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CONSTITUTIONAL JUSTICE AND THE  
PERENNIAL TASK OF 'CONSTITUTIONALIZING' LAW  
AND SOCIETY THROUGH 'PARTICIPATORY JUSTICE'

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*Constitutional Justice and the Perennial Task of  
'Constitutionalizing' Law and Society through 'Participatory Justice'*

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This paper is a contribution to the forthcoming conference book edited by H.Micklitz, *The Many Concepts of Social Justice in European Private Law* (2010).

## **Abstract**

This contribution argues that concepts of social justice in European and international *private law* must remain consistent with the principles of justice underlying European and international *public law*. The contribution begins with a brief explanation of the diversity of conceptions of constitutional justice and of their legal impact on ever more fields of European public and private law (1). After clarifying the constitutional terminology used in this contribution (2), Rawlsian principles of justice for national and international law (3) are distinguished from multilevel human rights as principles of justice (4), multilevel judicial protection of constitutional rights and rule of law by 'courts of justice' (5), and the diverse forms of democratic and private 'participatory justice' for transforming legal and social relationships (6). The constitutional dimensions of the 2007 Lisbon Treaty (as discussed in section 7) confirm that the 'many concepts of social justice in European private law' - the focus of this conference book - must be construed and developed with due regard to the diverse dimensions of 'constitutional justice' in European and international public law.

## **Keywords**

constitutional law; constitutionalization; distributive justice; ECHR; ECJ; economic law; EU law; human rights; justice; Lisbon Treaty; multilevel constitutionalism; participatory justice; principles of justice; private law; Rawlsian principles of justice; social justice; theories of justice

## 1. Diverse Conceptions of ‘Constitutional Justice’ for Justifying National and International Law

The EU Charter of Fundamental Rights, UN human rights instruments and many national constitutions (like Article 1 of the German Basic Law of 1949) proceed from respect for human dignity as source of inalienable human rights that must be protected by rule of law and democratic governance. This modern constitutional foundation of national and international legal systems can be interpreted in conformity with Immanuel Kant’s moral theory of human rights: Respect for the moral, rational and reasonable autonomy (dignity) of human beings justifies individual rights to equal external freedoms and corresponding moral duties to protect equal freedoms in all human interactions at national, transnational and international levels through multilevel constitutional guarantees.<sup>1</sup> As ‘(e)ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override’, justice is – as famously proclaimed by J.Rawls – ‘the first virtue of social institutions, as truth is of systems of thought’.<sup>2</sup> The term ‘constitutional justice’ can be used broadly in this Rawlsian sense as referring to constitutional ‘principles of justice’ and institutions (like ‘courts of justice’) for the moral and legal assessment of post-constitutional legislation, administration, adjudication and private conduct structuring social relations among free and equal citizens. The diverse procedural, conventional, egalitarian, redistributive, corrective, commutative and social principles of justice can be conceived as sub-categories within this broader concept of ‘constitutional justice.’ The moral assessment of individual and collective actions within the basic structure of rules is the domain of ethics and justice as a virtue of personal conduct. Principles of constitutional justice for designing and improving a just national and international order remain dependent on moral analysis of such social conduct (e.g. the individual responsibility of citizens to participate in designing and maintaining their society’s institutional order) and of the ‘circumstances of justice’ (e.g. the rational egoism and limited reasonableness of individuals constrained by scarcity of resources in their pursuit of a good life) that make just rules and institutions necessary for a stable social order protecting peaceful cooperation among free and equal citizens with often diverse conceptions for a good life and for social justice.

The main proposition of this contribution is that principles of ‘constitutional justice’ are of fundamental importance for the legitimacy and stability of social order and may also influence judicial interpretation and legislative harmonization of private law. Sections 3 to 6 briefly summarize four different, yet complementary conceptions of ‘constitutional justice’: Justice as constitutional fairness (3); justice as multilevel constitutional guarantees of human rights and protection of basic human needs (4); constitutional justice as multilevel judicial protection of individual rights and ‘rule of law’ in conformity with ‘principles of justice’ in relations among individuals, among individuals and governments, as well as among states (5); as well as democratic and private forms of ‘participatory justice’ for agreed transformations of social relations (6). Human rights and constitutional law make ‘constitutionalizing’ law and social cooperation across Europe a perennial task of democratic lawmakers, governments, ‘courts of justice’ and of civil society. The judgment by the German Constitutional Court in the famous *Lith case* (concerning a private boycott against a film produced by a former Nazi film director) of 1958 – in which the Court inferred from Article 1(3) of the German Basic Law that fundamental constitutional rights (such as the general personality right and freedom of expression protected by Articles 2 and 5 of the Basic Law), apart from granting individual rights, also prescribe objective constitutional values that apply to the whole legal order and must be taken into

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<sup>1</sup> On the diverse interpretations of Kant’s moral, historical and political conceptions of natural rights see, e.g.: G.Beck, Immanuel Kant’s Theory of Rights, *Ratio Juris* 19 (2006), 371-401.

