and medical innovation (eg ‘green technologies’), and ‘private-public partnerships’ in regulating economic markets (eg labour markets, Internet governance, ‘carbon emission trading systems’ contributing to adjustment to climate change). As illustrated by the citizen-driven European economic, legal and human rights regimes, transnational economic, environmental and legal PGs (like ‘rule of law’ for the benefit of citizens) cannot become effective and legitimate without rights of all affected citizens to have recourse to legal and judicial remedies against unjustified restrictions of individual rights and market distortions.

5. The hundreds of functionally limited treaty regimes for multilevel supply of international PGs (eg mutually beneficial free trade agreements), and their constitutional foundation in diverse national legal systems, entail a ‘rule of law gap’ that must be reduced through mutually ‘consistent interpretations’ of interdependent, multilevel legal systems. Both national as well as international legal systems tend to proceed from the legal assumption that governments are presumed to act in conformity with their international legal obligations (cf. Article 31 VCLT). Also HRL emphasizes, since the Universal Declaration of Human Rights (UDHR, 1948), the need for protecting ‘human rights ... by the rule of law’, including a human right ‘to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’ (Preamble, Article 28 UDHR). Numerous treaties and UN resolutions acknowledge this need for implementing international law in domestic legal systems in good faith in view of the interdependence of national and international rule-of-law systems.
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(as an ‘aggregate PG’). Both ‘constitutional nationalism’ as well as ‘UN multilevel constitutionalism’ prioritizing ‘sovereign freedom of states’ to disregard international law inside national legal systems (subject to international ‘state responsibility’) tend to aggravate the ‘policy coherence gap’ resulting from the rule-of-law-gap caused by the legal fragmentation among hundreds of national, international and transnational legal regimes and from parochial disregard for the ‘coherent interpretation requirements’ recognized in national and international legal systems.

3. HRL requires ‘access to justice’ and ‘cosmopolitan constitutionalism’ also in IEL

Cosmopolitan constitutionalism differs from national (big C) Constitutionalism and state-centered ‘UN multilevel (small c) constitutionalism’ by its objective of protecting cosmopolitan rights across national frontiers through more democratic, multilevel governance institutions and stronger, multilevel judicial protection of transnational rule of law for the benefit of citizens. Since the UN Declaration on the ‘Right to Development’ adopted in December 1986 up to the ‘Millennium Declaration’ of December 2000 committing UN member states to ‘making the right to development a reality for everyone and to freeing the entire human race from want’, the linkages between human rights protection and human development needs are specified in ever more UN legal instruments and development reports. Also national Constitutions increasingly refer to international law and international organizations as preconditions for protecting international PGs through multilevel governance. In IEL, transnational rule of law has rarely been secured only by rights and responsibilities of states without additional constitutional limitations of multilevel governance (eg by judicial remedies). The 2013 Report of the Panel on Defining the Future of International Trade convened by WTO Director-General P. Lamy concluded ‘that governments face a four-pronged convergence challenge’: (1) failures to promote further convergence of their trade regimes through multilateral WTO negotiations; (2) incoherencies of preferential and WTO trade regimes; (3) incoherencies between ‘trade and other domestic policies, such as education, skills and innovation’; and (4) inadequate ‘coherence between trade rules and policies, norms and standards in other areas of international

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5 On UN protection of rule of law beyond the state see the annual reports by the UN Secretary-General on ‘The Rule of law at the national and international levels’ (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).

co-operation’. The unnecessary poverty and lack of democratic governance in many LDCs (notably in Africa and Asia) illustrate similar ‘governance gaps’ and ‘rule of law gaps’: UN law continues to fail protecting effectively human rights, rule of law, democracy and other PGs in many UN member states; it offers no protection for the economic liberties (like freedom of profession), common market freedoms and property rights, whose guarantees in in European law enabled more than 60 years of unprecedented economic and social welfare and democratic peace. Hence, the ‘human rights approaches’ advocated by the UN High Commissioner for Human Rights for interpreting and developing IEL must be complemented by multilevel constitutional, legislative, administrative and judicial regulation of ‘market failures’ as well as of ‘governance failures’ in IEL - with due respect for the legitimate reality of ‘constitutional pluralism’, for instance regarding the diverse traditions of parliamentary democracy, ‘constitutional democracy’, and the ‘balancing’ of civil, political, economic, social and cultural rights.

