

RESEARCH ARTICLE

# The paradox of global constitutionalism: Between sectoral integration and legitimacy

Gürkan Çapar 

Law Faculty, Scuola Superiore Sant'Anna, Via G. Moruzzi, 1 – Località San Cataldo – Area CNR, Pisa, Italy  
Email: [gurkan.capar@santannapisa.it](mailto:gurkan.capar@santannapisa.it)

## Abstract

The liberal international legal order faces a legitimacy crisis today that becomes visible with the recent anti-internationalist turn, the rise of populism and the recent Russian invasion of Ukraine. Either its authority or legitimacy has been tested many times over the last three decades. The article argues that this anti-internationalist trend may be read as a reaction against the neoliberal form taken by international law, not least over the last three decades. In uncovering the intricacies of international law's legitimacy crisis, the article uncovers the paradox of global constitutionalism: that its need to adopt a sectoral form of integration may cause a legitimacy gap/deficit because international authorities, resting their legitimacy primarily on instrumental grounds, may face problems in compensating for the legitimacy deficit caused by the erosion of domestic sovereignty and extending their legitimacy to non-instrumental grounds. This paradox has one necessary structural and two contingent content-related implications for domestic democracies: (1) it necessarily narrows down the regulatory space of nation-states; and this may in turn (2) impair democratic stability and solidarity, and (3) provide a fertile ground for populism. Drawing on Raz's service conception, the article focuses on the interaction between international and domestic authorities and highlights the problematic aspects of the neoliberal constitutionalization of international law.

**Keywords:** Anti-internationalism; global constitutionalism; international law; legitimacy; neoliberalism; Joseph Raz

## 1. The legitimacy crisis of the liberal international legal order

The liberal international legal order is said to face a crisis today,<sup>1</sup> although its underlying reasons remain disputed and undecided. Some base their explanations on geopolitical developments by emphasizing the recent rise of the BRICS economies (Brazil, Russia, India, China and South Africa) and the concomitant decline of the US hegemony. For

<sup>1</sup>Among many studies, see GJ Ikenberry, 'The End of Liberal International Order?' (2018) 94(1) *International Affairs* 7; H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019); and GO Gök and H Mehmetçik (eds), *The Crises of Legitimacy in Global Governance* (Routledge, 2022).

them, the crisis is transitional and temporary. For when a new equilibrium is found, it is going to fade away.<sup>2</sup> Rajput, for instance, takes it as a positive step in the legitimization of international law. She emphasizes how the rise of the BRICS may pluralize the current unipolar international legal order and morph it into a plural and participatory one.<sup>3</sup> Ikenberry does not, however, associate the crisis of international law so much with the rise of the BRICS as with international law's marriage with neoliberalism. He therefore proposes focusing more on the underlying structural reasons than the actors, and insists on reading the anti-internationalist turn as a reaction to the international law's previous neoliberal twist precipitated in the last three decades.<sup>4</sup> The latter explanation seems promising when read together with Nancy Fraser's remarks: 'The populism of our time is a protest against neoliberalism – in the first instance, against neoliberalism's political economy.'<sup>5</sup> When populism is deemed an 'illiberal democratic response to undemocratic liberalism',<sup>6</sup> triggered by neoliberalism,<sup>7</sup> the connection between neoliberalism, populism and the legitimacy crisis of international law becomes clear. Accordingly, I think Russia's invasion of Ukraine has brought to the fore the legitimacy crisis of international law; this became particularly visible in a populist resurgence that makes no distinction between democratic and non-democratic countries and threatens the stability of both domestic and international legal orders.<sup>8</sup>

While neoliberalism has planted the seed of ongoing anti-internationalist and populist trend, its root dates to the period when the United States assumed the role of a hegemon. Not only with words (regulations) but also deeds, the normative foundation of the post-war liberal international legal order has been undermined over the last three decades.<sup>9</sup> The primacy of human rights is forgotten when global migration, security or health crises come to the surface or the prohibition on the use of force is disregarded when the hegemon's interest is at stake. The prohibition of the use of force, the foundational block of the post-war liberal international legal order, is a case in point. The United States weakened this norm when it invaded Iraq and consistently used drone strikes on numerous occasions in the aftermath of 9/11. And it is no surprise that those events did render the norm on the prohibition of the use of force 'not merely vague or ambiguous but effectively indeterminate' and unbreakable.<sup>10</sup> In other words, the norm was on the

<sup>2</sup>Ikenberry (n 1) 18; A Rajput, 'The BRICS as "Rising Powers" and the Development of International Law', in H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019) 105–24.

<sup>3</sup>Rajput (n 2).

<sup>4</sup>Ikenberry (n 1) 22–23.

<sup>5</sup>R Kumar, 'Populism, Neoliberalism and the Contemporary World: Reflections for an Alternative Politics with Nancy Fraser' (2019) 5(2) *Society and Culture in South Asia* 340.

<sup>6</sup>C Mudde and CR Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017) 82.

<sup>7</sup>N Lacey, 'Populism and the Rule of Law', in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge: Cambridge University Press, 2021) 463.

<sup>8</sup>Kumar (n 5) 346.

<sup>9</sup>H Krieger and G Nolte, 'Introduction', in H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019) 7–18; EA Posner, 'Liberal Internationalism and the Populist Backlash' (2019) 49 *Arizona State Law Journal* 795, 808–12.

<sup>10</sup>R Brooks, 'Drones and the International Rule of Law' (2014) 28(1) *Ethics & International Affairs* 83, 98. Even though I do not agree with Thomas Franck on his subjective account of legitimacy, I think he has a point in flagging the negative correlation between indeterminacy and legitimacy by linking it to the uniform application of a rule and effectiveness of an authority. He notes that 'noncompliant behavior, if tolerated, may render the content of that rule so indeterminate as to make it easy and tempting to be a scofflaw'. TM Franck,

verge of losing much of its function as a signpost guiding states' behaviour when Russia invaded Ukraine.<sup>11</sup> So the real threat to international law is coming not from autocratic states, but rather hegemonic states, as prominent international lawyers suggested many years ago.<sup>12</sup>

There is no doubt that Russia's violation of a norm (the prohibition on the use of force) that lays the foundation of the post-war liberal international legal order is neither lawful nor legitimate.<sup>13</sup> Nevertheless, the lens through which the Russians invasion of Ukraine needs to be observed and interpreted should not be confined to a dichotomy between democracy and autocracy.<sup>14</sup> Hence, I suggest reading it as part of a general anti-internationalist trend that impugns the legitimacy of international law.<sup>15</sup> First, I suspect an actor-centric approach that concentrates on the alleged connection between Russia's authoritarian anti-liberal form of governance and its outright breach of international law may go beyond labouring the obvious by putting the blame on Russia. Further, situating the discussion within a democracy–autocracy dichotomy risks concealing how democratic states contribute to the destabilization of the international legal order. The United Kingdom, for instance, has frowned upon supranationalism and internationalism on many occasions by leaving the European Union (EU) and resisting the legitimate authority of the European Court of Human Rights (ECtHR).<sup>16</sup> Second, I think this actor-centric approach runs the risk of masking the structural problems besetting the international legal order, particularly the problems posed by the neoliberalization of international law. In contrast, a broader perspective that approaches the Russian crisis within the framework of the legitimacy of international law bears the potential to

---

'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 93; for the linkage between legitimacy and determinacy see 94–99.

<sup>11</sup>Krisch castigates European states for their unscrupulous use of the norm, N Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' *EJIL: Talk*, available from <<https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis>>. It is also argued that 'unilateral uses of force are becoming the rule rather than the exception' R Geiß and N Melzer, 'Introduction', in R Geiß and N Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford: Oxford University Press, 2021) 10. Cf. AS Weiner, 'Authoritarian International Law, the Use of Force, and Intervention' (2020) 114(2) *American Journal of International Law* 220.

<sup>12</sup>See, for example, A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19(3) *Leiden Journal of International Law* 579, 604–5; and for the role of global leadership in the legitimacy of global governance due to its essentially decentralized enforcement mechanism R Falk, 'Legitimacy, crises of global governance, and international relations, in GO Gök and H Mehmetçik (n 1) at 19–36.

<sup>13</sup>AA Haque, 'An Unlawful War' (2022) 116 *American Journal of International Law* 155.

<sup>14</sup>For a similar argument in the EU context, see P Blokker, 'Populist Understandings of the Law: A Conservative Backlash?' (2020) 13(3) *Partecipazione & Conflitto* 1433. Cf. W Sandholtz, 'Resurgent Authoritarianism and the International Rule of Law' (2019) *KFG Working Paper Series No. 38*, available from <[https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/43589/file/kfg\\_wp38.pdf](https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/43589/file/kfg_wp38.pdf)>; T Ginsburg, 'Authoritarian International Law?' (2020) 114(2) *American Journal of International Law* 221. See <<https://worldjusticeproject.org/news/russia-ukraine-and-dangers-authoritarian-international-law>> for Ginsburg's latest comments about the Russia's invasion of Ukraine.

<sup>15</sup>H Krieger, 'Populist Governments and International Law' (2019) 30(3) *European Journal of International Law* 971.

<sup>16</sup>A Zimmermann and N Weiß, 'International Law in Times of Anti-Globalism and Populism: Challenges Ahead – Comment on Jan Wouters', in H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019) 272–73.

highlight its structural problems.<sup>17</sup> For the crisis of international law goes deeper than a simple autocracy–democracy dichotomy and invites us to discover its underlying structural causes.<sup>18</sup>

To uncover the structural causes fuelling the populism-induced reactions against liberal internationalism, let us benefit from Dani Rodrik's following trilemma: 'We cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three.'<sup>19</sup> There is no need to delve into the details of his argument to grasp the essence of his message: globalization is not always a good thing and does not always bring prosperity. Rodrik's trilemma makes me question whether global constitutionalism – legalization of international law – shares a similar fate with globalization. Is it virtually the case that global constitutionalism, as a good in itself, always contributes to the spread of liberal democracy? It is hard to provide a positive answer to this question. Yet it is equally hard to reveal the shortcomings of global constitutionalism and how it negatively affects domestic legal orders. Luckily, how globalization harms domestic legal orders (DLOs), weakens democracy and fuels populism is explored mainly by political scientists<sup>20</sup> and economists.<sup>21</sup> For instance, the new constitutionalists adroitly pay attention to how financial globalization, precipitated and advanced in the wake of the Cold War, harms DLOs, narrows down their regulatory space and abates the benefits of the welfare state.<sup>22</sup> It is further shown how advanced forms of economic globalization set the stage for populism. For it puts domestic distributive policies and labour markets under strain.<sup>23</sup> Yet it remains to be explored how global constitutionalism in its current form provides a fertile ground for populism and risks harming domestic democracies.

The article aims to uncover the paradox of global constitutionalism caused by the three structural conditions in which international law is operating. First, constitutionalization of international law has no choice other than to adopt a sectoral and incremental form of integration.<sup>24</sup> I call it the necessity of sectoral constitutionalization (the SC). Second,

<sup>17</sup>For a similar approach to the health crisis caused by the COVID-19 pandemic, see L Gruszczynski et al. (eds), *The Crisis of Multilateral Legal Order: Causes, Dynamics and Consequences* (London: Routledge, 2022).

<sup>18</sup>Krieger (n 15)

<sup>19</sup>D Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (Oxford: Oxford University Press, 2011) 200.

<sup>20</sup>See, for example, C Kreuder-Sonnen and B Rittberger, 'The LIO's Growing Democracy Gap: An Endogenous Source of Polity Contestation' (2022) *Journal of International Relations and Development*, available from <<https://doi.org/10.1057/s41268-022-00275-x>>.

<sup>21</sup>D Rodrik, 'Populism and the Economics of Globalization' (2018) 1(1) *Journal of International Business Policy* 12; D Rodrik, 'Why Does Globalization Fuel Populism? Economics, Culture, and the Rise of Right-wing Populism' (2021) 13 *Annual Review of Economics* 133. For an article that highlights the tensions between the negative correlation between neoliberalism and democracy, see K Acar, 'Neoliberalism Incites but Also Restrains Revolutionary Change in the Third World: Why Articulating Multiple Struggles is necessary to Confront Structures of Domination' (2022) 19(7) *Globalizations* 1013.

<sup>22</sup>S Gill and A Cutler (eds), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014); J Griffiths and T Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (Oxford: Oxford University Press, 2022); see also R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, (Cambridge, MA: Harvard University Press, 2009); with a focus on investment regime, see D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

<sup>23</sup>Rodrik (n 21); MA Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' (2013) 14(5) *German Law Journal* 527, 535.

<sup>24</sup>Literature is abundant, couched in different terms yet pointing to the sectoral integration and fragmentation of international law beyond territorial nation-states. For three seminal studies, see P Korth and G

global constitutionalism is likely to create a legitimacy gap/deficit because international authorities rest their legitimacy primarily on instrumental grounds and have problems extending their legitimacy to non-instrumental grounds and compensating for the legitimacy deficit caused by the erosion of domestic sovereignty.<sup>25</sup> The erosion of domestic sovereignty does not go hand in hand with the construction of international authorities, which is the third factor that contributes to the maintenance of the domestic legitimacy deficit wrought by globalization.<sup>26</sup> That the speed between the constitutionalization of international law and de-constitutionalization of DLOs is not synchronized creates a paradox. For international authorities fail to plug the legitimacy deficit simply because they are not so able to engender feelings such as trust, solidarity and loyalty as their domestic counterparts. To do so, they need to transform themselves into something that they are not initially designed for by, say, partially exceeding their legitimate boundaries and base their legitimacy on non-instrumental grounds. Without adopting policies that lie beyond their initial competence, it is highly unlikely that international authorities will awaken such feelings. The EU does present a telling example of the paradox of global constitutionalism, particularly when seen against the way it dealt with the financial, sovereign debt and health crises.<sup>27</sup> The paradox of global constitutionalism has one structural and two content-related probable consequences on domestic democracies: it narrows down the regulatory space of nation-states, which may in turn impair democratic stability and solidarity and provide a fertile ground for populism. Whether the SC undermines democratic stability and fuels populism depends on the form of SC adopted, mostly determined by the content of the norms constitutionalized at the international level.

A couple of clarifications are needed before we move on to the investigation into the current form of SC adopted by international law. First, the article argues that the legitimacy of international law cannot be appraised except by reference to its impact on DLOs.<sup>28</sup> For instance, one may consider an international authority legitimate because

---

Teubner, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in MA Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012); K Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015); and T Işıkşel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016).

<sup>25</sup>Peters underscores that international law needs to base its legitimacy on new grounds following the erosion of state consent. Peters (n 12) 586–87. Habermas also highlights the need for a new model of 'institutional arrangement that can secure a democratic legitimation for new forms of governance in transnational spaces'. J. Habermas, 'Constitutionalization of International Law' (2008) 15(4) *Constellations* 444, 445.

<sup>26</sup>Ibid 580.

<sup>27</sup>MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: Oxford University Press, 2021). Habermas writes also clearly that 'the institutions of the European Union are legally founded on international treaties but they exercise decision-making competences that intervene so deeply in the social relations of the member states that they can no longer be legitimized on this foundation alone'. Habermas (n 25) 445.

