Long-term Constitutional Law for Global Public Goods

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I. From national to multilevel constitutionalism?

Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, 'mixed government'), of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*), and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) are now recognized in most national Constitutions as necessary for protecting public goods (PGs). The 2030 UN Sustainable Development Agenda recommends constitutional principles also for UN governance of PGs like the universally agreed 17 sustainable development goals (SDGs). National Constitutions alone cannot protect citizens against external human disasters like global health pandemics, foreign military aggression, economic and environmental crises. 'Constitutional implementation deficits' in many countries entail 'SDG implementation deficits' like disregard for human rights and climate change.

Globalization transforms *national* into *transnational PGs*; it renders national Constitutions incomplete and requires complementary, multilevel constitutionalism protecting transnational governance of PGs. Path-dependent 'constitutionalism 1.0' based on (1) national Constitutions, (2) democratic legislation, (3) administrative and (4) judicial protection of rule-of-law must be extended to international law and institutions for legally constituting *transnational PGs*, which no single state can protect without rules-based international cooperation. Maintaining the output-legitimacy of functionally limited 'treaty constitutions 2.0' among states constituting and regulating such multilevel governance also requires 'cosmopolitan constitutionalism 3.0' based on multilevel, institutional protection of human rights (as inside EU law), transnational rule-of-law and multilevel implementing regulations, with due respect for 'constitutional pluralism'.

Regulating private goods, PGs, 'club goods' with limited membership, exhaustible common pool resources and 'global commons' (like outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, cultural heritage) must respond to diverse collective action problems. Hence, the 15 UN Specialized Agencies provide for diverse 'treaty constitutions' for multilevel governance of specific PGs. 'Open access regimes' for the 'global commons' share common principles (like non-appropriation, common management, peaceful use, openness to scientific research, benefit- and burden-sharing, protection of the environment); yet, their regulation necessitates particular treaty rules, institutions (like the compulsory WTO dispute settlement system) and safeguards of human rights and related principles of justice (like tri-partite representation of employers, employees and governments in the ILO). Evolutionary constitutionalism and functionally limited 'treaty constitutions' constituting, regulating and justifying multilevel governance of specific PGs interact dynamically.

Constitutional nationalism (eg in Russia) can undermine UN/WTO governance of PGs like transnational rule-of-law. Multilevel constitutionalism requires linking 'PGs treaties' to domestic implementing legislation, administration and judicial remedies empowering citizens. By demonstrating to citizens the 'constitutional functions' of UN/WTO law for overcoming collective action problems in multilevel governance of PGs, multilevel constitutionalism can limit 'bounded rationality' and enhance input-legitimacy for – and overall coherence of – multilevel governance of transnational PGs. Transforming path-dependent 'four-stage sequences' of constitutionalism (based on national Constitutions, implementing legislation, administration and adjudication protecting rule-of-

law) into multilevel constitutionalism (based on complementary treaties, multilevel governance institutions, implementing regulations, cosmopolitan rights) must remain democratic and legally coherent in order to be supported by citizens.

II. Constitutionalism as democratic struggle: environmental rights?

In Europe, the demands by EU citizens for regional and global PGs transformed *national 4-stage constitutionalism* into *multilevel constitutionalism* by 'constitutionalizing' (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules (like legal primacy, direct effects and direct applicability by citizens) and (8) domestic implementation of EU law inside member states protecting PGs across national borders. The emergence of 'illiberal' EU member states (eg in Hungary and Poland) illustrates why the 'normative pull' of human rights depends on their 'normative push', ie their effective legal implementation through constitutional law, democratic legislation, administration and adjudication, international treaties, multilevel governance institutions, 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and its domestic, legal implementation. The limitation of EU membership to constitutional democracies – and the democratic, regulatory and judicial EU institutions – promoted citizen-driven enforcement of EU law through multilevel, judicial protection of constitutional guarantees of civil, political, economic and social rights and common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession) across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the European community. The Lisbon Treaty's commitment (eg in Arts 3, 21 TEU) to protecting human rights and rule-of-law also in the EU's external relations contributed to worldwide recognition of multilevel judicial protection of rule-of-law beyond the EU in trade and investment agreements (eg through compulsory WTO and investment adjudication).

European economic law became embedded and restrained by multilevel human and constitutional rights of EU citizens protected by multilevel democratic and judicial institutions and treaty systems, like the EU Charter of Fundamental Rights (EUCFR), the European Convention on Human Rights (ECHR), the EU's common market constitution, its partial extension to EFTA countries, the EU's incomplete monetary constitution and functionally limited 'foreign policy constitution'.[1] The institutional 'checks and balances' constraining 'executive emergency governance' inside the EU during economic, financial, public health and environmental crises confirmed how human rights can become more effective if citizens can invoke and enforce precise, unconditional, international rules inside states and challenge power politics (eg by judicial remedies in national and European courts). The emergence of the 'anthropocene' caused by systemic human transgressions of laws of nature provoking climate change led to increasing calls for 'environmental constitutionalism'.

Articles 2 and 8 ECHR prompted ever more courts to protect human rights to life and family life against harmful environmental pollution and climate change. Some European states adjusted their national Constitutions by recognizing environmental rights or constitutional duties to protect the environment (as in Article 20a German Basic Law). According to Article 37 EUCFR, a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation – notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050 – offered leadership for implementing the Paris Agreement on climate change mitigation.

Climate litigation increasingly acknowledges greenhouse gas (GHG) reduction obligations of governments by invoking multilevel GHG reduction commit-

[1] Cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart 2017).

ments recognized in UN law (like the 2015 Paris Agreement on climate change mitigation) and domestic politics.[2] Rights to the protection of the environment are now recognized in the laws of more than 150 states, regional treaties, and by the UN Human Rights Council (HRC).[3] Environmental rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests. In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights and constitutional principles. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda* confirmed that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that human rights and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens in order to enforce positive obligations to take appropriate measures mitigating climate change. In the USA, by contrast, similar constitutional and human rights tend to be denied by US courts, for instance on grounds of judicial deference towards 'political questions' left open in the US Constitution.

III. Constitutionalizing 'implementation deficits' through 'militant democracies'

Transforming *national* into *multilevel constitutionalism* remains resisted by authoritarian rulers defending their self-interests in discretionary powers without legal accountability towards citizens. The defense of democracy in Ukraine against Russia's illegal aggression illustrates how defending rule-of-law requires 'militant democracies'; most UN member states refuse assisting Ukraine and sanctioning Russia for its violations of the UN Charter. Similarly, many other human disasters – like health, environmental, economic, food and migration crises – can be explained in terms of unwillingness of governments to protect and implement UN human rights law and related 'constitutional principles' like democratic governance and rule-of-law. The rules-based order necessary for realizing the SDGs requires antagonistic, perennial struggles for justice challenging abuses of power and struggling for collective protection of the SDGs. Without such a 'Sisyphus morality' and stronger leadership from constitutional democracies for improving multilevel governance of global PGs, realization of the SDGs and protecting 'human rights of all' risk remaining a *utopia*.

[2] Cf E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), chapter 9.

[3] See Resolution 48/13 adopted by the HRC on 8 October 2021, recognizing that having a clean, healthy and sustainable environment is a human right.

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