<sup>2</sup> J.Rawls (rev. edition 1999), at 3.

account in judicial interpretation of general private law clauses<sup>3</sup> - illustrates the potential relevance of constitutional law for the interpretation and judicial protection of private law, as recognized also in the case-law of the European Court of Justice (e.g. the 2007 ECJ judgments in the Laval and Viking cases) and in the Preamble to the EU Charter of Fundamental Rights of the European Union: 'Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.'<sup>4</sup> The relevance of European constitutional law for influencing, justifying or limiting harmonization and 'constitutionalization' of private law in Europe remains, however, contested. As European constitutional law is committed to 'respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels' (Preamble to the EU Charter of Fundamental Rights), the constitutional principles of EU law may also be invoked for justifying the prevailing diversity of national private law systems in EU member states.

## 2. Defining 'Constitutions', 'Constitutionalism' and 'Constitutionalization'

The terms 'constitution', 'constitutionalism' and 'constitutionalization' are used in this contribution in the following ways:

- *Constitution* refers to a coherent set of long-term principles and rules of a higher legal rank constituting the basic order of a political community (e.g. in a state), or of a functionally limited community (e.g. based on an international 'treaty constitution' for the collective supply of international public goods), with legislative, administrative and dispute settlement functions for the maintenance of rule of law for the benefit of citizens. Many national rules (e.g. 'basic laws', charters of human rights) and international 'treaty constitutions' can serve 'constitutional functions' for protecting equal rights, rule of law and transparent self-governance of citizens in public and private law relations even if the respective rules are not formally designated as 'constitutional.'
- *Constitutionalism* refers to the political method of using constitutional principles, rules and institutions (such as constitutional conventions elaborating constitutional rules) for the collective supply of national and international public goods that benefit all citizens concerned. Multilevel constitutionalism uses constitutional principles, rules and institutions at national and international levels of governance (e.g. legal organizations constituting legislative, executive and judicial powers protecting rule of law among citizens) for the collective supply of international public goods.
- *Constitutionalization* refers to legal methods aimed at strengthening constitutional principles, rules and institutions (like independent judicial protection of constitutional rights and 'constitutional justice') in the diverse forms of national and international rule-making, rule-administration and rule-enforcement. Due to the independence and impartiality of 'courts of justice' (e.g. compared with majoritarian political institutions) and their judicial 'administration of justice' on the basis of 'due process of law', judicial settlement – at national and international levels - of disputes over the interpretation and application of rules, and the resulting clarification and continuous adaptation of legal systems to the needs of citizens, offer a distinct mode of 'multilevel judicial governance' and principle-oriented 'constitutional restraint' on political rule-making and policy-making. As many international disputes are, directly or indirectly (e.g. by means of 'diplomatic protection' of individual rights by the home state), initiated at the request of citizens in order to defend their

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<sup>3</sup> BVerfGE 7, 198 (15 January 1958); cf. H.Rösler, Harmonizing the German Civil Code of the 19th Century with a Modern Constitution – The Lüth Revolution 50 years ago in Comparative Perspective, in: Tulane European and Civil Law Forum 23 (2008), 1 ff.

<sup>4</sup> Cf. O.J. EU C 306 of 17 December 2007 and: The Lisbon Treaty. The Readable Version (Foundation for EU Democracy 2008), at 199.



rights against alleged abuses of private and public power, 'judicial governance' complements the diverse modes of self-governance of citizens in constitutional democracies as well as in the multilevel governance of international cooperation among citizens.<sup>5</sup>

### **3. How to Interpret the EU Law Commitments to 'Justice'? Rawlsian 'Justice as Constitutional Fairness' in National and International Law-Making**

All EU member states have adopted national constitutions based on the insight of democratic constitutionalism that a society's legal and institutional order may be justified, improved and politically supported over time by constitutional agreement on political 'principles of justice' of a higher legal rank (e.g. for constituting, designing and limiting rights of citizens, human rights and democratic governance institutions) that must respect and protect the legitimate diversity of moral, religious and political conceptions of citizens and can be freely supported by all reasonable citizens.<sup>6</sup> Such an 'overlapping consensus' on a limited 'political conception of justice' can help justifying, maintaining and adapting a stable social order, endorsed by citizens with competing worldviews, if the principles respect and protect basic human needs and remain compatible with the enduring reality of diverse, and partially conflicting, moral, religious and other worldviews of citizens. Also in European law and integration, a shared conception of 'principles of political justice' justifying the 'basic structure' of European rules and institutions – as agreed in the 2007 Lisbon Treaty as well as in the EU Charter of Fundamental Rights which, *inter alia*, codify principles and rules of European constitutional law - can help resolve disputes on how constitutional rules and individual rights are to be developed over time and adapted to changing circumstances. The Treaty on European Union (as amended by the Lisbon Treaty), like the new Treaty on the Functioning of the EU and the EU Charter of Fundamental Rights as integral part of EU law, include numerous provisions referring to 'justice' (e.g. Article 2 TEU), for instance regarding the EU's 'area of freedom, security and justice' (e.g. Article 3 TEU, Arts. 67 ff TFEU), the 'Court of Justice of the EU' (Arts. 251 ff TFEU) and fundamental rights to justice (Title VI of the EU Charter of Fundamental Rights). Such explicit references of EU law to justice reflect the longstanding European tradition, since ancient Greek law, of conceptualizing law as participation in the idea of justice.