<sup>28</sup>Roughan stresses that how authority interacts with other authorities should be an independent condition for its legitimacy. N Roughan, 'Authorities: Conflicts, Cooperation, and Transnational Legal Theory' (Oxford: Oxford University Press, 2013), particularly Ch. 8 (Relative Authority). While elaborating and carrying on Dworkin's latest work on international law, Besson underlines the distinctive sort of legitimacy grounds international (non-political) and domestic (political) authorities are capable of enjoying. S Besson, 'Sovereign States and their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law' (2020) 2 *Jus Cogens* 2, 111.

it meets a certain standard of legitimacy, such as accountability, consent or some objective service.<sup>29</sup> The article, however, strives to raise a different point by arguing that even when those international authorities meet a certain standard of legitimacy, they may still be deemed illegitimate simply because of how they interact with domestic authorities.<sup>30</sup>

Second, this article avoids engaging in a detailed analysis of each legal regime that belongs to international law and investigating their distinctive impacts on domestic legal orders. This is so because it requires a much more detailed analysis that cannot be addressed in an article.<sup>31</sup> Further, this sort of an approach may fail to take into account the connections between different legal regimes and risk missing the broader picture. In other words, international authorities are interacting with each other horizontally, in addition to their vertical interaction with domestic authorities. For this reason, the article is interested less in appraising whether an international authority is legitimate when it is interacting with domestic authorities than in exploring the legitimacy challenges that arise from the cumulative effect of the SC of international law on domestic legal orders. Its purpose is therefore limited to paying attention to the connection between international and domestic legal orders, underscoring how the former impacts the legitimacy conditions in which the latter is embedded, and thereby addressing the question of whether the constitutionalization of international law, or global constitutionalism in its current form infused with a neoliberal logic, is legitimate. By raising this question, it aspires to unveil the structural conditions that inform the current crisis of international law and to approach it from a broader perspective that goes beyond the simple dichotomy between democracy and autocracy – although it is worth stressing that its purpose is not to justify the clear breach of international law by those autocratic and populist leaders.

Third, the paradox of global constitutionalism caused by the structural conditions is not a rule of nature that is impossible to overcome.<sup>32</sup> Even though the SC narrows down domestic regulatory space, the question of whether it is legitimate or not hinges on the form of SC adopted. Put simply, the legitimacy question depends on two different factors: (1) whether the SC of international law creates a legitimacy deficit; and, if so, (2) whether international authorities can manage to fill it by awakening feelings like trust and loyalty. Imagine, for instance, that under the existential threat of climate change, states agree on

<sup>29</sup>Marmor argues, for example, that authority should be accountable to its subjects. A Marmor, *Authority, Legitimacy & Accountability* (1 March 2023) Cornell Legal Studies Research Paper No. 23-06, available from <<http://doi.org/10.2139/ssrn.4374357>>.

<sup>30</sup>I take domestic authorities to be the authority of a legal system and use interchangeably with the term domestic legal orders.

<sup>31</sup>See, for example, A Føllesdal, JK Schaffer and G Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2013), Vol. 4 and G Çapar, '(II) Legitimacy of International Intellectual Property Regime?' (2023) *Leiden Journal of International Law* 1–27. doi:10.1017/S0922156523000146. Further, the approach I adopted here borders on what Føllesdal calls the legitimacy of “global basic structure” whose “primary unit of analysis is this multilevel legal order as a whole, rather than international or regional law and institutions in isolation from domestic legal systems” A Føllesdal, ‘Constitutionalization, Not Democratization’ in N Grosmann et al (eds.) *Legitimacy and International Courts* 311 (Cambridge University Press, 2018).

<sup>32</sup>In the section titled ‘The Ideology of the Sectoral Constitutionalization: New Constitutionalism’, I will explain how the previous form of SC, which is called embedded liberalism, was much more capable of solving the legitimacy problems posed by the constitutionalization of international law. I am grateful to an anonymous reviewer who pushed me to further draw a distinction between the problems posed by the SC itself and the additional problems caused by its marriage with neoliberalism. It had a huge impact on my line of argument.

creating an international environmental authority and entrust it with the governing of climate change. Further assume that it acquires the status of a dominant regime such that international law is coloured with norms that accord almost absolute primacy to environmental norms over others. Let us call it the Anthropocene SC.<sup>33</sup> Even though one may consider the Anthropocene SC legitimate on the ground that it pursues legitimate and progressive aims, I think we must still raise the question of whether it creates a legitimacy deficit by observing its impact on domestic legal orders.<sup>34</sup> Assume further that the international environmental authority is filled with scientists who are authorized to decide only according to the scientific evidence adduced by climate change scientists who are accountable to nobody. In this case, the international authority that operates independently from states and individuals may still theoretically be counted as legitimate if it achieves to fill the legitimacy gap by garnering the trust and support of individuals. Even though I find it quite unlikely that an international authority absent necessary accountability mechanisms can cultivate feelings of trust and loyalty, I still leave the door open to the possibility that those feelings could flourish under the extreme conditions in which individuals find themselves.

Fourth, because the legitimacy deficit is argued to derive from the fact that international authorities are, at least for now, unfit for generating feelings such as trust and solidarity, a brief explanation about the conception of trust used in this article is required. The literature on trust takes an authority to be trustworthy when it is believed to be competent and benevolent in the sense that it will pursue the interest of its subjects.<sup>35</sup> The article, however, uses trust in a quite idiosyncratic sense, which requires a political community in which individuals may define themselves with their own political authority and consider it trustworthy when it operates in a morally decent way. I call it the political conception of trust.<sup>36</sup> I will argue that, unlike their international counterparts, domestic authorities are capable of grounding their legitimacy on both instrumental and non-instrumental considerations, which means they can generate feelings such as trust and solidarity when they are functioning well and operating in a morally decent way. The SC therefore creates a legitimacy deficit because: (1) international authorities are rising in number and competence, mostly absent a background political community to awaken trust; and (2) they began to undermine the very conditions that cultivate trust and solidarity in domestic political communities. The first condition applies to any form the SC may take, while the second condition results from the current form it takes after its marriage with the neoliberal logic. This is why the question of whether international authorities manage to fill the legitimacy deficit depends, among other things, on the content of norms that acquire de facto constitutional status. On this score, the article relies mostly on the literature on new constitutionalism in detecting the dominant legal regimes and their norms that give the current international law its distinctive colour.

<sup>33</sup>I am grateful to the anonymous reviewer who raises a similar argument and challenge my claims about the paradox of global constitutionalism. Their criticism led me to make further clarifications about the paradox of global constitutionalism and draw a distinction between the SC and its neoliberal form. For a similar suggestion, see J Tully et al., 'Introducing Global Integral Constitutionalism' (2016) 5(1) *Global Constitutionalism* 1.

<sup>34</sup>I will explore the limits of SC in Parts V and VI by introducing two important constraints: (1) essential services; and (2) the authority dependency exceptions.

<sup>35</sup>For a seminal study, see R Hardin, *Trust* (Cambridge: Polity Press, 2006).

<sup>36</sup>See the section titled 'Trust as an Additional and Non-Instrumental Grounds of Legitimacy for Domestic Authorities'.

Against this backdrop, the article next provides a conceptual clarification of what I call the sectoral constitutionalization (the SC) (Part II). Then it places the emphasis on its neoliberal turn by visiting the literature on the new constitutionalism and explores how trade-related norms acquired constitutional protection at the international level (Part III). Part IV is devoted to the analysis of the SC from the perspective of normative legitimacy by using Raz's recent explanations centered around the connection between international and domestic authorities. As the main concern of the article is the way the neoliberal SC bears on domestic authorities, Parts V and VI seek to discover the reasons for granting an additional level of protection to domestic authorities, then show how the neoliberal SC puts those services unique to domestic authorities under pressure and provides a fertile ground for populism.

## II. What is sectoral constitutionalization?

Despite the growing anxieties of international lawyers over the fragmentation of international law, it keeps going with its constitutionalization even though it is a process fraught with pushbacks and various difficulties.<sup>37</sup> As it lacks neither a global legislator nor constituent power, it cannot avoid undergoing a process of sectoral constitutionalization (SC) by adopting a fragmented and piecemeal approach. The constitutionalization of international law has deprived the world of an absolute government with an 'overarching, all-encompassing authority'<sup>38</sup> as it 'erode(s) state sovereignty without replacing it'.<sup>39</sup> Hence, the circumstances in which we are living may be summarized as 'international interdependence, the weakening of national political authority, and the absence of an effective international order'.<sup>40</sup> We are in a transition period when neither states nor international institutions can have absolute sovereignty, a reality that finds its best expression in terms such as 'interlegality',<sup>41</sup> 'relative authority'<sup>42</sup> and 'limited state'.<sup>43</sup> That leads to what I term the paradox of global constitutionalism because international law is likely to weaken domestic authorities when it is in the process of constitutionalization.

Nonetheless, before moving on to the paradox of global constitutionalism and its attendant legitimacy problems, it is necessary to explain what constitutionalism or constitutionalization implies for this article. Constitutionalism in the international realm

<sup>37</sup>G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

<sup>38</sup>C MacAmlaigh, *New Constitutional Horizons: Towards a Pluralist Constitutional Theory* (Oxford: Oxford University Press, 2022) (depicting it as 'world state gap') 59. Habermas objects to thinking of the ultimate form world organization in terms of states. Habermas (n 25) 447–48.

<sup>39</sup>J Raz, 'The Future of State Sovereignty', in W Sadurski, M Savel and K Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press, 2019) 76.

<sup>40</sup>L Green, 'Globalization, Civil Disobedience, and the Rule of Law' (2006) 10, available from <<http://www.iilj.org/wp-content/uploads/2016/11/Green-Globalization-Civil-Disobedience-and-the-Rule-of-Law-2006.pdf>>.

<sup>41</sup>J Klabbbers and G Palombella (eds), *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019); see also N Krisch (ed.) *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2021).

<sup>42</sup>Roughan (n 28).

<sup>43</sup>J Raz, 'Why the State?', in N Roughan and A Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 159–61.



may come to mean different things.<sup>44</sup> First, it may refer either to a normative standard, criteria or current state of affairs.<sup>45</sup> I therefore suggest, taking a cue from Brown, reading *constitutionalization* as a descriptive enterprise that *maps* and explains the process of legalization occurring beyond nation-states.<sup>46</sup> *Global constitutionalism*, in contrast, refers to the normative enterprise concerned with *shaping* international law and aligning its constitutionalization process with a normative theory of constitutionalism.<sup>47</sup> Here, constitutionalization indicates a process, a state of becoming or more clearly marching towards an ideal state of (global) constitutionalism. If we put aside its normative foundations, constitutionalization simply adverts to a process of ‘formalization, ‘legalization’ or ‘judicialization’.<sup>48</sup> Constitutionalization may further meet two different meanings: constitutionalization of a subset of norms either *within* international law or of international law *over* domestic legal orders. We may call the first *internal* and the second *external* constitutionalization. Dunoff and Trachtman, for instance, identify constitutionalization primarily with empowering international institutions endowed with law-making powers (enabling constitutionalism) and developing some mechanisms to curb the former’s power (constraining constitutionalism).<sup>49</sup> Their understanding of constitutionalization thus falls under what I refer to as internal constitutionalization. In contrast, constitutionalization in this article stands for a process through which a set of norms gains relative hierarchical superiority over others and imposes limitations on both domestic and international authorities,<sup>50</sup> so it covers both internal and external hierarchies.

A broader reading of constitutionalization, concerned with any sort of international norm that restricts the DLOs and depreciates their regulatory autonomy, fails to discriminate between ordinary international norms and those that acquired a special constitutional status.<sup>51</sup> What the SC implies, however, is that several norms, roughly connected and converged around a regime, are, at least to some extent, immune to everyday politics.<sup>52</sup> Their constitutional status depends on their *de facto* substantive

<sup>44</sup>My focus is on international law’s constitutionalization process without much regard for how constitutional ideas migrate between domestic constitutional systems and generate a common set of constitutional principles. For an analysis from this perspective, see M Tushnet, ‘The Globalisation of Constitutional Law as a Weakly Neo-liberal Project’ (2019) 8(1) *Global Constitutionalism* 29.

<sup>45</sup>For constitutionalism’s liberal and republican traditions, see MacAmlaigh (n 38) 119–30.

<sup>46</sup>GW Brown, ‘The Constitutionalization of What?’ (2012) 1(2) *Global Constitutionalism* 201, 202, 209, 227; A Wiener, AF Lang, J Tully, MP Maduro and M Kumm, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1(1) *Global Constitutionalism* 1, 8. See also M Loughlin, ‘What is Constitutionalisation?’, in M Loughlin, JP McCormick and N Walker (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 47–69.

<sup>47</sup>For normative theories of constitutionalism, see C MacAmlaigh, ‘Harmonizing Global Constitutionalism’ (2016) 5(2) *Global Constitutionalism* 173.

<sup>48</sup>MacAmlaigh (n 38) 130–31, arguing that constitutionalism may also imply a transition from primitive and less-systematic to advanced and modern legal orders. Loughlin (n 46) 61, noting: ‘At its core, constitutionalisation presupposes legalisation; as greater swathes of public life are brought within the ambit of constitutional norms, so too are they disciplined by formal legal procedures.’

<sup>49</sup>JL Dunoff and JP Trachtman, ‘A Functional Approach to International Constitutionalism’, in JL Dunoff and JP Trachtman (eds), *Ruling the World?* (Cambridge: Cambridge University Press, 2009) 9–11.

<sup>50</sup>This is couched in different terms. Some call it robust international law. See A Buchanan and R Powell, ‘Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?’ (2008) 16(3) *Journal of Political Philosophy* 326; others name it international rule of law. See Krieger et al (n 1).

<sup>51</sup>Dunoff and Trachtman (n 49) 11–13.

<sup>52</sup>J Klabbers, ‘Constitutionalism Lite’ (2004) 1(1) *International Organizations Law Review* 31.

power, to wit the extent to which they are practically resistant to ordinary political change and they are privileged over ordinary international norms. The de facto power of a legal regime or a set of norms may lie in the level of institutionalization that a regime has achieved – say, by developing either advanced and politically independent law-applying institutions or armed with a decentralized yet coordinated enforcement mechanism. As such, those constitutional norms set *vertical* limits on domestic authorities and restrict their regulatory space even though they lack the power to pre-empt or displace conflicting domestic norms.<sup>53</sup> Further, they horizontally affect how other international norms are interpreted.

### *The constitutionalized sector*

Whether the constitutionalization of international law is a good thing hinges primarily on the content of the norms constitutionalized at the international level. Such an investigation invites us to unearth the underlying ideology of global constitutionalism as well as provide an opportunity to evaluate whether the SC complies with the principles of global constitutionalism.<sup>54</sup> The ideology of global constitutionalism has so far attracted limited attention, and it is simply assumed that ‘any steps forward in overcoming the self-enclosure of domestic legal orders’<sup>55</sup> are deemed as good and desirable. However, before making a normative assessment of global constitutionalism, it is essential to look at the norms constitutionalized at the international level and expose the hidden ideology of the SC.<sup>56</sup> First, we need to acknowledge that law, a medium or tool to transform political wills into legal propositions, cannot but help but be both an inclusive and exclusive device.<sup>57</sup> It may bring about ‘favourable global conditions, including the increased security between powerful states, economic regulations that promote more trade, and generate some general compliance with humanitarian values’. Yet it always bears the potential of being an instrument for domination by simply ‘lock(ing) in asymmetrical legal relationships that favour some states far more than others’.<sup>58</sup> Hence, without primarily mapping the process of constitutionalization and describing the norms being constitutionalized, it is not possible to appraise whether or not the SC of international law is legitimate.<sup>59</sup>

<sup>53</sup>The impact of entrenched norms on DLOs is also dependent on whether other supranational or regional mechanisms exist. The norms of the EU legal order, exemplifying a condensed and intensified version of the SC, have the power to preempt and disapply domestic norms owing to the principle of direct effect. MacAmlaigh (n 38) 153–54. In contrast, the ECtHR has achieved in time pre-empting the domestic legal norms that contradict its judgments, even though the regime fails to develop a similar principle of direct effect. Helfer calls it diffuse embeddedness by contrasting it with direct embeddedness. RL Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19(1) *European Journal of International Law*, 125–159.

<sup>54</sup>A Shinar, ‘The Ideologies of Global Constitutionalism’ (2019) 8(1) *Global Constitutionalism* 12, 13.

<sup>55</sup>G Palombella, ‘The Rule of Law Beyond the State: Failures, Promises, and Theory’ (2009) 7(3) *International Journal of Constitutional Law* 442, 448.