If the purpose of constitutionalism and democracy is defined in terms of institutionalizing ‘public reason’ for protecting constitutional rights of citizens in legitimate ways, then the power-oriented domination of UN and WTO institutions by the self-interests of governments (eg in limiting their legal, democratic and judicial accountability vis-à-vis citizens) is part of the problem - rather than of the solution - of multilevel governance of ‘aggregate PGs’. Due to the absence of a transnational ‘demos’ and of effective parliamentary and judicial control of intergovernmental power politics, transnational ‘cosmopolitan democracy’ must rely more on rights-based ‘participatory democracy’, cosmopolitan rights and their multilevel, legal and judicial protection as ‘countervailing powers’ to the diffusion of ever more regulatory powers to international institutions and non-governmental actors due to globalization. As many rulers are complicit in abuses of public and private power (eg by means of foreign loan and concession agreements for exploiting natural resources, restrictive business practices), the vigilance of self-interested citizens and of independent ‘courts of justice’ may offer more effective ‘countervailing powers’ limiting the ubiquity of abuses of power in transnational economic

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7 Cf, Petersmann (2012), chapters IV and VII.
8 This conception was emphasized by the CJEU in its Van Gend en Loos judgment (Case 26/62, ECR 1963, 1), where the CJEU stated that ‘the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States’.

relations than reliance on ‘Westphalian ideals’ of ‘benevolent governments’ committed to ‘Aristotelian virtue politics’. By linking the ‘cosmopolitan functions’ of IEL to existing domestic constitutional guarantees of civil, political, economic and social rights of citizens and to the universal human rights obligations of all UN member states, ‘cosmopolitan interpretations’ of IEL and their judicial protection for the benefit of citizens can initiate ‘cosmopolitan reforms’ and more citizen-oriented ‘public reason’ in multilevel governance of PGs, as illustrated by the common market rights of European citizens and the derivation of investor rights from bilateral investment treaties and their multilevel judicial protection by arbitral and national courts. Also the General Agreement on Tariffs and Trade and the WTO Agreements include a large number of requirements to make available judicial, arbitral or administrative tribunals and independent review procedures not only at international governance levels among WTO members, but also in domestic legal systems in the field of GATT (cf Article X), the WTO Antidumping Agreement (cf Article 13), the WTO Agreement on Customs Valuation (cf Article 11), the Agreement on Pre-shipment Inspection (cf. Article 4), the Agreement on Subsidies and Countervailing Measures (cf Article 23), the General Agreement on Trade in Services (cf Article VI GATS), the Agreement on Trade-Related Intellectual Property Rights (cf Articles 41-50, 59 TRIPS) and the Agreement on Government Procurement (cf Article XX). As the legal and ‘dispute settlement system of the WTO’ is explicitly committed to ‘providing security and predictability to the multilateral trading system’ (Article 3 DSU) and to ‘raising standards of living, ensuring full employment’ and promoting ‘sustainable development’ for the benefit of citizens (Preamble WTO Agreement), the WTO guarantees of ‘access to justice’ and of ensuring inside each WTO member ‘the conformity of (domestic) laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’ (Article XVI:4 WTO Agreement) justify interpreting precise and unconditional WTO obligations of governments also in terms of cosmopolitan rights of their citizens. HRL and regional environmental law likewise include numerous guarantees of access to justice or to ‘a review procedure before a court of law or another independent and impartial body established by law’ in transnational environmental regulation (cf Article 9 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and
Access to Justice in Environmental Matters). As some national Constitutions have responded to systemic governance failures by providing for broad legal and judicial remedies whenever ‘rights are violated by public authority’ (eg Article 19:4 German Basic Law), and some regional economic agreements (like the Lisbon Treaty) are explicitly committed to facilitating ‘access to justice’ (Article 67:4 TFEU), ‘rule of law’ (Article 2 TEU) and a ‘right to an effective remedy and to a fair trial’ whenever ‘rights and freedoms guaranteed by the law of the Union are violated’ (Article 47 EU Charter of Fundamental Rights), interpreting national, regional and international legal guarantees of ‘access to justice’ in mutually coherent ways for the benefit of citizens can be justified also as a legal requirement of the ‘consistent interpretation principles’ underlying national and international legal systems (cf Article 31 VCLT).