Rawls' *Theory of Justice* aims at promoting an 'overlapping consensus' among citizens on (1) a common moral justification of (2) principles of political justice for (3) the design, and adjustment over time, of the 'basic structure' of a stable social order. In accordance with this tripartite objective, Rawls conceived his *Theory of Justice* as having three tiers: the 'original position' on the top level is a contractualist thought experiment necessary for ensuring 'justice as fairness' in the social agreement, on the middle level, on two principles of justice<sup>7</sup> (with two priority rules) that constitutionally guide and restrain, on the bottom tier, the 'basic structure' of rules concretizing and institutionalizing the 'principles of justice' so as to sustain a stable order for social cooperation among citizens with fundamental interests in a good life, in a shared public conception of justice, and in successfully pursuing their chosen life plans. As citizens are not only shaped and bound by, but also collectively

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<sup>5</sup> Cf. Joerges/Petersmann, (2006). See also M.Shapiro/A.Stone Sweet (2004), chapter 4 (describing adjudication as a particular mode of governance, through which the legal structures of a legal community are continuously adapted to the needs and purposes of citizens and governments).

<sup>6</sup> On this 'idea of a well-ordered society' respecting the 'fact of reasonable pluralism' and pursuing only a limited conception of 'political justice' see: J.Rawls (1993), at 35 ff.

<sup>7</sup> Rawls' first statement of the two principles reads as follows: 'First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonable expected to be to everyone's advantage, and (b) attached to positions and offices open to all' (Rawls, rev. ed. 1999, at 53).

responsible for their social order, the Rawlsian constitutional theory justifies constitutional rules as resulting from *justice as fairness*, and as being in the rational self-interest of all reasonable citizens affected by the rules. In order to protect the ‘constitutional contract’ from being distorted by differential bargaining power and potential threats favouring certain contracting parties, the reasoning of citizens and balancing of their diverse interests must take place behind a ‘veil of ignorance’ (Rawls) ensuring equal consideration for all citizens. As, in such an ‘original position’, all individual interests are represented fairly and the constitutional principles of justice protect equal access of citizens to the ‘social primary goods’ essential for their individual well-being (e.g. equal basic liberties, rights and opportunities)<sup>8</sup>, ‘justice as fairness’ (Rawls) suggests that also the principles of justice and basic rules and institutions justified by such a ‘constitutional contract’ are to be accepted as fair and *just* by all individuals living under this social order.

European constitutional law reflects Rawlsian principles of justice and of procedural fairness in diverse, albeit imperfect ways. For instance, similar to the features of Rawls’ ‘original position’ for negotiating national and international principles of justice (such as the ‘veil of ignorance’, the requirement of publicity and unanimity, the negotiation of international principles of justice by representatives of national peoples rather than by individuals), the elaboration of the Lisbon Treaty and of the EU Charter of Fundamental Rights (as entered into force on 1 December 2009) by intergovernmental negotiations and ‘European Conventions’ (which elaborated the EU Charter of Fundamental Rights adopted on 8 December 2000 as well as the 2003 Draft Constitution for Europe<sup>9</sup>), and the ratification of the Lisbon Treaty by national parliaments, the European Parliament and by popular *referenda*, offered uniquely comprehensive procedures for taking into account interests of all groups of European societies and of their democratically elected representatives. EU law includes much broader and more detailed, constitutional as well as judicial guarantees of transnational liberty rights, equality rights, solidarity rights, citizen rights and rights of ‘access to justice’ (e.g. in terms of national and European judicial remedies) than any national constitution of any of the 192 UN member states. In spite of the economic origins of European law (e.g. in the European Atomic, Coal and Steel as well as Economic Communities), justice has become recognized – in line with the Rawlsian theory of justice – as being prior to utilitarian promotion of economic welfare through market integration and sectoral policy integration. Also the controversial, eight Rawlsian principles for an international ‘law of peoples’<sup>10</sup> – respect for the freedom and independence of people, *pacta sunt servanda*, equality of people, non-intervention, the right of self-defense, respect for human rights, for the laws of war and international development assistance – are all reflected in corresponding EU law principles. Likewise, the Rawlsian explanation of the causes of economic welfare in terms of domestic legal and political culture<sup>11</sup> seems to be confirmed by the relative welfare in each EU member state, just as Rawls’ support for the longstanding ‘democratic peace argument’ (i.e. the explanation by philosophers like Montesquieu, Kant and A. Smith that voluntary international trade contributes to peaceful cooperation across frontiers among democracies)<sup>12</sup> appears to be confirmed by the ‘democratic peace’ among all 27 EU member states.