<sup>56</sup>C Schwöbel-Patel, ‘The Political Economy of Global Constitutionalism’, in AF Lang and A Wiener (eds), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017) 406–10; A Orford, ‘A Global Rule of Law’ in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge: Cambridge University Press, 2021) 563.

<sup>57</sup>H Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018).

<sup>58</sup>Brown (n 46) 225–26.

<sup>59</sup>Ibid 216.

Which norms fall under the constitutional category at the international level? First, it is important to stress that I am less concerned with detecting the reasons why one of those regimes or sets of norms acquired the status of constitutional and enjoyed primacy over others. My concern is to reveal how those norms give today's international law its distinctive colour and identity in order to detect the ideology of the current SC. This requires sociological research similar to that carried out by those we might lump under the heading of new constitutionalism, which is why I will mostly rely on their literature. For this reason, the legitimacy analysis of the neoliberal SC is premised on the acceptability of the arguments advanced by the new constitutionalist scholars.

If *jus cogens* norms are brushed aside due to their limited impact on the international and domestic levels,<sup>60</sup> one is left with three alternatives: (1) international human rights norms aimed at protecting individuals' interests beyond nation-states; (2) norms that render possible the international economic, commercial and financial activities (international economic law);<sup>61</sup> and (3) international security norms clustered around the UN security regime.<sup>62</sup> The new constitutionalists hold that international economic norms gained priority over other norms such as human rights, climate change and international security. Patel, for instance, asserts that 'there is larger consensus on how to conduct the global economy – by states, organizations, corporations and individuals alike – than there is on rights protection'<sup>63</sup> and underlines how international economic law acquire a constitutional status owing to its clarity, stability and predictability. Genschel and Zangl similarly, note: 'There is hardly an issue area today which is not to some extent regulated by the decisions of international institutions ... However, it is in the economic sphere where international decision-making competences have extended furthest.'<sup>64</sup> The editors of this journal subscribe to the view that the logic of trade (the principle of 'progressive development')<sup>65</sup> lies hidden behind the trinity of global constitutionalism (human rights, democracy and the rule of law) as a second-order norm that provides interpretive unity and clarity to the international legal order. The relationship between international economic norms and the trinity of global constitutionalism is, they submit, inversed in the hope that economic prosperity will bring about human rights, democracy and the rule of law.<sup>66</sup>

Explanations for why the neoliberal SC accorded priority to economy and trade-related norms are abundant. Some, for instance, show how globalization in the economic, financial and communication sectors brings about the global synchronization of relevant norms. This prompts a process of functional disintegration of trade-related norms at the national level, which renders domestic legal and political systems partially dysfunctional

<sup>60</sup> A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 3, 491–508.

<sup>61</sup> A Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011) (tracing the history of international economic law within the framework of a dichotomy between trade and human rights) 23–156.

<sup>62</sup> B Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in JL Dunoff and JP Trachtman (eds), *Ruling the World?* (Cambridge: Cambridge University Press, 2009) 133–48.

<sup>63</sup> Schwöbel-Patel (n 56) 415.

<sup>64</sup> P Genschel and B Zangl, 'Transformations of the State: From Monopolist to Manager of Political Authority' (2008) TranState Working Papers, No. 76, available from <<https://www.econstor.eu/bitstream/10419/27908/1/600426661.PDF>>.

<sup>65</sup> Tully et al. (n 33) 3.

<sup>66</sup> *Ibid* 3–4.

and desynchronized.<sup>67</sup> Similarly, some evince why nation-states are compelled to outsource their regulatory competence to international technocratic institutions, administrative bodies, private standard-setting institutions and even digital platforms under the pressure of technological and digital transformations and the ensuing demand for high-speed and technical regulation.<sup>68</sup> The literature also draws attention to how globalization has a mutually supportive relationship with trade-related norms, which requires mostly negative regulation, as opposed to other norms asking for positive regulation, which requires to reach a decision at the international level.<sup>69</sup> In giving an account of the neoliberal SC, it is also possible to underline the level of institutionalization by pointing out that the international economic norms are embedded in stronger institutional settings vested with advanced and somehow politically independent law-applying institutions,<sup>70</sup> as well as decentralized yet coordinated enforcement mechanism.<sup>71</sup> I am not so much interested in excavating the reasons that give rise to the neoliberal SC as in demonstrating that international economic law has gained a privileged status over other norms in today's international law. To do so, I will rely first on the explanations presented by the new constitutionalists and then present two different examples to show how today's international law is painted with the colour of economic laws.

### *The ideology of the sectoral constitutionalization: New constitutionalism*

The ideology question of global constitutionalism has so far attracted scant attention. As Shinar so rightly puts it, 'Much of the literature on global constitutionalism can thus be read against the background of hope',<sup>72</sup> an aspiration that it will render possible the peaceful coexistence and effective functioning of international and domestic legal orders. However, it is unclear whether more international law brings always more normativity. The plurality of norms may, for instance, undermine the effectiveness of international law, provoke regime and court shifting and enable multiple non-compliance channels to be exploited by powerful states.<sup>73</sup> It may give rise to hegemonic inter-regime relationships

<sup>67</sup>H Rosa, *Societal Acceleration: A New Theory of Modernity* (New York: Columbia University Press, 2013).

<sup>68</sup>C Thornhill, 'Constitutionalism between Nation States and Global Law', in P Blokker and C Thornhill (eds), *Sociological Constitution* (Cambridge: Cambridge University Press, 2017) 135–77.

<sup>69</sup>JP Trachtman, 'Constitutional Economics of the World Trade Organization', in JL Dunoff and JP Trachtman (eds), *Ruling the World?* (Cambridge: Cambridge University Press, 2009) 206–29; Habermas (n 25) 446.

<sup>70</sup>The collision of human rights norms with humanitarian law leads the former to colonize the latter. S Oeter, 'Regime Collisions from a Perspective of Global Constitutionalism' in K Blome, A Fischer-Lescano, H Franzki, N Markard and S Oeter (eds), *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016) 37–39.

<sup>71</sup>For the distinctive features of the WTO regime, see D Palmetter, 'The WTO as a Legal System' (2000) 24 (1) *Fordham International Law Journal* 444, 469; for its interpretive power over other regimes, see J Flett, 'Importing Other International Regimes into World Trade Organization Litigation', in MA Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012) 261–304.

<sup>72</sup>Shinar (n 54) 17.

<sup>73</sup>E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595. The absence of a regulatory authority may set the stage for regulatory competition, which may, in turn, bring about unilateralism and Eurocentrism, G Çapar, 'Global Regulatory Competition on Digital Rights and Data Governance: A Novel and Contractive Form of Eurocentrism?' (2022) 11(3) *Global Constitutionalism*, 465.

in a way that reflects the deep-rooted domestic tensions ‘between a political and economic elite and the politically and economically deprived and silenced’.<sup>74</sup> As might be expected, it runs the risk of delegitimizing international law.<sup>75</sup>

International law’s sectoral integration that prioritizes economic and market freedoms and trade-related norms over others – say, environment, biodiversity, public health and cultural rights – is depicted by many scholars as a new form of imperialism or colonialism. Although it is couched in different terms, including ‘new constitutionalism’,<sup>76</sup> ‘constitutionalism 3.0’<sup>77</sup> and ‘authoritarian liberalism’,<sup>78</sup> the crux of their argument is similar: the neoliberal SC’s economic bias exerts illegitimate pressures on DLOs. Somek, for instance, argues that constitutionalism 3.0 is a far cry both from constitutionalism 1.0 concerned with the protection of human rights and constraining public power, and from constitutionalism 2.0, the hallmark of which is the deontological protection of human rights. For Somek, constitutionalism 3.0 is marked by empowering of international and technocratic institutions under the impression of necessity; therefore, it implies doing the right thing in the ‘brave new world of exigencies’.<sup>79</sup> Under these conditions, constitutionalism is said to abandon its emancipatory aspirations, states are governed like companies, and democratic decision-making is to be tamed and aligned with the interests of global capital.<sup>80</sup>

The hallmark of the new constitutionalism is therefore the subordination of DLOs to the demands of global capital and the economy. It is most visible in the EU’s economic integration project, the judicialization of the international trade regime after the establishment of the World Trade Organization’s (WTO) Dispute Settlement Bodies (DSBs) and the mushrooming of free trade agreements that increase the protection accorded to trade-related rights (intellectual property and investment rights). The new constitutionalists are not against international economic law, which brings many benefits to nation-states – including fostering trade, promoting the general welfare, and increasing individuals’ average living standards. Rather, they find fault with the hyperglobalization that commenced in the mid-1970s and precipitated after the collapse of the two-polar world.<sup>81</sup> They contest the depoliticization of economic and trade-related policies under the guise of necessity and emphasize the essentially political nature of the politics of necessity.<sup>82</sup>

The constitutionalization of international law that began after the World War II has marked a period of distrust in politics and democracy rather than capitalism itself.<sup>83</sup> The blame is put on the over-politicization of parliamentary democracy during the inter-war period and the solution was found in different mechanisms based on a similar idea: technocratic institutions tasked with preventing democracy from having gone awry are to be established within and beyond nation-states.<sup>84</sup> It is held that international technocratic

<sup>74</sup>Schwöbel-Patel (n 56) 410.

<sup>75</sup>MacAmlaigh (n 38) 140–43.

<sup>76</sup>Gill and Cutler (n 22).

<sup>77</sup>A Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

<sup>78</sup>Wilkinson (n 27).

<sup>79</sup>Somek (n 77) 23.

<sup>80</sup>Ibid 25.

<sup>81</sup>Orford (n 56) 563.

<sup>82</sup>Wilkinson (n 27) 73–79.

<sup>83</sup>‘Distrust of unrestrained popular sovereignty’ is ‘in the very DNA of post-war European politics’. JW Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’ (2015) 21(2) *European Law Journal* 141, 152.

<sup>84</sup>Müller classifies the European Union as an example of militant democracy. JW Müller, ‘Beyond Militant Democracy?’ (2012) 73 *New Left Review* 39.

institutions are necessary to ‘inoculate capitalism against the threat of democracy’ and to defend it against the inclusionary tendencies of national democratic movements.<sup>85</sup> Hence, entrenching economic norms at the international level is a double-purpose project plotted against both nationalism and democracy. Connecting the spread of democracy with the legalization of international trade, Slobodian invites us to take the rise of international technocratic institutions as a response to the spread of mass democracy. In keeping with the ordoliberal’s aspirations, a mode of ‘double government’ is constructed. According to Slobodian, the governance of international economic law is insulated or encased from the government of domestic democratic legal orders.<sup>86</sup> International regulation of fiscal, monetary and economic policies is believed to discipline domestic democracies if it is hermetically isolated from the influence of domestic legal orders. The depoliticization and de-democratization of the economy are thought to be the best alternatives to the inter-war period of excessive majoritarian democracies.<sup>87</sup>

It goes without saying that we need international norms regulating international trade in an integrated and interdependent world such as ours. Less clear is what the level of integration should be and how much regulatory autonomy should be left to nation-states.<sup>88</sup> In other words, there is no one version of the SC. The first phase, spanning the period from the 1950s to the late 1970s, is generally dubbed ‘embedded liberalism’ to emphasize its characteristic feature: global economy or liberal trade is ‘embedded within a larger commitment to interventionist domestic policies’.<sup>89</sup> In other words, established with the Bretton Woods conferences, the regime mirrors a compromise between the requirements of international trade and domestic regulatory autonomy, envisions a moderate form of globalization or shallow multilateralism, and gives nation-states sufficient leeway to pursue their own distributive policies.<sup>90</sup> In that sense, the global economy is ‘subservient to domestic policy objectives ... not the other way around’,<sup>91</sup> which is the reason why many scholars consider the regime legitimate.<sup>92</sup>

The WTO, established in 1995, marks a turn away from Bretton Woods embedded liberalism towards a vertically stricter separation of economy from politics. It heralds a different mode of international economic integration that is deeper than that of Bretton Woods.<sup>93</sup> Domestic regulatory policies are made ‘subservient to international trade and finance’ and international trade law turns out to be ‘an end in itself’.<sup>94</sup> Hyperglobalization, the term used by Rodrik to differentiate it from embedded liberalism, is marked by two key developments introduced by the WTO regime. First, the scope of international

<sup>85</sup>Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018) 2.

<sup>86</sup>Ibid 23–26.

<sup>87</sup>Gill and Cutler (n 22) 24.

<sup>88</sup>This is what Lang (n 61) 5 calls ‘the indeterminacy of the WTO’.

<sup>89</sup>G Moon and L Toohey, ‘Introduction to the Embedded Liberalism Compromise’, in G Moon and L Toohey (eds), *The Future of International Economic Integration* (Cambridge: Cambridge University Press, 2018) 3. For a broader analysis of international economic law, see A Afilalo and D Patterson, ‘Global Economic Constitutionalism and the Future of Global Trade’ (2018) 40 *University of Pennsylvania Journal of International Law* 323; and for international law, see JHH Weiler, ‘The Geology of International Law: Governance, Democracy and Legitimacy’ (2004) 64 *ZaöRV* 547.

<sup>90</sup>Rodrik (n 19) 69; Lang (n 61) 190–220.

<sup>91</sup>Rodrik (n 19) 70.

<sup>92</sup>Afilalo and Patterson (n 89) 339–49.

<sup>93</sup>Lang (n 61) 221–72.

<sup>94</sup>Rodrik (n 19) 76.

economic law expanded remarkably after the Uruguay Round in the mid-1990s, which brings many policies under the WTO regimes, including services and agricultural and industrial policies.<sup>95</sup> That causes the further shrinkage of the regulatory space left to the nation-states. Second, a dispute-settlement mechanism with compulsory jurisdiction and relative isolation from the political influence of nation-states is established to promote predictability and legal security. These developments have placed it in a hierarchically superior position in the global legal order as the international economic law gained a far more institutionalized and centralized appearance than its competitors.

### *Two examples: The European Union and the TRIPS-Plus*

As may easily be anticipated, this second period is generally deemed illegitimate.<sup>96</sup> It is said, for instance, that the new constitutionalism predominantly protects the interests of transnational companies ‘in the name of the primary rights of corporate persons, free trade and unlimited growth’.<sup>97</sup> Tushnet, for instance, observes an elective affinity between global constitutionalism and neoliberalism because the DLOs are impelled to prioritize ‘economic growth over the expansion of the social welfare state’.<sup>98</sup> Even more radically, Patel maintains that global constitutionalism has been a ‘facilitator of neo-liberalism and neo-colonialism’ rather than ‘being a beacon for rights and freedom’.<sup>99</sup> In other words, the post-1989 period has witnessed a process whereby liberalism is equated with free trade and individual rights are sacrificed on the altar of market freedoms. It does so by bestowing norms related to trade and commerce with constitutional status and protection.<sup>100</sup>

The new constitutionalism has far-reaching impacts on domestic legal orders: it narrows their regulatory space, shifts the centre of politics away from parliaments to executive and administrative bodies and technical standard-setting institutions<sup>101</sup> and supports an unsustainable form of ‘market-preserving federalism’ that vertically separates economic from politics.<sup>102</sup> The technocratization and de-democratization of the law are the hallmarks of this period. The downward pressures on domestic labour, health and safety standards, as well as on tax and industrial policies after the globalization of services, IP rights and finance, are a paradigmatic example of how the SC influences domestic legal orders.<sup>103</sup> In addition to this vertical pressure, its influence is also felt in the neighbouring regimes such as the environment, public health and cultural heritage. As a relatively institutionalized regime with an apex court, international economic law also plays a major role in the interpretation of other norms that have a trade-related dimension. Revisiting two brief exemplary cases would suffice to show how the SC impairs domestic legal orders.

<sup>95</sup>Ibid 78–83.

<sup>96</sup>Afilalo and Patterson (n 89); Lang (n 61) 313–17.

<sup>97</sup>Tully et al (n 33) 8.

<sup>98</sup>Tushnet (n 44) 30.

<sup>99</sup>Schwöbel-Patel (n 56) 414

<sup>100</sup>Ibid.