4. ‘Cosmopolitan constitutionalism’ as a ‘struggle for justice’

Almost a century ago, the German jurist R.Jhering noted that the 'life of the law’ often depends on citizens struggling for their rights; such ‘struggle for his rights’ may be a ‘duty of the person whose rights have been violated' as well as a 'duty to society'. In US antitrust law as well as in European economic law, individual plaintiffs invoking and enforcing competition and common market rules have been likened to ‘attorney generals’ promoting also ‘community interests’ rather than only individual self-interests. Following the recognition of human rights and other ‘principles of justice’ as integral parts of national and international legal systems, ever more national and international courts throughout Europe interpret international guarantees of freedom, non-discrimination and rule of law for the benefit of citizens even if the international rules were addressed to states without explicitly providing for cosmopolitan rights: “the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 Defrenne v Sabena [1976] ECR 455, par. 31). Such consideration must, a fortiori, be applicable to Article 48 of the Treaty, which … is designed to ensure that there is no discrimination on the labour market’.

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9 Cf. A.A.Cancado Trindade (2011). The terms ‘effective remedy’ and ‘access to justice’ are often used interchangeably for protecting individual rights to effective access to a dispute resolution body; rights to fair proceedings; rights to timely resolution of disputes; rights to adequate redress; and the principle of efficiency and effectiveness of legal remedies.

10 R. Jhering (1915), chapters II to IV.

The increasing legal and judicial guarantees of ‘access to justice’ and of cosmopolitan rights offer individuals decentralized and de-politicized instruments to enforce IEL against illegal government restrictions and irresponsible interest group politics. The more the ‘constitutional trias’ of human rights, rule of law and democracy becomes an ‘acquis communautaire’ of national Constitutionalism and a paradigm for ‘constitutionalizing’ also multilevel governance of transnational PGs, the more citizens and courts of justice must struggle for ‘cosmopolitan re-interpretations’ of UN law and WTO law ‘in conformity with principles of justice’ and ‘human rights and fundamental freedoms for all’, as required by HRL and the customary methods of treaty interpretation (cf Preamble, Article 31 VCLT) and adjudication. For example, interpreting ‘state sovereignty’ in conformity with ‘popular’ and ‘individual sovereignty’ in terms of ‘responsible sovereignty’ - focusing on the universal obligations of all UN member states to respect, protect and fulfill human rights – justifies limiting the Westphalian paradigm of ‘intergovernmental rule by law’ by a paradigm of rights-based ‘cosmopolitan democracy’ beyond the state based on transnational ‘rule of law’, cosmopolitan rights and their multilevel, legal and judicial protection, with due respect for ‘constitutional pluralism’ and subsidiarity promoting diversity inside UN member states as well as in functionally limited international organizations. The more the ‘rational ignorance’ of citizens vis-à-vis the complexity of multilevel governance problems and the diversity of national democratic preferences limit the space for transnational parliamentary representation and control, the more important becomes ‘constitutionalization’ of transnational governance powers through ‘cosmopolitan constitutionalism’ protecting individual and democratic diversity in multilevel governance.