<sup>101</sup>S Sassen, ‘When the Global Inhabits the National: Fuzzy Interactions’ in S Gill and A Cutler (eds), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 115–25.

<sup>102</sup>A Harmes, ‘New Constitutionalism and Multilevel Governance’ in S Gill and A Cutler (eds), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 147–48.

<sup>103</sup>Rodrik (n 19) 190–200.

One relates to the EU's response to the financial crisis and the other to the governance of intellectual property rights beyond nation-states.

The EU's dissimilar attitudes towards the financial and rule of law crisis are telling examples of the biased nature of the post-war SC. When the EU is staggeringly reluctant to take measures against those populist countries (Hungary and Poland) that challenge its foundational normative values,<sup>104</sup> it showed no hesitation in disciplining Greece when it recognized that Greece failed to meet the EU's financial requirements.<sup>105</sup> The EU abstains from taking necessary measures against those populist countries, even though it is a union founded on the values like democracy and the rule of law,<sup>106</sup> and is premised on the idea that all states meet those requirements at least to a sufficient degree, which find its best expression in the principle of mutual recognition.<sup>107</sup> The dissimilar attitude of the EU towards the financial and rule of law crisis manifests lucidly how the SC is imbued with the logic of neoliberalism.<sup>108</sup> Further, the EU's austerity measures were made possible only by sidestepping its formal treaty-based institutional structure through Troika and bypassing various democratic control mechanisms, primarily the Greek parliament. All in all, those measures are implemented even at the cost of undermining the basic social and economic services provided to Greek citizens.<sup>109</sup> When it comes to the rule of law crisis, however, the Commission – the guardian of the treaties – shies away from initiating a new institutional mechanism that may solve the problem, as it did during the financial crisis.<sup>110</sup>

Another example that springs to mind is the disharmony between the status of international IP rights and their exceptions and limitations. Under the TRIPS regime, international IP rights are elevated to constitutional status while their limitations and exceptions are left to nation-states without much clarity regarding to how to use and implement them.<sup>111</sup> This one-dimensional constitutionalization of IP rights accords them priority over other rights (public health, protection of cultural heritage, disability rights), creates a regulatory chill and pushes nation-states further away from regulating any domain, tangentially or plausibly infringing IP rights. Because it constitutionalizes the minimum level of protection accorded to IP rights, their exceptions and limitations become vulnerable to further erosion through the FTAs in which IP rights are dressed up as investment rights to circumvent the use of exceptions.<sup>112</sup> International IP rights are depicted as a second enclosure movement or constitutional hedges because multi-level

<sup>104</sup>G De Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20 *International Journal of Constitutional Law* 1, 13.

<sup>105</sup>Müller (n 84) 39, 44.

<sup>106</sup>Article 2 TEU.

<sup>107</sup>Müller underlines how these populist states pose a challenge to the effective functioning of the EU while he notes 'a government going "rogue" puts into jeopardy the entire European edifice' simply because 'If national institutions of democracy and the rule of law fail, mutual recognition will end' Müller (n 83) 145.

<sup>108</sup>Müller (n 84) 44.

<sup>109</sup>G Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge: Cambridge University Press, 2014) 179–208.

<sup>110</sup>Müller (n 83) 150–56. He suggests a Copenhagen Commission responsible for overseeing whether domestic authorities comply with the basic requirements of democracy and the rule of law.

<sup>111</sup>Griffiths and Mylly (n 22). For a legitimacy assessment of the regime see Çapar (n 31).

<sup>112</sup>R Dreyfus, 'Hedging Bets with BITS: The Impact of Investment Obligations on Intellectual Property Norms' in J Griffiths and T Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (Oxford: Oxford University Press, 2022) 157–75.



protection is provided by bringing different legal regimes together.<sup>113</sup> The exceptions and limitations are vital to domestic legal orders as they allow them to strike a balance between the demands of international economic law, and local needs and interests. When this dynamic is further exposed to light, it becomes clear that international law's SC provides powerful states with ample opportunities to further their interests by either shifting or combining regimes.<sup>114</sup>

The foregoing examples underscore once again how important it is to separate mapping the constitutionalization of international law from its normative evaluation. They demonstrate why many scholars discredit as an example of global constitutionalism the TRIPS-plus era or the EU's technocratic measures against the financial and sovereign debt crisis,<sup>115</sup> as well as why EU scholars lambast the Maastricht design for its insulation of macro-economic policies from the oversight of domestic democracies.<sup>116</sup> In fact, many scholars from different disciplinary traditions agree on a moderate form of globalization that leaves nation-states enough regulatory space to align their policies with the demands of globalization without undermining the local needs of society.<sup>117</sup> The common and recurring thread visible in those suggestions is that the transformation of international law after the Cold War has illegitimately suffocated domestic legal orders and that we need new forms of SC that are attentive to the demands of nation-states and supportive of democracy.

### III. The legitimacy of (the neoliberal SC of) international law

The constitutionalization of international law is believed to compensate for the problems afflicting DLOs overwhelmed by the pressure of globalization and to contribute to their democratization and liberalization processes.<sup>118</sup> This is indeed a normative argument about how international law should interact with domestic authorities. For instance, Peters, one of the earliest proponents of compensatory constitutionalism, avows that 'domestic de-constitutionalization due to globalization should and could be compensated for by the constitutionalization of international law'.<sup>119</sup> For Peters, constitutionalism means developing a set of normative principles – respect for human rights, the rule of law and the global common interest – on top of the principle of state sovereignty.<sup>120</sup> By the same token, Pavel takes international law to be 'an institutional insurance scheme' designed to

<sup>113</sup>PK Yu, 'The Second Transformation of the Intellectual Property Regime' in J Griffiths and T Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (Oxford: Oxford University Press, 2022) 176–97.

<sup>114</sup>Benvenisti Downs (n 73).

<sup>115</sup>Brown (n 46) 214–15; Tuori (n 24).

<sup>116</sup>Majone (n 109) 118–79.

<sup>117</sup>Rodrik (n 19) 207–32; JL Cohen, *Globalization and sovereignty: Rethinking legality, legitimacy, and constitutionalism*, (Cambridge University Press 2012); Majone (n 109); Tuori (n 24); Raz (n 43); Afilalo and Patterson (n 89). J Tully, 'Unfreedom of Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65(2) *Modern Law Review* 204. An eco-social constitution is suggested as a replacement for neoliberal sectoral constitutionalism: Tully et al (n 33) 10–11.

<sup>118</sup>For 'supplemental constitutionalism' see Dunoff and Trachtman (n 49) 14–18; Thornhill (n 68) 159. It is also called 'multi-level constitutionalism' Loughlin (n 46) 64–68. Raz (n 43) also underlines that institutional fragmentation of international law may be a welcomed development, 76.

<sup>119</sup>Peters (n 12) 580.

<sup>120</sup>Ibid 586. Habermas (n 25) 445, discussing supplementary function of international law.

intervene in DLOs ‘only when states as primary agents have failed dramatically’<sup>121</sup> in what they are supposed to do. In other words, the legitimacy of international institutions is dependent on whether they succeed in ‘compensate(ing) for grave failures of state agency’.<sup>122</sup> Viehoff similarly draws attention to this complementary nature of international authorities by stating that: ‘Many cases of legitimate authority are ‘compensatory’: they depend on the presence of some deficiency or incapacity—insufficient knowledge, an inability to coordinate, etc. – that the authority is meant to help overcome.’<sup>123</sup>

Many benefits come with international law. It primarily helps domestic authorities to overcome collective action problems by ensuring coordination, providing superior empirical and normative knowledge, and surmounting the problems of volitional deficiencies and cognitive biases. Most clearly, international law serves to overcome normative disagreements by authoritatively laying down norms for the globe and bringing together different interests under a particular legal regime.<sup>124</sup> To illustrate, international human rights law serves to surmount the difficulties of constitutional democracies with the protection of minority rights and curbing the power of special interest groups.<sup>125</sup> But nothing comes without a price. As Buchanan and Powel note, the *constitutionalization* of international law carries a risk of domination, not least when it is lacking constitutional safeguards with which we are acquainted in the DLOs.<sup>126</sup> As international law’s legitimacy is bound up with its standing in a complementary relationship with the DLOs, it should not only help states to alleviate the problems that come with globalization, but also avoid impairing the legitimate authority–subject relationship developed in the domestic context.

The literature is abundant in the relationship between democracy and international law, and some of those are highly radical, as they observe a conceptual tension between technocratic international law and constitutional democracies.<sup>127</sup> Since my interest lies in the legitimate forms of interaction between domestic and international authorities, I will dwell on what Buchanan and Powell call ‘the constitutional derangement argument’.<sup>128</sup> They contend that international law risks impairing ‘the internal constitutional structures of a constitutional democracy’ by undercutting either ‘the constitutional allocation of power among the branches of the government’ or ‘the undermining of federalism by robbing federal units (states, cantons, provinces, etc.) of some of their proper

<sup>121</sup>C Pavel, *Divided Sovereignty: International Institutions and the Limits of State Sovereignty* (Oxford: Oxford University Press, 2014) 197.

<sup>122</sup>Ibid 198.

<sup>123</sup>D Viehoff, ‘On Authority, Legitimacy, and Service: Discussion of the Morality of Freedom’ (2016) 14(1) *Jerusalem Review of Legal Studies* 113, 118.

<sup>124</sup>J Tasioulas, ‘The Legitimacy of International Law’ in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 102.

<sup>125</sup>Buchanan and Powell (n 50) 330–31.

<sup>126</sup>Ibid 329–30. For a similar argument based on an examination of how internationalization of judicial review has provoked domestic reactionary judgments whose most visible examples include constitutional identity review and counter-limits doctrine, despite its many benefits to domestic authorities, see D Lustig and JHH Weiler, ‘Judicial Review in the Contemporary World—Retrospective and Prospective’ (2018) 16(2) *International Journal of Constitutional Law* 315, 341.

<sup>127</sup>They call it the argument from the loss of self-determination; ibid 343–44. Lustig and Wiler (n 126) argue that “a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all” 371.

<sup>128</sup>Ibid 341–43. This is why Lustig and Weiler (n 126) consider it the main reason that provokes the third wave of judicial review, 345–369.

authority'.<sup>129</sup> The constitutional derangement argument invites us to investigate whether international authorities may exert undue influence on DLOs, impair their internal functioning and undermine their collective decision-making process. And it encourages us to inquire whether there are other ways in which international authorities vitiate the functioning of domestic authorities. We need to take seriously the arguments advanced by the new constitutionalists and inquire whether the requirements of compensatory constitutionalism are satisfied.

### Conceptions of legitimacy

Legitimacy is an ambiguous concept appropriate to an analysis from different perspectives, including sociological, constitutional, legal and normative standpoints,<sup>130</sup> yet it is clear that with authority comes the need for legitimation and the problem of legitimacy. When legitimacy is understood from a sociological perspective, it addresses the question of whether an authority is perceived as legitimate by those who live under its rule. The term legitimation is mostly used the process through which an authority gains legitimacy in the eyes of its subjects. The normative account of legitimacy is concerned, however, with the question of what gives an authority the right or power to rule over its subjects.<sup>131</sup> In other words, the legitimacy in the normative sense is interested less in how authority is perceived by individuals than in how it gives them objective reasons for action.<sup>132</sup> It pertains to the normative power to change others' normative situations. So when an institution is deemed legitimate, its rulings are held to be binding because it is believed that authority has a right to rule over individuals.<sup>133</sup>

The literature on the normative account of legitimacy is divided into two main camps that give distinct answers to the question of what makes an authority legitimate: will-based and reason-based accounts.<sup>134</sup> The proponents of the will-based account hold the view that an authority derives its legitimacy from the consent or will of those who are subject to the commands of an authority. In contrast, those who defend the reason-based account deny assigning an ultimate role to consent by raising mostly the argument that consent can be a source of obligation only if it is given for the right reasons. In other words, the consent-based account of legitimate authority is predicated on the assumption that because consent

<sup>129</sup>Ibid 341.

<sup>130</sup>See, for example, MacAmlaigh (n 38) 178–206.

<sup>131</sup>For a summary of the literature, see F Peter, 'Political Legitimacy', *The Stanford Encyclopedia of Philosophy* (Summer 2017), available from <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy>>.

<sup>132</sup>J Raz, 'Democratic Deficit' (2018) Columbia Public Law Research Paper No. 14-587, 8, available from <[https://scholarship.law.columbia.edu/faculty\\_scholarship/2082](https://scholarship.law.columbia.edu/faculty_scholarship/2082)>.

<sup>133</sup>The close relationship between sociological and normative accounts of legitimacy is already conceded by Raz, *ibid* 18.

<sup>134</sup>For a threefold distinction that also includes hybrid account in addition to reason- and will-based accounts, see F Peter, 'The Grounds of Political Legitimacy' (2020) 6(3) *Journal of American Philosophical Association* 372. Hershowitz similarly classifies legitimacy into three types: substantive, procedural and hybrid theories of legitimacy. S. Hershowitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9(3) *Legal Theory* 201, 212. I follow here the twofold classification in order to avoid the complexities likely to be posed the hybrid accounts in which the legitimacy of an authority is based on the sufficiently justified belief that authority is competent to do what it is supposed to do. For a similar twofold distinction, see Harel and Shinar (n 25) and Roughan (n 28) 29–42, who draws a distinction between justification to subjects and justification simpliciter.

is a manifestation of individual autonomy, there is no tension between individual autonomy and authority when consent is given. However, we all know that not every given consent is compatible with individual autonomy. Raz therefore rightly argues that ‘to the extent that the validity of consent rests on the intrinsic value of autonomy, it cannot extend to acts of consent that authorize another person to deprive people of their autonomy’.<sup>135</sup> In other words, the assumption that consent does always protect individual autonomy is to be refuted on two different grounds. First, because individuals may consent to many things such as being a slave or using drugs, the validity of consent is better to be limited by some objective moral reason that, for Raz, finds its expression in his service conception of authority.<sup>136</sup> Second, there is a crucial difference between the consent in the private domain when an individual gives their consent to somebody to do something, and the consent given to the state whose claim to authority is unlimited and unbounded to such an extent that it ‘may at any time take away all one’s autonomy’.<sup>137</sup> This is the main reason why Raz militates for the reason-based account of legitimate authority by noting:

It appears that one can validly consent only to an authority that is legitimate anyway, on independent grounds ... It means that consent to be governed can be binding only if it is limited so as to be consistent with autonomy. That entails that it must be consistent with the two conditions of legitimacy.<sup>138</sup>

The two conditions of legitimacy stand for what Raz calls the service conception of authority, whereby authority is legitimate as long as it is a better service provider than its alternatives (the normal justification condition), and when it is more important to give the right decision than to decide for oneself (independence/autonomy condition).<sup>139</sup> The first thing that sticks out is that the service conception is the normal, rather than the only, way to justify authority. For this reason, consent plays a secondary role in the service conception in the sense that it is not used as a condition necessary for the legitimacy of authority but rather as an output, which finds its expression as an attitude of respect shown to authorities when they are deemed worthy of it.<sup>140</sup> In fact, this is one of the main points of criticism raised against the service conception on the ground that it does undervalue the role played by consent or democratic procedures in the justification of authority.<sup>141</sup> I will avoid engaging in those discussions about whether a more prominent role is to be given to democracy and consent, first because I adopt an instrumental and reason-based approach to the legitimacy question of authorities and second because my research question concerns whether the neoliberal SC poses undue constraints on domestic authorities and weaken their democratic decision-making capacity, which in

<sup>135</sup> Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 2013) 364.

<sup>136</sup> When the service conception is understood broadly in a way that includes the independence condition.

<sup>137</sup> Raz (n 135) 364.

<sup>138</sup> Ibid.

<sup>139</sup> Raz (n 143) 136–39. The service conception is composed of three conditions: (1) the normal justification thesis; (2) the dependence thesis; and (3) the pre-emption thesis. For detailed explanations, see Raz (n 142) 54–69.

<sup>140</sup> Raz (n 135) 356.

<sup>141</sup> Hershowitz’s challenge to the service conception of authority seems to be modest, as he notes that his aim is to highlight that the service conception is inadequate because the legitimacy of political authorities also has a procedural dimension. Hershowitz (n 134) 218.

turn may undermine its legitimacy. If an affirmative answer may be given to this question from the perspective of the service conception, which accords a secondary role to consent and democracy, then we may easily conclude that it is also defensible from the perspective of hybrid or will-based accounts of legitimacy.

### *Political trust as an additional and non-instrumental ground of legitimacy for domestic authorities*

Recall that Raz presents us with an instrumental and functional account of legitimacy, according to which an authority is legitimate as long as it succeeds in helping individuals to better reach their objective reasons. Yet his conception of authority is general in the sense that it is applicable to any sort of practical authority, many examples of which are quite dissimilar to the authority of states. For once, we have many practical authorities in our life such as doctors, dance teachers and financial experts, all of whom help us to better reach our objectives by providing us with authoritative guidance, provided that we have already made the decision to benefit from their services. But we are mostly subject to the authority of only one state. States are further distinctive because their claim to legitimate authority is comprehensive in the sense that they are committed to governing any aspect of our life. Although it is a species of practical authority, it is different from them mostly because of its non-voluntary and comprehensive nature. We find ourselves living in a political community to which many of us do not give an explicit or implicit consent. Let us call the sort of authority enjoyed by states political authority.

Raz makes it clear that political authorities are distinctive because they are capable of supporting their instrumental legitimacy with non-instrumental reasons.<sup>142</sup> They are not only instrumental in shaping individual behaviors and guiding them to right reasons; they also play a partial role in constituting a political community by serving as ‘an object for identification’.<sup>143</sup> In other words, because political authorities are capable of becoming an object for identification and play ‘an important role in people’s sense of who they are’,<sup>144</sup> Raz argues that law may also be seen as ‘the authoritative voice of a political community’.<sup>145</sup> This is why he warns against overlooking this non-instrumental dimension of political authorities by noting:

<sup>142</sup>He notes, for instance, that, ‘An obligation to obey which is part of a duty of loyalty to the community is a semi-voluntary obligation, because one has no moral duty to identify with this community. It is founded on non-instrumental considerations, for it constitutes an attitude of belonging which has intrinsic value, if addressed to an appropriate object.’ Raz (n 135) 364. For his distinction between outcome and action reasons, see J Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) 145–46.

<sup>143</sup>J Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) 106. Habermas similarly writes that citizens ‘have an interest in preserving and improving the respective national forms of life with which they identify and for which they feel themselves responsible’ and warns against neglecting ‘the fund of trust accumulated in the domestic sphere and the associated loyalty of citizens to their respective nations’. Habermas (n 25) 449.

<sup>144</sup>Raz (n 143) 106.

<sup>145</sup>Ibid 99. The non-instrumental role of law and political authority in people’s lives is closely connected with Raz’s thesis that “some values exist only if there are (or were) social practices sustaining them” J Raz, ‘The Thesis’ in J Raz and RJ Wallace (eds), *The Practice of Value* 19 (OUP, 2005). He affirms lucidly that “political structures are created by social practices—or, at any rate, as their existence depends on such practices—so must their distinctive virtues and forms of excellence depend on social practices that create and sustain them” Ibid 33.

Given the importance of political communities in the life of their members, an ability to identify with one's political community is, within the framework of the considerations I mentioned, intrinsically valuable. Any account of the law which disregards that aspect of it is incomplete. Therefore any account which adopts exclusively the instrumental approach is incomplete.<sup>146</sup>

First, the term 'instrumental approach' denotes here the service conception of authority, developed to explain the legitimacy of political authorities in terms of their capacity to effectively shape and mould the behaviors of individuals.<sup>147</sup> Second, Raz may sound in the excerpt as if he is talking about law in general, yet when the context in which he raises those points is taken into consideration, it becomes clear that his concern is political authorities, namely states. As such, even though Raz explains the authority of states primarily in terms of the services with which it provides individuals, he never closes the door to the non-instrumental grounds of legitimacy that states may develop. In a nutshell, states may ground their legitimacy in both instrumental and non-instrumental reasons, even though the latter's role is secondary to the former.<sup>148</sup>

The non-instrumental reasons are couched in different terms by Raz, including trust, loyalty, solidarity and self-identification.<sup>149</sup> This cluster of terms, while they may seem disconnected from one another, acquires a special meaning in Raz's own theory. They are the properties that a political authority may possess or generate when they are in good shape and meet certain principles when governing. In other words, they are not essential to all political authorities, even though each political authority is capable of awakening those feelings. If we begin with self-identification, Raz argues that individuals may identify themselves with their political communities when they believe their political community is worthy of respect because it functions well and provides individuals with different opportunities for living their lives.<sup>150</sup> Thus, a political authority may be an object for self-identification for those individuals who consider it legitimate when it garners their trust by operating in a 'morally decent' way and allows individuals opportunity of being full members of a community.<sup>151</sup> When that is the case, individuals develop a distinctive

---

<sup>146</sup>Ibid 106.

<sup>147</sup>Ibid 104.

<sup>148</sup>The secondary role assigned to consent and democracy is the main point of criticism levelled against the service conception by those who defend a procedural account of legitimacy. Hershowitz, for instance, argues that though we acknowledge that consent is neither necessary nor sufficient to constitute authority, it is 'often ineliminable part of the story of why one person is subject to the authority of another'. S Hershowitz, 'The Role of Authority' (2011) 11(7) *Philosophers' Imprint* 15, available from <<https://quod.lib.umich.edu/cgi/p/pod/dod-idx/role-of-authority.pdf?c=phimp;idno=3521354.0011.007;format=pdf>>. See also Roughan (n 28) 120.

<sup>149</sup>Raz, 'Government by Consent' (1987) 29 *Nomos* 76, 92. Habermas similarly underlines the importance of preserving 'the fund of trust accumulated in the domestic sphere and the associated loyalty of citizens to their respective nations' because citizens 'have an interest in preserving and improving the respective national forms of life with which they identify and for which they feel themselves responsible'. Habermas (n 25) 449.

<sup>150</sup>Raz uses states and political community interchangeably because he believes that the authoritativeness of legal rules 'is intertwined with their being part of a political community', and thereby that the 'law and the state are mutually dependent; they partly constitute each other'. Raz (n 143) 101.

<sup>151</sup>'One crucial non-instrumental aspect of the law derives from the fact that full membership of political communities – that is, membership that enables members to identify with the communities (assuming the communities themselves are morally decent) – is intrinsically good'. Ibid 106.

attitude of respect for law, namely respect towards their political authorities,<sup>152</sup> which we may call loyalty because individuals who trust in their own governments that function well feel themselves under an obligation to obey its laws, even though Raz clearly denies that there is a general obligation to obey the law.<sup>153</sup> However, this obligation is optional because it holds for only those individuals who express their consent tacitly or explicitly to their governments. Moreover, because some individuals take the political authority as an object for identification, they probably regard its laws as their laws. When it comes to how solidarity fits into this picture, we may benefit from Raz's idea that trust is in fact directed to political community, even though it is embodied in the political institutions.<sup>154</sup> In other words, solidarity indicates the level of burdens that individuals are willing to incur for others with whom they are partaking in the same political community.

Needless to say, not all political authorities are worthy of respect. Nonetheless, it is not necessary to deny the potential that they have for generating those feelings. This is why Raz underscores that the intrinsic value of identifying oneself with a political community is a potential value,<sup>155</sup> whose realization depends on the content of law, as well as how authority functions. We may here invoke Raz's argument that consent is better not as a condition for legitimacy of an authority, but rather as an output likely to emerge when authority is already perceived as legitimate. Accordingly, consent given to a political authority is an output that manifests the feelings of trust and confidence placed on political authorities by some of its subjects.<sup>156</sup> From here it follows that trust is not a feature essential to political authorities. Put differently, it is not in the nature of political authorities that they are to be *trustworthy* even though they are *entrusted* with the task of providing individuals with some services.<sup>157</sup> So the initial phase of the authority–subject relationship is not based on the fact that individuals trust public authorities.<sup>158</sup> Hence, trust is something to be deserved by a political authority, and thereby contingent on the fact that it is in morally decent form in the sense that it fulfils its instrumental function in a morally acceptable way.

<sup>152</sup>Raz explains the respect for law as follows: 'It is a belief that one is under an obligation to obey because the law is one's law, and the law of one's country. Obeying it is a way of expressing confidence and trust in its justice. As such, it expresses one's identification with the community. Respect for law does not derive from consent. It grows, as friendships do; it develops, as does one's sense of membership in a community. Nevertheless, respect for law grounds a quasi-voluntary obligation.' Raz (n 135) 354.

<sup>153</sup>J Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) 250. 'His respect is the source of this obligation.' Ibid 260.

<sup>154</sup>For Raz, respect for law is a manifestation of loyalty shown to society and the community of which individuals are part. It represents itself in the institutionalized dimension of society. Ibid 260–61; Raz (n 135) 368–69; Raz (n 142) 91. For the sake of brevity, I find nothing amiss in dismissing this dimension of respect for law.

<sup>155</sup>'First, I am discussing, here and throughout, not the value the law has but the value it can have. Whether the law of any political community has value depends on its content, and the circumstances of the community'. Raz (n 143) 103.

<sup>156</sup>Raz (n 135) 366–69.

<sup>157</sup>'Some conceptions of legitimate authority make trust a condition of legitimacy. This seems to be unjustified.' J Raz, 'Liberty and Trust', in R George (ed.), *Natural Law, Liberalism, and Morality: Contemporary Essays* (Oxford: Oxford University Press, 2001) 123. See, e.g. N Adams, 'The Relational Conception of Practical Authority' (2018) 37 *Law and Philosophy* 549.

<sup>158</sup>For the distinction between trusting and entrusting and why the authority–subject relationship is not in its initial phase grounded in trust, see GJ Postema, 'Fidelity, Accountability and Trust: Tensions at the Heart of the Rule of Law', in T Bustamante and TL Decat (eds), *Philosophy of Law as an Integral Part of Philosophy: Essays on the Jurisprudence of Gerald J Postema* (Oxford: Hart, 2020) 33, 39.

The foregoing explanations draw a subtle, and possibly opaque, explanation for how a political authority may be an object for identification and how it can generate a feeling of trust on the part of its subjects. Yet I believe it suffices to reveal the distinctive role to be played by states in our lives: they are capable of being an object for self-identification. When a legal system is thought of as part of a political system to which individuals may develop a distinctive attitude of respect, we may also see how it may extend its legitimacy grounds to non-instrumental reasons. Trusting a government, which finds its most clear expression in the consent given to it, in fact mirrors the attitude a person adopts towards their own political community.<sup>159</sup> This is clear in Raz's remarks that 'our perception of ourselves, of who we are, depends among other things on our ability to identify with communities we live in, on our ability to belong to these communities in the full sense of the word'.<sup>160</sup> When a person is living in a well-functioning and morally decent political system and community, Raz holds, they may enjoy also benefits of becoming a full member of this community. What Raz means by the term 'full membership' goes beyond the notion of legal citizenship, as it stands for the fact that individuals 'regard themselves as fully belonging to the political community, and similar to regard its law as their law, and its government as their government'.<sup>161</sup> There is a lot to be explained about what the conditions of respect for law and being a full member of a political community are,<sup>162</sup> and what it requires for being a trustworthy authority. Nevertheless, I believe that the foregoing explanations suffice to support my argument that political authorities – namely the authority of states – are capable of extending their legitimacy claims to non-instrumental grounds. For they are objects for self-identification when the relevant conditions are satisfied, and they enable the conditions of full membership.

One question left unaddressed so far is whether there are any other authorities – such as international authorities – capable of generating feeling of trust, understood as the attitude that a person develops towards their own political community. Before giving an answer to this question, it is necessary to underscore that Raz uses the concept of trust in a rather distinctive manner compared with how it is conceptualized in the literature about trust. For Raz, trust manifests a feeling of loyalty on the part of subjects, which is supposed to subsequently generate an obligation to obey the trustworthy political authority. For this reason, he mostly converges notions such as trust, loyalty and self-identification. I will call it a political conception of trust to underline the fact that it requires a political community. The literature on trust takes the concept to consist mainly of two different components. The authority is believed to be competent to provide individuals with services and to have goodwill in the sense that it is believed that it will act in the interests of individuals. When

<sup>159</sup>Undertaking an obligation to obey the law is an appropriate means of expressing identification with society, because it is a form of supporting social institutions, because it conveys a willingness to share in the common ways established in that society as expressed by its institutions, and because it expresses confidence in the reasonableness and good judgment of the government through one's willingness to take it on trust, as it were, that the law is just and that it should be complied with.' Raz (n 142) 92.

<sup>160</sup>Raz (n 143) 103.

<sup>161</sup>Raz (n 157) 124.

<sup>162</sup>The root of Raz's argument about the intrinsic value of full-membership may be found in his perfectionist moral theory, in which he grounds the wellbeing of an individual not only in individual, but also in social and community-related, conditions. Some explanations in this regard may be found in Ibid 125–26, and in his explanations about the value of collective right to self-determination. Raz (n 135) 125–45 (co-authored with Avishai Margalit).



seen from this broader perspective, it is reasonable that international authorities, like many other practical authorities, may engender trust, provided they show how competent they are through their past performances and how they observe the interests of individuals. Yet, when trust is understood in its political conception as Raz puts it, which denotes the sort of attitude shown towards authority as an object of identification, it seems harder to defend the foregoing argument. Trust seems to require in this narrower sense a political community in which individuals enjoy full membership and consider the state and its law as their law. This is why I view the legitimacy of international authorities as monolithic, suggesting that they base their legitimacy mainly on the service conception and its instrumental justification.

A further explanation is needed concerning the connection between the principles of the rule of law (RoL) and legitimate authority, and how the former may contribute to generating trust. Since my approach aligns mostly with legal positivism, I regard the RoL as a moral principle intrinsic to law, designed to guide legal institutions that operate within a legal system. When a legal system is conceived of as a political authority, we may easily conclude that when it observes the principles of the RoL, it is more likely that it is perceived by individuals as well functioning and even legitimate. Even though Raz does not clearly deal with how the RoL relates to legitimate authority, some of his disciples – including Tasioulas – assert that the principles of the rule of law are intrinsic to the concept of political authority.<sup>163</sup> Buchanan similarly holds the view that the RoL plays a crucial role for the legitimacy of political authorities, although he warns against making the mistake of thinking that mere legality confers legitimacy.<sup>164</sup> The RoL is therefore endemic to political authorities, simply because they are institutional and normative systems as opposed to many practical authorities. For instance, we do not expect a pope (religious authority) or father (parental authority) to observe the principles of the RoL, even though they may feel themselves obliged to some principles associated with their distinctive role. This is why political authorities do lay claim to observing the principles of the RoL in addition to their claim to legitimacy. We may infer the same conclusion from Tasioulas's following explanations:

There is a broad category of reasons bearing on the NJC that are formal or procedural in nature, many of which are captured by the familiar requirements of the Rule of Law: laws must be clear, publicly accessible, stable, non-retrospective in content and application, and official behaviour must be congruent with pre-existing legal norms. All these requirements reflect the idea that those subject to the law should be able to identify the law and conform with it. Other procedural norms include requirements of transparency, responsiveness, and even democratic accountability in law-making.<sup>165</sup>

<sup>163</sup>Tasioulas (n 124) 115.

<sup>164</sup>A Buchanan, 'Institutional Legitimacy' in D Sobel et al. (eds.) *Oxford Studies in Political Philosophy Volume 4* (Oxford: Oxford University Press, 2018) 74.

<sup>165</sup>Tasioulas (n 124) 115. For a similar argument based on the view that certain procedural standards are of constitutive importance for the legitimacy of an authority, even though how demanding they are depends on further factors such as the density of political power enjoyed and the ensuing risks it generates, see A Scherz, 'Tying Legitimacy to Political Power: Graded Legitimacy Standards for International Institutions' (2021) 20 (4) *European Journal of Political Theory* 631.