Transnational regulation of multilevel governance in international organizations without effective parliamentary control (like the Bretton Woods institutions, the ILO, the WTO) will continue to differ depending on the functionally diverse governance problems. For example, the regulation of ‘market failures’ through competition, environmental, social and consumer protection laws and policies may be guided more by economic theories (e.g. on ‘internalizing external effects’) than by human rights considerations. The legal ranking of trade policy instruments in GATT/WTO law is influenced by economic theories that differ from those justifying regulation of monetary organizations and regional common markets. The regulation of many ‘collective action problems’ in supplying international public goods may be guided by
political ‘public choice’- and ‘public goods’-theories emphasizing the diversity of ‘production strategies’ for ‘single best effort public goods’ (like an invention), ‘weakest link public goods’ (like nuclear non-proliferation) and ‘aggregate public goods’ (like ‘rule of law’).\(^{12}\)

In a globally interdependent world, democratic self-government risks remaining an illusion unless treaties ratified by national parliaments are not respected. Yet, transnational ‘rule of law’ differs from ‘rule by law’ and must be promoted by recognizing, ‘balancing’ and reconciling competing rights and constitutional claims on the basis of common constitutional principles (like guarantees of human rights and popular self-determination in UN law), with due respect for legitimately diverse interpretations in conformity with different national constitutional traditions and democratic preferences. As intergovernmental rules often unduly restrict individual rights, transnational ‘rule of law’ – as a constitutional, jurisdictional and judicial restraint protecting equal individual rights against abuses of ‘rule by law’ – may require ‘struggles for justice’ as illustrated by the citizen-driven jurisprudence of European courts, for example in the Kadi-judgments of the ECJ refusing application of UN Security Council sanctions violating human rights.\(^{13}\) In contrast to power-oriented ‘Westphalian diplomacy’ focusing on foreign policy discretion by government executives without legal and judicial accountability vis-à-vis citizens (e.g. for welfare-reducing trade protectionism, inadequate financial regulation), democratic self-government and the ‘subsidiarity principle’ call for legal empowerment of citizens and decentralized government ‘as openly as possible and as closely as possible to the citizens’ (Article 1 TEU). If, as claimed by most economists in conformity with Rawls’ *Theory of justice*, the poverty in most LDCs is unnecessary and due to inadequate constitutional restraints of welfare-reducing abuses of public and private power\(^{14}\), civil society and parliaments must struggle for stronger cosmopolitan


\(^{13}\) See joined cases C-402/05P and C-415/05 P, Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the European Communities (judgment of 3 September 2008, ECR 2008 I-6351), para, 284: ‘It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00, Schmidtberger [2003] ECR I-5659, paragraph 73 and case-law cited).’ For an explanation of the importance of ‘human rights coherence’ and respect for legitimate ‘constitutional pluralism’ for the interpretation, legitimacy and effectiveness of IEL see: Petersmann (2012), chapters II to IV.

\(^{14}\) Cf. J. Rawls (1999), at 37-38, 106-120 (‘the crucial element in how a country fares is its political culture – its members’ political and civic virtues – and not the level of its resources’, at 117). For instance, China and India – whose trade liberalization since the 1990s has helped to lift hundreds of millions out of poverty – could have avoided the impoverishment of many of their citizens if they had complied with GATT rules since the GATT membership of China and India in 1948.

rights and constitutional restraints of multilevel economic and environmental governance in compliance with international treaties ratified by parliaments.