Even though I am not sure whether all those examples given by Tasioulas are apt to be considered as part of the service conception of authority, I am certain that political authorities lay claim to govern lawfully by observing the principles of the RoL,<sup>166</sup> no matter how they are conceptualized and instantiated. As regards the question of whether there is a distinction in this respect between domestic and international authorities, I find no reason to concede that both lay claim to governing lawfully.<sup>167</sup> One may rightly raise the objection that not all international authorities are equally institutionalized, and some differ significantly from domestic authorities in this respect. Yet I am afraid this runs the risk of diverting our attention away from our research towards investigating the essential properties of a legal system and the role that the RoL is supposed to play in a legal system. Hence, I will accept that both domestic and international authorities lay claim to governing lawfully by observing the principles of the RoL, even though the ways in which its principles are instantiated may differ to a certain extent.<sup>168</sup> When an authority observes those principles, it may engender feeling of trust on part of its subjects, yet it is hard to say that the RoL is sufficient to generate the sort of trust in which we are interested – that is, political trust. Political trust needs the development of some assessment mechanism such as democratic elections, though which individuals may participate in the activity of governing themselves, as well as changing the incumbent authority when they are dissatisfied with their services, which will be touched upon in the next section.<sup>169</sup>

### *States are different because their claim to authority is comprehensive*

The previous section laid the foundations for the distinction between domestic and international authorities by explaining what makes a political authority different from a generic concept of practical authority. It demonstrated that domestic authorities are capable of generating trust, understood narrowly in its identification conception, which requires an underlying political community. International authorities are thus accepted as incapable of generating trust, which may serve as an additional and non-instrumental source of legitimacy simply because they are not, at least so far, backed by a political community. Lastly, it has also underscored that both domestic and international authorities are expected to observe the principles of the RoL, which arise from their institutional nature, as well as the very logic of the service conception of authority. Yet it left unaddressed one of the crucial distinctions between domestic and international authorities: their claim to legitimate authority.

Even before Raz conceded that the service conception applies also to international organizations,<sup>170</sup> international lawyers had already explored its potential for international authorities.<sup>171</sup> Nevertheless, several problems surface when an investigation into the

<sup>166</sup>‘The rule of law, as I will understand it, is a specific virtue or ideal that the law should conform to.’ J Raz, ‘The Law’s Own Virtue’ (2019) 39(1) *Oxford Journal of Legal Studies* 1.

<sup>167</sup>The RoL ‘applies not only to the law of states, but also to the law of, say, voluntary associations. Their law, the law of associations, is also meant to serve some common good, and should not be arbitrary or self-serving.’ Ibid 13.

<sup>168</sup>The principles of the RoL ‘allow considerable room for flexibility and adaptability’ to such an extent that it ‘is mediated by conventions’ and ‘gives plenty of room for adaptability to local traditions’ Ibid 12–13.

<sup>169</sup>This connection is also clear in Raz’s following article: see Raz (n 132).

<sup>170</sup>Raz (n 43) 161.

<sup>171</sup>See, for example, S Besson, ‘The Authority of International Law: Lifting the State Veil’ (2009) 31(3) *Sydney Law Review* 343; Tasioulas (n 124), denying the contention that a weaker conception of legitimacy bespoke to international law is to be developed. For a weaker conception of legitimacy in which authority’s

legitimacy of international law is set out. What Tasioulas calls the problem of ‘domain fragmentation’ arises when multiple authorities concurrently lay claim to legitimacy – that is, ‘a legal system’s claims of legitimacy are justified in some domains but not in others’.<sup>172</sup> It begs the question of how to reconcile an authority’s claim to comprehensive and unlimited authority with the fragmented reality of international authorities. Unlike DLOs, where authority is comprehensive and unlimited, international law exerts its rulings over states and individuals in a sectorally fragmented manner. That poses a problem for authority and forces us to reflect on notions such as limited or relative authority.

In addressing the problem of domain fragmentation, Roughan suggests conceiving those *claims* as relative rather than absolute and unlimited when individuals are confronted with multiple authority claims originating from different legal orders.<sup>173</sup> Put differently, the claimed legitimate authority ‘is relative to that of ... other competing and overlapping international regimes, rules or institutions’.<sup>174</sup> At first sight, Raz seems to support this argument in his article ‘Why the State?’, when he concedes that authority holds ‘extensive responsibility within its own domain’. So it seems that authority’s legitimacy is not unlimited, but ‘relative to a domain’.<sup>175</sup> For this reason, Raz submits, the scope of authority ‘may be *extensive*, for example, the population of China, or all corporations throughout the world, or rather *small*, for example, the population of Lichtenstein or the fencing clubs of Riverdale, NY’.<sup>176</sup> To put it bluntly, an authority’s power to rule is not unlimited; rather, it is *relative to* a specific domain and limited to ‘certain circumstances or for certain purposes’.<sup>177</sup> However, the foregoing explanations about ‘comprehensive authority within a domain’ fail to dispel the air of uncertainty surrounding whether comprehensiveness and relative authority are compatible.<sup>178</sup> That is so particularly when Roughan’s following remarks are taken into consideration:

A claim to relative authority is different from a claim to reduced authority; rather, is a claim that acknowledges the conditionality of one’s authority upon appropriate interaction with others.<sup>179</sup>

I concur with Roughan on many scores, and find her theory of relative authority groundbreaking. Yet I am not quite sure whether her argument that political authorities lay claim to relative authority mirrors the practices of state and what we mean when we

---

right to rule is substituted by a bundle of rights including the right to expect support and non-interference, see A Buchanan, ‘The Legitimacy of International Law’ in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 79–96. For an application of the service conception to the international courts, see A Follesdal, ‘The Legitimate Authority of International Courts and Its Limits: A Challenge to Raz’s Service Conception?’, in P Capps and HP Olsen (eds), *Legal Authority Beyond the State* (Cambridge: Cambridge University Press, 2018) 188.

<sup>172</sup>Tasioulas (n 124) 102.

<sup>173</sup>Roughan (n 28). For the connection between relative authority and interlegality, G Çapar, ‘(Relative) Authority and Interlegality’ (2022) XI(1) *Rivista di filosofia del diritto* 43.

<sup>174</sup>N Roughan, ‘Mind the Gaps: Authority and Legality in International Law’ (2016) 27(2) *The European Journal of International Law* 329, 340.

<sup>175</sup>Raz (n 43) 145.

<sup>176</sup>*Ibid.*

<sup>177</sup>*Ibid.*

<sup>178</sup>Cf S Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011) 219–23.

<sup>179</sup>Roughan (n 28) 158.

are talking about their authority. In other words, it does not necessarily follow that the claims made by authorities are relative from the fact that authorities should be ‘committed to pursuing the appropriate relationships with other authorities’.<sup>180</sup> This obligation, for instance, may emanate from the service conception itself. One may easily argue that if ensuring coordination is one of the essential services for which authority is responsible, then authorities should be responsive to each other lest they undermine the services with which they provide individuals. Simply, there seems to be an argumentative gap between the sort of obligations or responsibilities that arise from the circumstance of pluralism and the nature of authority and its claims.

Further, we may admit that today’s legal space is interlegal,<sup>181</sup> occupied by overlapping legitimacy claims raised by different authorities. We may also count how it interacts with other authorities as an independent factor in the legitimacy assessment of authority.<sup>182</sup> Yet we are still confronted with the question of whether there is something distinctive to domestic authorities or we should rather consider them as being on an equal footing with international authorities. In other words, admitting that authority is relative provides us with no guidance when international and domestic authorities rely on different *kinds* of legitimacy. It does not follow from the decline of domestic sovereignty that states will lose their paradigmatic place, and nor does it entail that there is nothing distinctive to them and their claim to legitimacy. Hence, we must explore what differentiates domestic authorities from their international counterparts and explore whether the legitimacy claims made by international and domestic authorities are of the same *kind*.

### *The transformation of the legitimacy structure*

It does not necessarily follow from the limited state that domestic authorities should abandon their claim to comprehensive authority. They may still hold their claim to comprehensive authority even when they are living together with other authorities. In other words, there is a distinction between the claim to legitimate authority and its realization.<sup>183</sup> And there is no need for domestic authorities to give up their claim to comprehensive authority even if they make peace with the concept of limited sovereignty. More clearly, it is dubious whether it is justified for domestic authorities to abandon their claim to comprehensive authority, particularly when no other institution has the capacity to serve as ‘a general ends entity’ and none seems ready to assume responsibility for the

<sup>180</sup>Ibid 158. The key point that I would like to underline that domestic authorities, though their authority are reduced given the constitutionalization of international law, may contest the legitimacy of international authorities and reject engaging in a proper relationship with them. The relative authority thesis proposed by Roughan seems to be based on the view that international authorities are good and fare well in compensating for domestic disfunctionalities. It seems to me that international authorities should interact properly with domestic authorities, though the latter may sometimes oppose to the former’s legitimate authority simply because of comprehensive responsibility towards its citizens.

<sup>181</sup>Klabbers and Palombella (n 41).

<sup>182</sup>According to Roughan’s relativity condition, authorities, irrespective of their relationship with other authorities, ‘are required to engage one another in such a way that supports their legitimacy as authorities over subjects’. N Roughan, ‘The Relativity of Political Authority: Overlapping Claims and Shared Subjects Beyond the State’ (2020) 27(4) *Constellations* 702, 709.

<sup>183</sup>‘The government may have only some of the of the authority it claims, it may have more authority over one person than over another.’ Raz (n 142) 74.

whole.<sup>184</sup> International authorities, operating in functionally delineated domains, are likely to remain content with a claim to relative authority unless they are brought together under the banner of an absolute world government. Thus, it is misleading to think of their claim to authority as comprehensive. One may challenge this assumption, suggesting that using authority within a limited sector is not incongruent with a claim to comprehensive authority. Even though this challenge brings up further questions, I will not delve into further detail and consider comprehensiveness as the ability to regulate the life of individuals in a holistic way by finding a balance between conflicting interests, rights and expectations. Because international authorities carry out their authority in a segment of international law, their claim to authority is better classified as relative than comprehensive authority.

Under normal conditions, an authority should be apt to realize its aspirations and claims, and thereby remain potentially fit for realizing its claim to authority. This implies that a domestic authority should be apt to fulfil its true potential and capable of living up to its claim of comprehensive authority.<sup>185</sup> If we applied the similar logic to international authorities, it goes without saying that they should also be apt to realize their claim to relative authority. The SC brings with it a pluralist situation where authorities whose claims to authority are not uniform live together. If the current trend towards globalization continues, it seems that in the future, international authorities will increase their de facto authority at the expense of domestic authorities.<sup>186</sup> Taking this projection as a point of departure, I would like to ask what the possible impacts of increasing globalization on this legitimacy structure might be. Addressing this question requires us to embark on what Raz calls speculative analytical jurisprudence – that is, ‘to evaluate some of the dominant trends in analytical jurisprudence in light of likely developments’.<sup>187</sup>

Even though Raz admits that there is always a gap between what an authority claims and what it possesses, the SC seems to put further pressure on this gap and to significantly reduce the likelihood of domestic authorities to fulfil their claim to comprehensive authority. Domestic authorities appear less likely to exert their power in a comprehensive manner under the pressure of further globalization, for they are required to observe many restrictions imposed by international authorities. It is likely that their aspirations and claim to comprehensive authority will remain unfulfilled. Since domestic authorities are doomed to fail in their ambition for comprehensive authority under the circumstances of globalization, we may label them literally *authority manqué*. International authorities operating within a functionally delineated domain, however, are not subject to the same challenge. As they do necessarily lay claim to relative authority, they are fit for what they

<sup>184</sup>G Palombella, ‘Theory, Realities and Promises of Inter-legality: A Manifesto’ in J Klabbers and G Palombella (eds), *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019) 369.

<sup>185</sup>‘If the claim to authority is part of the nature of law, then whatever else the law is it must be capable of possessing authority.’ Raz (n 135) 215 For a similar distinction between the different claims made by functionally comprehensive and functionally specific authorities see, Lynn Dobson, ‘Legitimacy, Institutional Power, and International Human Rights Institutions: A Conceptual Inquiry’ in Follesdal et al (n 31) 190, 207–210.

<sup>186</sup>Drawing on the examples of the WTO, the UN Security Council and regional organizations such as the EU, Raz underlines a trend in international authorities towards developing features such as ‘difficulty of exit, and autonomous legal development, independent of assent of member states’. Raz (n 43) 154. It is not an exaggeration to expect that we will encounter more international institutions similar to them.

<sup>187</sup>Ibid 161.

are claiming to achieve. For the authorities whose claim to authority is sincere and straightforward, I will use the term *authority genuine*.

As the pluralist model brings different authority claims together, it poses many challenges to our traditional authority model. One is the disharmony between the domestic authority's claim and the extent to which it is realized. The disharmony arises from the simple fact that the primary responsibility for advancing individuals' living conditions and promoting basic services rests with states, despite the proliferation of international authorities that may erode the authority of the former. They are still 'the most comprehensive legally based social organisation of the day',<sup>188</sup> even though each passing day renders it impossible for states to 'regulate the totality of governance in a comprehensive way'.<sup>189</sup> Recall that states are capable of extending their legitimacy grounds by awakening feelings such as solidarity, trust and loyalty when they operate in an efficient and morally decent manner. The erosion of domestic authority whose claim to legitimacy is comprehensive may occasion a legitimacy deficit whose elimination by international authorities is highly questionable, at least under the neoliberal SC. That arises from the very fact that international authorities expected to complement the state's authority do not enjoy the same *kind* of legitimacy that they are eroding at the domestic level.<sup>190</sup> Hence a shift is underway in our traditional legitimacy structure (Raz's traditional model based on the comprehensiveness of any authority) towards a more pluralist model where neither state nor international authorities enjoy comprehensive authority.

### *The independence condition and the limits of the neoliberal SC*

Let us recall the two conditions that lead to the paradox of global constitutionalism. First, the SC is the only feasible and promising alternative, given that we are caught up in the middle between a domestic and global state/sovereign. In its current form of SC, international law may help states solve collective action problems and provide many services, yet it fails to bridge the legitimacy gap caused by the erosion of the non-instrumental legitimacy grounds that domestic authorities are likely to enjoy. The most important question to be addressed under these circumstances is whether there is something distinctive to states that render their legitimacy special in comparison to their international counterpart. In addressing this question, we may benefit from Raz's independence condition, which sets the outer boundaries beyond which instrumental justification of authority does not hold. So, it emphasizes that some cases escape the instrumental logic of the service conception and demands additional justification. The argument that lies at its core is the following. When it is less important for an individual to act according to the right reason (the service conception) than to decide for oneself how to

<sup>188</sup>Ibid 137.

<sup>189</sup>Peters (n 12) 580.

<sup>190</sup>This has further implications when the service conception is read together with Raz's perfectionist approach to liberalism. For a study dealing with the problem of whether incomprehensive authorities operating beyond nation-states meet the demands of Raz's perfectionist approach to liberalism, see M Sevel, 'Perfectionist Liberalism and the Legitimacy of International Law' in W Sadurski, M Savel and K Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press, 2019) 206–22. Buchanan and Powell (n 50) also underlines that "the piecemeal, incremental development of increasingly robust international law ... is highly problematic from the standpoint of the values that underlie constitutional democracy" 329–330.

act, the authority should give way to individual autonomy.<sup>191</sup> Seen in this light, it makes the justification of authority through the service conception conditional on it being compatible with the exceptions that fall under the scope of independence condition.

Raz presents three different cases to which the independence condition applies. The first case is concerned with parental authority when children's decision-making capacity is still developing. It underscores that authority should let children develop their decision-making capacity and autonomy by granting a certain margin of error. So the authority should retreat and open space for them until they flourish and develop their individual autonomy. I will call it the individual autonomy exception. The second case consists of a comparison between having recourse to authority for technical (pharmaceuticals) and non-technical issues (marriage) and emphasizes why individuals are less justified to benefit from an authority in the latter than the former. I will call it essential services exception.<sup>192</sup> Third, Raz warns against the danger of cognitive laziness, noting that, 'We are not fully ourselves if too many of our decisions are not taken by us, but by agents, automata, or superiors.'<sup>193</sup> The third case underlines how important it is to keep an individual's practical reasoning and decision-making capacity in good shape. Overwhelmed by the pressure of increasing demand for high-speed decision-making, individuals are more likely to use authorities and delegate their decision-making competence. As may be anticipated, when individuals hand their decision-making responsibility over to authorities, this may have deleterious effects on their individual autonomy and practical reasoning capacity in the long run. In particular, the over-use of authority comes with a price and jeopardizes individual autonomy after a certain point. I will briefly call it the authority dependency exception. In sum, the three exceptional cases that allow us to derogate from the rule of instrumental justification of authority are: (1) the individual autonomy exception; (2) the essential services exception; and (3) the authority dependency exception.

#### IV. The authority dependency exception and weakening of domestic democracies

In relocating the independence condition to the international domain, a couple of caveats are needed. First, what I mean by international authority is the authority exercised by international law in its neoliberal form of SC. For this reason, my argument is modest and limited to the current form of SC, and it is open to reevaluation when circumstances change. However, I believe it has some further implications for the SC regardless of its

<sup>191</sup>J Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, 1014. Follesdal draws attention to the cases where international authorities may prevent states from acting on other reasons Follesdal (n 171) 197–98. Habermas also limits the role of supranational world organization to ensuring security, order and freedom. Habermas (n 25) 445. Buchanan and Powell (n 50) introduce what they call meta-constitutional principle, according to which when the cumulative impact of international authorities on DLOs amounts to a domestic constitutional change, it asks for "public constitutional deliberation and popular choice" 347.

<sup>192</sup>'The former case for self-reliance (parents and children) is instrumental where the end is to secure what conformity with reason will, in the long run, secure; the latter case (marriage) depends on the fact that there are reasons that can only be satisfied by independent action.' Raz (n 191) 1016.

<sup>193</sup>Ibid 1016. A similar argument presented by Viehoff highlights the difference between the legitimate use of authoritative power and manipulation where power is used to create or enhance the dependency of subjects to authorities. Viehoff (n 123) 121–22.

particular instantiation and content. The argument, for instance, that the over-use of international authority may enfeeble domestic authorities seems applicable to any form of the SC, even to the Anthropocene SC, although the likelihood that the latter makes up for the legitimacy deficit appears to be higher than the neoliberal SC.

Second, states are to be treated as the legitimate representatives of their citizens, at least for the sake of this article.<sup>194</sup> By doing so, we may draw an analogy between individual autonomy and DLO's regulatory autonomy.<sup>195</sup> First, the independence conditions function as a bulwark against the instrumental justification of international authorities and provide a non-instrumental reason for domestic regulatory autonomy. As regards the first (individual autonomy) exception, since all states are accepted as equal with full personhood under international law,<sup>196</sup> the individual autonomy exception has no relevance for the international domain. However, that is a rebuttable presumption open to further consideration in case compelling evidence is presented. In any case, the other two exceptions seem quite relevant. At their core sits the idea that states are entitled to regulate the life of their citizens without undue external interference in their regulatory domain.<sup>197</sup>

Let us begin with the authority dependency exception. Endicott affirms that 'if the state is subject to *too much* regulation by international law and to too much external constraint', it risks losing its legitimacy.<sup>198</sup> In other words, over-using authority through excessive legalization of international law may weaken domestic authorities. The point is clarified by Endicott in the following remarks:

Rules of international law in general do not necessarily enhance or detract from sovereignty. States do, however, stand to lose their sovereignty (to a greater or lesser extent) if rules of international law or treaty obligations prevent them from exercising the freedom and power that they need in order to act justly and effectively as states. That can conceivably happen through illegitimate developments in international law (or even through trade treaties that make it impossible for a state to engage in just and effective labour market regulation or environmental regulation).<sup>199</sup>

<sup>194</sup>For an analysis that focuses on the complex relationship between autonomy of states with respect to international authorities and autonomy of individuals with respect to domestic authorities from the perspective of independence condition, see S Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights' in A Follesdal et al (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2013) 71–75.

<sup>195</sup>T Endicott, 'The Logic of Freedom and Power' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 245–59. Raz also draws a similar analogy, Raz (n 43) 158–159. Even though I have no space to benefit from its conclusions, we should be open to exploring how individual autonomy may differ from the DLOs' regulatory autonomy, see, e.g., D Enoch, 'Autonomy as Non-alienation, Autonomy as Sovereignty, and Politics' (2022) 30(2) *The Journal of Political Philosophy* 143.

<sup>196</sup>Ibid 254. For a similar analysis based on the idea of freedom, see Tasioulas (n 124) 112–15. 'Collective self-determination has value only in so far as it serves the interests of those individuals. Moreover, I leave aside the thorny question of whether such collective self-determination is only intrinsically valuable in the case of democratic states.' Ibid 113.

<sup>197</sup>Endicott (n 195) 254.

<sup>198</sup>Ibid 252. Zarbiyev succinctly notes that "more authority does not automatically translate into more legitimacy" F Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9(2) *Journal of International Dispute Settlement* 291, 312.

<sup>199</sup>Ibid 259.



From the foregoing, it follows that excessive legalization of international law may incapacitate domestic authorities and discourage them from making decisions for their own citizens. And that threatens the legitimacy of international and domestic authorities. It is clear that we need authorities, yet that is not to say that we need too many authorities. More authorities than needed may be detrimental to states.<sup>200</sup> Authority–autonomy equilibrium is antithetical to both weak (international) authority and (domestic) autonomy. On one hand, when domestic authorities are too strong, we have the problem of weak international authority. On the other hand, when international law is too strong and exerts undue influence on domestic authorities, we have the problem of weak domestic authority. When domestic authorities are strained under the excessive pressure of international authorities, they face a significant threat against their regulatory autonomy and de facto authority. Disproportionate reliance on the regulatory capacity of international authorities and their technocratic knowledge risks restricting domestic authority's autonomous decision-making capacity and endangers its relative independence from international authorities.<sup>201</sup>

The preceding explanations appear to support the arguments introduced by the new constitutionalists and manifest the problematic aspects of the neoliberal SC from the perspective of legitimacy. Fraser, for instance, asserts that neoliberalism 'is not self-sustaining, but free rides'<sup>202</sup> on the non-economic structural conditions such as the legal and political structure that safeguards private property and secures international trade. At the core of her claims sits the idea that, by its nature, neoliberalism destroys the very structural conditions that make it possible. Hence, for Fraser, neoliberalism should be better depicted as cannibal capitalism. Forgetting the political, natural and societal conditions on which it is founded, neoliberalism is set to 'destabilize these very conditions of its possibility'<sup>203</sup> and incapacitate its own basic structure. In our case, what is cannibalized and 'butchered' are democracy and domestic political systems.<sup>204</sup>

The literature is filled with similar commentaries that examine the political economy of the SC and reveal how it compels nation-states to abandon their welfare policies and adopt austerity measures.<sup>205</sup> They also point to a connection between technocracy, democratic backsliding and the rise of populism. Rodrik, for instance, documents how advanced stages of globalization aggravate the pressure on domestic legal orders and 'generate a base for populism'.<sup>206</sup> One key factor is the decay in distributive policies despite the intensified competition in the domestic labor market with globalization.<sup>207</sup> This may trigger a populist discourse against migrant workers simply because domestic

<sup>200</sup>As argued by Marmor in the rule of law context, 'too much, even of a good thing' may be bad for us. A Marmor, 'The Rule of Law and Its Limits' (2004) 23 *Law & Philosophy* 1.

<sup>201</sup>Endicott (n 195) 254.

<sup>202</sup>N Fraser, *Cannibal Capitalism: How our System is Devouring Democracy, Care, and the Planet and What We Can Do About It* (New York: Verso, 2022) 23.

<sup>203</sup>Ibid. The connection between political and economic liberalism is named by Christiano as the complementarity thesis, according to which "there is complementarity between successfully functioning political democracy and fairness in the structuring of economic life" T Christiano, 'Democracy, Participation, and Information: Complementarity Between Political and Economic Institutions' (2019) 56 *San Diego Law Review* 935, 936.

<sup>204</sup>Ibid 26.

<sup>205</sup>S Sassen, 'Expanding the Analytical Domain: American Democracy and Its Predatory Economies' (2021) 66(1) *Amerikastudien* 163.

<sup>206</sup>Rodrik, 'Populism and the Economics of Globalization' (n 21) 13.

<sup>207</sup>Sassen (n 205) 163–67.

workers may fear losing their jobs and feel threatened by the competition in the labor market.<sup>208</sup> Similarly, Afialo and Patterson underline how the rise of a 'global middle class' with the globalization of the labour market has altered the conditions of domestic workers by crumbling economic and social securities, and transformed the domestic middle class into a chronically excluded one.<sup>209</sup> The bottom line recurrent in the foregoing is that hyperglobalization incentivizes populism unless it compensates for the risk it creates through redistributive policies or social and economic security schemes.<sup>210</sup>

## V. Essential services exceptions

As already underscored, it does not follow from the fact that service conception remains 'the normal and primary way of justifying the legitimacy of an authority'<sup>211</sup> that it entirely closes off any other way of justifying an authority.<sup>212</sup> Raz admits that the role played by non-instrumental reasons in shaping the way an authority acquires legitimacy, the most prominent example of which is the trust placed by individuals on their own governments when they identify themselves as part of a political community and full members of a nation.<sup>213</sup> He subscribes to the view that those secondary reasons are apt to make a positive contribution to the legitimacy of domestic authorities by lessening the burden of proof necessary to their instrumental justification.<sup>214</sup> The essential services exception echoes a similar yet inverse logic because it seeks to protect the services endemic to the DLOs from the intervention of international authorities. It is based on a simple idea that 'I should decide for myself, rather than be dictated to by authority'.<sup>215</sup> As such, it places limitations on the instrumental justification of authority.

### *The right to democratic participation*

What exactly are those non-instrumental values or reasons? It is hard to give a clear description of all the values embedded in the DLOs, yet we may follow the explanations made by Raz to excavate some of the basic values. First, Raz suggests that domestic authorities differ from their international counterparts in providing the following services: (1) enabling individuals to enjoy their democratic right to participate in public affairs; and (2) functioning as a forum in which people develop their own identity and respect value-pluralism.<sup>216</sup> Put differently, those services are non-fungible and endemic to domestic authorities. First, international authorities are unable to meet the following service: a citizen's right to participate in democratic procedures and have a say in public affairs. Second, domestic authorities are distinctive because they lay claim to comprehensive authority and strive to regulate the lives of individuals in a holistic manner by

<sup>208</sup>Rodrik, 'Populism and the Economics of Globalization' (n 21) 24–27.

<sup>209</sup>Afialo and Patterson (n 89) 350–51.

<sup>210</sup>Ibid 368, 372.

<sup>211</sup>J Raz, 'Authority and Justification' (1985) 14(1) *Philosophy & Public Affairs* 3, 20.

<sup>212</sup>S Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford: Oxford University Press, 2013), 143, 148, 149.

<sup>213</sup>Raz (n 149).

<sup>214</sup>Ibid; Raz (n 211) 20.

<sup>215</sup>Raz (n 191) 1015.

<sup>216</sup>Raz (n 39) 79–80.

striking a balance between competing interests. It is evident that this is associated with the domestic authority's claim to comprehensive authority and legitimacy, and its potential to provide an environment suitable for individuals to enjoy the benefits of becoming full members of their community.

For instance, a state cannot abrogate its responsibility toward its citizens by raising an argument like the following: 'I cannot make the necessary legal regulations to increase your living standards owing to the stringent international economic regulations that bind us'<sup>217</sup>. The reason why this sort of argument fails to serve as a justification for a state's failure to provide its citizens with basic services is simple: States are not on equal footing with international organizations in their claim to legitimate authority. Theirs is necessarily comprehensive because it provides individuals with some services unique to DLOs. States' claim to regulate the lives of its citizens in a comprehensive manner is essential to promoting and protecting the value pluralism existing in a community. And that is, therefore, closely connected with democracy and an individual's right to democratic participation. In contrast, international authorities are reluctant to go beyond their sectoral boundaries and find a balance between multiple stakes relevant to the case simply because of their claim to relative authority.

Raz enumerates four benefits that come with democracy: (1) stability; (2) peaceful transition of power; (3) loyalty; and (4) solidarity.<sup>218</sup> Domestic democratic procedures therefore deserve respect and protection because they are home to many feelings, such as trust, solidarity and loyalty, as well as being beneficial for developing a sense of identity ('defining one's own identity as a member of a nation or some other group').<sup>219</sup> For now, those values find no home beyond nation-states, given the apparent failure of international authorities to garner the support of individuals and attract their loyalty.<sup>220</sup> Even though some international authorities have devoted considerable effort to democratizing the ways in which they operate, it is hard to say that democracy has gained any currency beyond the level of the nation-state. The EU, for instance, has developed various mechanisms for individuals to use their right to democratic participation at the

<sup>217</sup>Political space is filled with discussions revolving around this sort of questions and arguments. An anonymous reviewer pays my attention to the reaction of the current prime minister Rishi Sunak to the then PM's mini-budget proposal. Mr. Sunak says: 'If we don't directly help those vulnerable groups, those on the lowest incomes, those pensioners, then it will be a moral failure of the Conservative government and I don't think the British people will forgive us for that.' Available at: <https://www.nationalworld.com/news/politics/rishi-sunak-former-chancellor-liz-truss-tax-cuts-tory-leadership-campaign-2022-3858806>.

<sup>218</sup>Raz (n 132) 17.

<sup>219</sup>Raz (n 211) 20

<sup>220</sup>Raz (n 43) 162. 'The global constitution must address the issue of trustworthiness. It does not suffice to show that particular independent bodies now pursue Pareto improvements. There must also be mechanisms in place to ensure citizens that these independent authorities can be trusted over time. In the domestic cases of independent agencies, central banks and courts are embedded so that they still largely operate in the shadow of democratic scrutiny and accountability.' A Follesdal, 'When Common Interests are Not Common: Why the Global Basic Structure Should be Democratic' (2009) 16(2) *Indiana Journal of Global Legal Studies* 585, 603. Schaffer writes that "compared to a state, a global governance institution usually by definition faces greater cultural pluralism and people do not identify with it in the way that they identify with their states and nations". J H Schaffer, 'Legitimacy, Global Governance and Human Rights Institutions: Inverting the Puzzle' in Follesdal et al (n 31) 212 at 213. Likewise, Besson notes that "international law can only constrain states and individuals materially in a legitimate fashion if it also constitutes them formally as a political community of communities", as the constitutionalization of international law carries also the potential of domination and empiricism S Besson, 'Whose constitution(s)? International Law, Constitutionalization, and Democracy' in Dunoff and Trachtman (n 49) 406.