European integration confirms that overcoming discriminatory ‘legal nationalism’ requires ‘multilevel guardians of PGs’ based on cosmopolitan rights of citizens, independent institutions (like the EU Commission) with rights to initiate rule-making and promote ‘deliberative democracy’, multilevel judicial protection of transnational rule of law, and accountability of governments for violations of internationally agreed rules. The transformation of GATT 1947 into the rules-based WTO trading system with compulsory, national and international jurisdiction for the peaceful settlement of disputes and judicial protection of rule of law was achieved by ‘intergovernmental leadership’ by constitutional democracies (e.g. insisting on the compulsory WTO dispute settlement system and on terminating GATT 1947). The ‘governance failures’ in concluding the ‘Development Round’ negotiations in the WTO illustrate the need for additional, legal and cosmopolitan governance reforms of the WTO legal system, for instance by promoting leadership based on an enlarged mandate of the WTO Director-General, creation of a new WTO Executive Committee, regular review of the WTO legal and dispute settlement systems by a WTO Legal Committee, institutionalizing the inter-parliamentary cooperation inside the WTO, and introducing more flexibility for ‘plurilateral trade agreements’ among WTO members. Just as international investment law has succeeded in depoliticizing investment disputes (eg in the International Court of Justice) by offering non-governmental actors access to investor-state arbitration, many international trade disputes in the WTO could be avoided and decentralized by empowering citizens through cosmopolitan rights to challenge arbitrary violations of WTO obligations and of transnational rule of law in domestic courts.

5. Constitutional pluralism as ‘overlapping consensus’ for piecemeal reforms

There are many diverse conceptions of ‘cosmopolitan rights’ and legal duties vis-à-vis foreigners, for instance depending on whether national boundaries are considered to have moral significance (eg in terms of ‘democratic responsibility’ of a people for its own welfare). ‘Cosmopolitan constitutionalism’ must respect this legitimate reality of ‘constitutional pluralism’ by searching only for an ‘overlapping consensus’ (J.Rawls) among individuals,

people and governments with often conflicting conceptions of a good life and of social justice. Yet, as securing human rights in multilevel governance of PGs is ‘a matter of justice’ rather than of charity or foreign policy discretion of the rulers, citizens and people will continue to struggle (eg in the ‘Arab spring’) for ‘constitutionalizing Westphalian power politics’ and insist also on stronger constitutional and democratic accountability of foreign policy powers and intergovernmental rule-making, notably in terms of ‘principles of justice’ and ‘human rights and fundamental freedoms for all’ as required by the customary rules of treaty interpretation and adjudication. Realizing this ‘democratic responsibility’ for ‘cosmopolitan democracy’ is impeded by the ‘rational ignorance’ of many citizens vis-à-vis the complexity of multiple governance problems:

- Which powers of initiative, rule-making, rule-application, adjudication and rule-enforcement should be transferred to higher governance levels?

- Should the delegated powers be of an exclusive nature (e.g. for international adjudication of disputes among states) or concurrent powers (e.g. for clarification and enforcement of rules) with due regard to the ‘principle of subsidiarity’, i.e. that governance powers should be exercised ‘as closely as possible to the citizens’ (cf. Article 1 TEU)?

- Does the economic theory of ‘separation of policy instruments’ justify the separate mandates of UN Specialized Agencies? How should the coherence and cooperation between monetary, trade, development and environmental agencies be strengthened in order to promote synergies and reduce collective action problems?

- To what extent should membership of international economic and environmental organizations go beyond governments and provide for rights and duties also of nongovernmental and parliamentary institutions and civil society in order to institutionalize ‘cosmopolitan public reason’ and ‘participative parity’ in deliberations so as to promote ‘transformative decisions’ on competing claims of just distribution? How can the different operational logics of markets (e.g. their ‘power of exit’) and organizations (e.g. their communitarian loyalties) be reconciled in order to promote ‘just responses’ to global problems?

Answers to such questions may differ depending on the policy area concerned. For instance, multilateral negotiations in the UN and WTO could be enhanced by granting the UN Secretary-General and WTO Director-General more ‘powers of initiative’. Synergies between

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15 Cf. Petersmann (2012), chapter VI.