European level, but to no avail. One simple reason for the scarcity of democracy beyond nation-states relates to the fact that international authorities rest their legitimacy mainly on instrumental considerations.<sup>221</sup> For this reason, we are faced with the following dilemma: can international authorities preserve their legitimacy by merely grounding their legitimacy on instrumental grounds even when they avoid extending their legitimacy to 'non-instrumental values'?<sup>222</sup> They have so far carried on their activities in the limited areas where 'people do not feel that they are making "sacrifices"',<sup>223</sup> yet it is dubious whether they can maintain their legitimacy into the future. Raz expresses his concerns about this trend by noting that

without loyalty and solidarity ... even their [international organizations'] instrumental success is in jeopardy. The problem affects all regional organizations, like the European Union, the African Union, and the United Nations. It also affects all human rights organizations. A revival of – not very attractive – nationalism embracing extensive state sovereignty is a real possibility.<sup>224</sup>

To many, it may come as a surprise that Raz, as a legal philosopher, detected the main reason why international law is confronted with a populist reaction. For Raz, the simple fact that international authorities assume the role of states without being like them poses a dilemma for the former.<sup>225</sup> What we encounter here is an example of the paradox of global constitutionalism. As may be recalled, the SC envisions a process in which international authorities vested with technocratic expertise exercise their authority within a functionally circumscribed domain. So they must observe the relative domain in which they are operating to preserve its instrumental legitimacy. Yet they cannot generate feelings akin to trust and solidarity unless they go beyond their instrumental rationality, stretch their boundaries and extend their legitimacy to non-instrumental grounds. But when they go beyond their legitimate instrumental boundaries, they are prone to being charged with illegitimacy criticism simply because they are violating the legitimacy of another authority, namely domestic authorities. For this reason, the more they fail to garner the support of individuals and generate feelings such as loyalty, solidarity and trust, the more they are disposed to put their instrumental legitimacy in jeopardy. As international authorities rest their legitimacy mainly on instrumental grounds, they have problems generating feelings like trust and solidarity. They therefore need a creative leap to spawn those feelings and diversify their grounds for legitimacy. Yet the game must be played under the threat of populist reaction simply because whenever they are stretching their boundaries, they probably face nationalist and populist resistance. What I term the legitimacy gap, caused by the different kinds of legitimacy enjoyed by international and domestic authorities, is one explanation for why we encounter populist resistance against international law.

### *Democracy-Legitimate Authority Cycle*

The contribution of democracy to developing a sense of identity and solidarity among citizens, as well as between citizens and authority, is stated above. A further key function

<sup>221</sup>Raz (n 39) 78–79.

<sup>222</sup>Ibid 79.

<sup>223</sup>Ibid.

<sup>224</sup>Ibid 80.

<sup>225</sup>Ibid 79. Weiler points to a similar problem when he is talking about the tragedy of democracy in the international legal order, the legitimacy of which is based largely on output legitimacy. Weiler (n 89) 561–62.

of democracy is, according to Raz, to provide our political system with stability, regularity and predictability. Contrary to the commonsense approach that pits democracy against constitutionalism and the rule of law,<sup>226</sup> Raz associates democracy with stability. For him, democracy brings stability in the long term, even though it provokes public debates and discussions and sets in motion a process of contestation. Democracy's contribution to stability is tied to solidarity, which 'manifests itself most importantly in the degree to which they (individuals) are willing to make sacrifices or to suffer disadvantages for the sake of other members of their society'.<sup>227</sup> When solidarity is developed within a society, Raz argues, it has a positive impact on the health of a political system. Not surprisingly, the absence of solidarity is marked by democratic backsliding and political instabilities, where individuals are exposed to 'inner tensions and disintegrative tendencies'.<sup>228</sup> Following the line of reasoning, we may conclude that democracy and solidarity are closely connected, and both play a major role in the health and stability of a political system.

Many benefits that come with the rule of law depend partially on the fact that 'in democracies ... rulers don't have tenure' and are 'in a continual competition with one another'.<sup>229</sup> However, it is yet to be explored how democracy may strengthen the stability of a political system and keep it healthy. To address this, I suggest exploring how the SC impairs what I call the democracy–legitimate authority cycle, which suggests seeing democracy as an assessment mechanism through which individuals may measure the performances of their governments. If Raz is right in his contention that authority's legitimacy is contingent on its being a better service provider than its alternatives, then one cannot but help ask how we can be sure that authority is really doing better than others. Namely, we need a mechanism to measure the authority's performance and change it in case of dissatisfaction. Not surprisingly, democracy helps us kill two birds with one stone, as it empowers individuals to change the government when they are dissatisfied with its services. Because democracy provides a mechanism for a peaceful transition of power,<sup>230</sup> it not only contributes to the stability of the regime but also helps individuals measure the performance of their governments. So the simple fact that individuals are endowed with the right to vote in regular elections transforms an unstable legal system ridden with the threat of political revolution into a stable political system armed with a permanent assessment mechanism.<sup>231</sup>

As an assessment mechanism, democracy has further implications for the overall stability of a political system.<sup>232</sup> For example, it helps individuals to maintain authorities' services in good shape, prevent them from falling below a certain threshold and strengthen the overall stability of the political system in the long term. Seen in this light,

<sup>226</sup>For a different critique of this traditional paradigm from a different perspective, based on Habermas's idiosyncratic and original discourse theory, see J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles' (2001) 29(6) *Political Theory* 766.

<sup>227</sup>Raz (n 39) 74.

<sup>228</sup>Ibid.

<sup>229</sup>J Hampton, 'Democracy and the Rule of Law' (1994) 36 *Nomos* 13, 34.

<sup>230</sup>Ibid 32–33. Hampton calls it 'a form of controlled revolutionary activity'. Ibid 34.

<sup>231</sup>Marmor also underlines the connection between democracy and accountability by noting that, 'Creating mechanisms requiring re-election in regular and reasonable intervals is one of the greatest achievements of democratic systems, rendering, indeed, the elected officials accountable, at least to those who get to vote on their re-election'. Marmor (n 29) 14.

<sup>232</sup>Raz (n 132) 17.

it also functions as an enforcement mechanism that allows individuals to replace the old with the new government.<sup>233</sup> As sharply put by Jakab:

The rule of law is itself a product of democratic rotation; if governing parties have no fear of being outvoted and finding themselves in opposition, they will inevitably be less and less inclined to respect the separation of powers, particularly judicial independence, and fundamental rights.<sup>234</sup>

When democracy is worn out under the pressure of authoritarian or populist regimes, it is evident that it destabilizes the democratic assessment mechanism. Tushnet, for instance, asserts that when one political party dominates a constitutional system for a long time, there is a high probability that the regime degenerates into a *rule by law* system<sup>235</sup>. Put differently, what keeps authorities reliable and consistent is maintaining electoral competition between political parties in good shape.<sup>236</sup> Otherwise, it gets harder to appraise the performance of governments, keep authorities healthy and hold them politically accountable,<sup>237</sup> as exemplified by authoritarian and populist countries.

Like authoritarian and populist regimes, the neoliberal SC has a corrosive impact on the democratic assessment mechanism simply because it separates politics from the economy and reshapes our imagination of politics both at the international<sup>238</sup> and domestic levels. As already mentioned, neoliberalism narrows down the regulatory scope of DLOs by omitting many policies related to trade and economy from their regulatory scope. It therefore implies that ‘the space for domestic politics and contestation over such issues is more or less closed’.<sup>239</sup> And apparently the more the world is globalized, the higher the degree of internationalization and technocratization of law-making will be. Subsequently, many policies will be delegated to international authorities that operate at arm’s length from domestic authorities. However, it is not always unwarranted to benefit from international and technocratic institutions, as it may sometimes be done for the sake of democracy. I would like to stress that the costs incurred by the neoliberal SC may outweigh its benefits at some point. And one of the dangers that deserve significant attention is the way it bears on the democracy–legitimate authority cycle.

If an authority’s legitimacy is based on the services it is supposed to deliver, I find nothing amiss in claiming that the economy is one of the leading indicators of an authority’s success in delivering services.<sup>240</sup> Because the impact of economic policies

<sup>233</sup>O Hathaway and SJ Shapiro, ‘Outcasting: Enforcement in domestic and International Law’ (2011) 121 *Yale Law Journal* 252.

<sup>234</sup>A Jakab, ‘What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law’ (2020) 6(5) *Constitutional Studies* 23.

<sup>235</sup>M Tushnet, ‘Rule by Law or Rule of Law?’ (2014) 22(2) *Asia Pacific Law Review* 79.

<sup>236</sup>*Ibid* 91.

<sup>237</sup>‘Electoral procedures are designed to accomplish accountability; they are means to an end, and the end is the appropriate kind of accountability of an authority that is morally called for’ Marmor (n 29) 15.

<sup>238</sup>Lang (n 61) 6. Hardin also argues that when economic policies are settled in favor of the market’s authority, citizens find themselves faced with less important yet fragmented and blurred policies, which make it harder for them to assess the performance of their governments. R Hardin, ‘Government Without Trust’ (2013) 3(1) *Journal of Trust Research* 32.

<sup>239</sup>G De Burca, ‘Is EU Supranational Governance a Challenge to Liberal Constitutionalism’ (2018) 85 *University of Chicago Law Review* 337, 363.

<sup>240</sup>For a similar explanation, see Hardin (n 244).

on individuals' lives is immediate and substantive, they help individuals to make a rough assessment of how well the government performed in the last couple of years. Seen in this light, the new constitutionalist is right to claim that neoliberalism has impoverished public discourses simply because it debilitates the democratic assessment mechanism by simply identifying the economy with technocracy and undemocratic governance.<sup>241</sup> In brief, the depoliticization of economic policies potentially goes hand in hand with the politicization of other issues outside economics. The latter's relative importance for individuals is likely to increase when they are assessing the performance of governments. Here, the main concern resides in the difficulty of measuring the performance of authorities after the transfer of a bunch of economic policies to international and technocratic institutions.<sup>242</sup>

The neoliberal SC has further implications for the democracy–legitimate authority cycle because of its dissimilar impact on developed and developing countries. It puts the middle class under significant pressure and lays the foundations of a populist reaction to international and technocratic institutions in the developed countries. The primary reason why the middle class is further subject to economic pressure in developed countries is that they are forced to compete with incoming migrants under less favorable economic conditions than it was two or three decades ago. Its influence on developing countries is a bit nuanced, though. First, hyperglobalization results in the bourgeoning of the middle class in developing countries.<sup>243</sup> In other words, despite its distributional biases, hyperglobalization has brought with it many benefits, such as improving the living conditions of lower classes and increasing the overall welfare in developing countries. This creates a perception on the side of individuals that the governments – even those that are authoritarian and populist – are doing well simply because of the benefits accompanying hyperglobalization. In other words, the separation of economic from political liberalization allows authoritarian governments to reap the benefits of economic globalization without bearing the burden of political liberalization. China and Russia are exemplary cases in this regard. For instance, Matveev documents how economic growth and stability have always been foundational sources of legitimacy for Putin's Russia.<sup>244</sup> When the economy is cut off from its political roots, the political incumbents are largely given free rein to govern in whatever way suits their interests with limited electoral control under weak democracies.<sup>245</sup> For this reason, populist and authoritarian leaders rarely call into question the rules of international economic law with which they find a way to accommodate their authoritarian and populist policies.<sup>246</sup> In sum, even though

<sup>241</sup>Wilkinson (n 23) 535. For a similar argument, see TWG Van Der Meer, 'Economic Performance and Political Trust', in EM Uslaner (ed.), *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2017) 599.

<sup>242</sup>Sassen (n 211) 165–66; Hardin (n 244). Beetham pays attention similarly to the decline in the government's capacity to deliver services, as well as in its credibility after the economic globalization that accepts the market as good and states as bad. D Beetham, *Democracy: A Beginner's Guide* (One World Publication, 2005) 54–68.

<sup>243</sup>Afilalo and Patterson (n 89) 349.

<sup>244</sup>I Matveev, 'State, Capital, and the Transformation of the Neoliberal Policy Paradigm in Putin's Russia' (2019) 45(1) *International Review of Modern Sociology* 29.

<sup>245</sup>A similar argument is raised by Hardin when he argues that it is 'a corollary of letting the market run its course without massive government planning of economic growth and distribution that government escapes the burden of being judged for the success or failure of its economic planning'. Hardin (n 244) 42.

<sup>246</sup>Ginsburg underscores that today countries headed by populist or authoritarian leaders are integrated into the international economic system at least as much as their democratic counterparts. Ginsburg (n 14).

transferring economic policies into the international realm may increase global trade and overall welfare, it may also weaken domestic democracies and the democracy–legitimate authority cycle due to its impact on the democratic assessment mechanism.

## VI. Conclusion

Because we are living under the circumstances of globalization, where neither domestic nor international authority (sovereignty) is absolute, we need to reflect on the legitimate form of interaction between domestic and international authorities<sup>247</sup> and question whether the latter intervenes legitimately in the former's regulatory domain. This was the task that Raz assigned to the legal philosopher: to explore the concept of limited state and investigate 'the relation of state law to other legal systems ... the ways state integrate within the emerging international law'.<sup>248</sup>

Taking Raz's suggestion seriously, this article has approached this problem from the perspective of legitimacy and based its analysis on the statement that the SC of international law faces a legitimacy crisis. Russia's invasion of Ukraine and its violation of a norm on which the liberal international legal order is erected provide just one example of this legitimacy crisis of liberal international order. In unveiling the structural reasons informing the legitimacy crisis that international law faces today, the article has sought to explore how the neoliberal SC of international law destabilizes DLOs and creates a fertile ground for the flourishing of populism. It has further underscored that the conclusion reached in this article may not be applicable to all forms of SC, for it all depends on whether they create a legitimacy deficit and whether they succeed in making it up. In other words, even though it is clear that the SC narrows down domestic authority's regulatory space, whether it vitiates the legitimacy-democratic authority cycle and fuels populism depend on the form of SC adopted.

Having said that, the article has made the case that the paradoxical process of constitutionalization undergone by international law, owing to the lack of neither domestic nor global sovereign, is likely to create a legitimacy crisis mostly because of the distinctive sort of legitimacy grounds on which international and domestic authorities are founded. The SC's instrumental legitimacy has its own limitations, as made clear by the notion of the paradox of globalization, which argues that international law necessarily adopts a sectoral form of integration, and that it may create a legitimacy gap when international authorities fail to fill the legitimacy gap by engendering feelings such as trust and solidarity. While the article frequently relies on the analysis and examples advanced by the new constitutionalists, I believe its conclusions may cast light on the way in which any form of SC may fail to gain legitimacy. From the examination of whether the neoliberal SC is legitimate, for instance, we learn that we must look at whether it vitiates the domestic democracy–legitimate authority cycle, which may also stimulate populism.

In sum, international law remains caught between moving towards a global constitutional order through sectoral and functional integration and keeping its normative legitimacy intact. Yet it seems to have had a hard time continuing its functional integration without changing its legitimacy structure. We should remind ourselves of the famous phrase that 'you cannot have your cake and eat it too'. A balance is needed between global constitutionalization through sectoral integration and preserving

<sup>247</sup>Raz (n 39) 71–76.

<sup>248</sup>Raz (n 43) 161.



international law's normative legitimacy, as well as between international economic governance and the domestic democratic political process. Nevertheless, as argued and shown by the new constitutionalists, the neoliberal SC has worn domestic democracies away by narrowing their regulatory policies and undercutting their democratic stability and internal solidarity. Due to the excessive pressure that it exerts on DLOs, the neoliberal SC is prone to threaten domestic solidarity, trust and national identity, as well as deforming the democracy–legitimate authority cycle. The erosion of this cycle has further implications for the liberal international legal order, as it creates a fertile environment for populist and authoritarian leaders. They all reap the benefits of economic globalization even though they fall woefully short of meeting the basic standards of political liberalism and democracy. In other words, the neoliberal SC, which disconnects economic from political liberalism undermines the democracy–legitimate authority cycle and provides a permissive environment for populist and authoritarian leaders who can contest the liberal international legal order. For this reason, global constitutionalism, believed to compensate for the problems posed by globalization, bears the potential of weakening the non-instrumental legitimacy grounds of domestic authorities. Under these conditions, the legitimacy of international law is by no means incontestable and conclusive.

**Acknowledgments.** I would like to thank Gianluigi Palombella, Kutay Acar, and Walter Alberto Abalo Navia for their comments and contribution to the development of the paper. Further, I am highly indebted to two anonymous reviewers who challenge my arguments on various points, encourage me to think clearly about the target of my article, and press me to further clarify and elaborate on my arguments. Last but not least, I am grateful to the editors for giving me a chance to express my arguments in this special issue, though my paper takes on a rather different approach by not focusing on the direct consequences of the Russian invasion of Ukraine.