**In:** NUNES, Adriano Peclar; SIQUEIRA, Julio Pinheiro Faro Homem de (ed.). Miscelânea sobre a integração europeia. *Panóptica*, vol. 10, n. 1, pp. 74-91, jan./jun. 2015.
regional and global PGs could be promoted by stronger incentives for using regional agreements (e.g. on free trade areas, environmental regulation) as ‘building blocks’ for global PGs and for connecting multilevel ‘courts of justice’ in their joint task of protecting human rights and rule of law. However, the differences between the compulsory jurisdiction of WTO dispute settlement bodies and the ‘compliance procedures’ of multilateral environmental agreements (e.g. focusing more on fact-finding, mediation, financial assistance and capacity-building) illustrate that international dispute settlement procedures must be tailored to the specific regulatory problems. For instance, whereas multilevel rule-making may be most effective if based on internationally agreed minimum standards, multilevel administration and rule-enforcement are often more effective and more democratically acceptable at decentralized, national or private levels rather than international levels. Examples include

- the ‘global corporate economy’ governed by private law structures;
- the decentralized enforcement of European economic law by citizens empowered by effective legal and judicial remedies in national courts;
- the governance of the Internet based on US corporate law, administrative law and intergovernmental coordination; or
- the use of the US Alien Torts Claims Act for holding multinational corporations legally accountable for abuses of workers’ rights in foreign jurisdictions.\(^\text{16}\)

The effectiveness and legitimacy of multilevel governance depend on bottom-up support by citizens and parliaments as well as on legal protection of the overall coherence of multilevel governance. As UN law offers only few effective safeguards of cosmopolitan rights and responsibilities (eg under international criminal law as protected by national and international courts), empowerment of individuals and transnational protection of PGs may be promoted more effectively by multilevel protection of cosmopolitan rights and judicial remedies in IEL, possibly following the example of protection of cosmopolitan rights and judicial remedies in European economic law, international investment treaties, the WTO Protocol on the Accession of China, and regional human rights treaties. IEL - eg the US Reciprocal Trade Agreements Act of 1934 delegating limited powers for negotiating reciprocal trade liberalization agreements subject to congressional ‘fast track approval’ - offers multiple lessons for regulating the ‘collective action problems’ in supplying transnational PGs through ‘transformative strategies’

\(^{16}\) For case studies of these diverse forms of multilevel governance see: C.Joerges/ E.U.Petersmann (2006).

limiting ‘constitutional failures’ of ‘constitutional nationalism’ and of related international law conceptions. This contribution has argued that human rights and globalization require cosmopolitan ‘revolutions in legal thinking’ that most constitutional lawyers, international lawyers and diplomats resist even in citizen-driven areas of transnational cooperation like IEL. ‘Cosmopolitan constitutionalism’ offers the most convincing framework for the biggest policy challenge in the 21st century, ie constituting, limiting, regulating and justifying multilevel governance of transnational ‘aggregate PGs’ in order to protect the human right to an international order enabling fulfillment of the universal human rights obligations of all states (cf. Article 28 UDHR). As diplomats and other interest groups often oppose cosmopolitan ‘re-interpretations’ of ‘Westphalian international law’ (eg in order to limit their legal, judicial and democratic accountability vis-à-vis citizens), political pragmatism suggests to acknowledge ‘constitutional functions’ and ‘multilevel constitutional restraints’ of international legal rules even if governments and judges do not (yet) acknowledge the cosmopolitan dimensions of ‘multilevel constitutionalism’ (eg of WTO guarantees of multilevel judicial remedies). For instance, WTO diplomats and lawyers may find it easier to construe the WTO guarantees of judicial remedies at national and international levels (eg in Articles X, XXIII GATT) in mutually coherent ways on the basis of the ‘consistent interpretation’ requirements of national and international legal systems than on grounds of human rights like access to justice (as recognized in Article 47 EU Charter of Fundamental Rights). Likewise, linking the ‘constitutional functions’ of IEL to domestic constitutional guarantees, and adjusting domestic constitutionalism to the ‘collective action problems’ of multilevel governance of ‘aggregate PGs’ (eg by granting ‘fast-track legislation’ for parliamentary approval of international ‘public goods agreements’), can promote ‘public reason’ and limit ‘constitutional failures’ even if many governments do not (yet) recognize the cosmopolitan dimensions of UN law and IEL. In the absence of legal hierarchies among functionally limited treaty regimes, reducing ‘legal fragmentation’ and promoting rule of law for the benefit of citizens requires legal and judicial ‘balancing’ of the respective treaty principles through more inclusive, democratic and dispute settlement procedures.

As governments often find it easier to acknowledge transnational individual rights and remedies on the basis of principles of ‘good governance’ and ‘global administrative law’ than on the basis of ‘cosmopolitan constitutional law’, explaining ‘multilevel constitutionalism’ by
the need for a coherent ‘multilevel constitutional house’ (President Gorbatev, T.Cottier) may be easier to understand for many citizens than ‘cosmopolitan constitutionalism’. This is particularly true in the current economic and social crises in view of the political disagreement among citizens and national parliaments about whether and to what extent constitutional and governance failures abroad (eg due to corruption in tax and financial regulations in Greece) justify financial redistribution on grounds of cosmopolitan rights from ‘law-complying’ Euro countries (often with on average poorer families) to Euro members that have never complied with the fiscal and debt disciplines prescribed by EU law (cf Article 126 TFEU). As long as governments and courts (including the CJEU) interpret and apply UN law and also WTO guarantees of freedom, non-discrimination and rule of law as ‘Westphalian law’ (eg by granting the EU institutions ‘freedom of maneuver’ to restrict freedom of trade in manifest violation of WTO obligations) without protecting cosmopolitan rights of adversely affected citizens (eg their rights of access to justice and rule of law), ‘multilevel constitutionalism’ is a more realistic description of the ongoing ‘struggles for justice’ challenging Westphalian power politics than the normative ideal of ‘cosmopolitan constitutionalism’.17 Similarly, while European HRL has evolved into an effective ‘multilevel cosmopolitan law’, UN HRL is more correctly described in terms of ‘multilevel constitutionalism’ as long as it fails to effectively protect cosmopolitan rights and judicial remedies for the benefit of citizens. Also the legal design and collective supply of some international ‘weakest link PGs’ (like nuclear non-proliferation) will continue to be dominated by ‘intergovernmental approaches’ rather than by ‘cosmopolitan law’. Such policy constraints challenge neither the cosmopolitan ideal of constitutionally limited self-government among free and equal citizens nor the resultant requirement of establishing constitutionally legitimate authority (eg for more effective regulation of nuclear non-proliferation). Yet, in order to pragmatically promote ‘transitional justice’, ‘multilevel constitutionalism’ limiting abuses of power may continue to be a more realistic ‘foreign policy paradigm’ allowing ‘cosmopolitan interpretations’ by constitutional democracies as well as participation by non-democratic governments interpreting their claims to ‘sovereign equality of states’ in statist terms rather than in terms of universal cosmopolitan rights. As long as the procedures for negotiating IEL remain dominated by power politics without protecting


cosmopolitan rights and ‘justice as fairness’, courts of justice should take more seriously their constitutional duties of protecting cosmopolitan rights of citizens against intergovernmental power politics.\textsuperscript{18} The bailout agreements for Greece and Cyprus illustrate the limits of ‘cosmopolitan justice’ vis-à-vis governments and citizens failing their ‘cosmopolitan duties’ to prevent ‘governance failures’ at home (like persistent violations of EU fiscal, debt and financial disciplines) with harmful externalities on citizens and governments in other EU member states.-

6. Literature

M.Broneckers/V.Hauspie/R.Quick (eds), \textit{Liber Amicorum for J. Bourgeois} (Cheltenham: Elgar, 2011)
R. Jhering, \textit{The Struggle for Law} (Chicago: Callaghan, 1915)

\textsuperscript{18} See the numerous case-studies of judicial promotion of teleological ‘reformative justice’ rather than merely textual ‘conservative justice’ in Petersmann (2012), chapter VIII.