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<sup>8</sup> Cf. Rawls (rev. ed. 1999), at 52 ff, 78 ff; on the lexical priority of basic liberties (which may be reduced only for the sake of basic liberties but not for the sake of any other social primary goods), see 36 ff.

<sup>9</sup> Cf. J.M. Beneyto, From Nice to the Constitutional Treaty. Eight Theses on the (Future) Constitutionalisation of Europe, in: Griller/J. Ziller (2008), at 1-20.

<sup>10</sup> J. Rawls (1999), at 36-37.

<sup>11</sup> Rawls (1999), at 108 ff.

<sup>12</sup> Cf. Rawls (1999), at 51-54.

#### **4. Justice as Multilevel Constitutional Guarantees of Human Rights**

The multilevel, constitutional protection of human rights through national laws, European law and international human rights conventions in all EU member states reflects Kant's theory of justice based on multilevel constitutional guarantees of human rights to maximum equal freedoms. In contrast to the US tradition of prioritizing civil and political liberties over economic and social rights ensuring fulfilment of basic socio-economic needs, Rawls later recognized that

'the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic socio-economic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.'<sup>13</sup>

This Rawlsian acknowledgement - that fulfilment of basic needs may be among the 'equal basic rights and liberties of citizenship'<sup>14</sup> - corresponds to the today worldwide recognition, in hundreds of national and international human rights instruments, of 'inalienable' and 'indivisible' civil, political, economic, social and cultural human rights to be respected and protected by national and international legal systems.<sup>15</sup> By explicitly acknowledging (e.g. in the Preambles of the European Convention on Human Rights and of the 1966 UN Covenants on civil, political, economic, social and cultural human rights) 'the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world', human rights are simultaneously recognized as 'principles of justice' limiting governance powers and guiding legislation, administration and adjudication. European Community law and the 2007 Treaty of Lisbon provide for comprehensive constitutional rights, human rights and other 'principles of justice' for an 'area of freedom, security and justice without internal frontiers' (Article 2 TEU), safeguarded by multilevel legal and judicial remedies in national and European courts. The EU Charter of Fundamental Rights emphasizes that

'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice' (Preamble).<sup>16</sup>

The comprehensive legal guarantees of the EU Charter for the protection of dignity rights, liberty rights, equality rights, solidarity rights, citizen rights and judicial rights, like the Lisbon Treaty's requirement of EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), reflect a dynamic evolution, and slow convergence, of national and international human rights and constitutional rights in Europe limiting multilevel governance and protecting social justice beyond national frontiers. The recognition of a human right to respect for, and protection of, human dignity by national and European courts, notwithstanding its diverse judicial interpretation within particular jurisdictions<sup>17</sup>, has promoted judicial protection also of basic human needs for a decent life and work in dignity (e.g. offering special protection to weaker parties like

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<sup>13</sup> Rawls (1993), at 7. Rawls specifies (at 166) that the level of well-being and education required depends on the level of development of the respective society; someone's basic socio-economic needs are met if she has the requisite means (including education) to take part in the social and political life of the society as a citizen.

<sup>14</sup> Cf. Rawls (1993), at 227 ff.

<sup>15</sup> E.U.Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in: F.Abbott/C.Breining/T.Cottier (2006), 29-67.

<sup>16</sup> Cf. The Lisbon Treaty (note 4), at 198.

<sup>17</sup> Cf. C.McCruden, Human Dignity and Judicial Interpretation of Human Rights, in: 19 EJIL (2008), 655 ff.

foreign workers, refugees, migrants and their families inside EC member states).<sup>18</sup> The new Article 6 TEU on the legally binding effect of the EU Charter of Fundamental Rights, on EU accession to the ECHR, and on fundamental rights as ‘general principles of the Union’s law’ will further strengthen the multilevel constitutional character of European law and its constitutional safeguards of fundamental rights and ‘principles of justice’ constraining multilevel governance inside the EU.<sup>19</sup>

## 5. Justice through Multilevel Judicial Protection of Constitutional Rights and Rule of Law

As an alternative to Rawls’ ‘original position’ as the basis for ‘justice as fairness’, the ethical theory of T.Scanlon<sup>20</sup> and the theory of justice by B.Barry<sup>21</sup> posit participants who are aware of their identities and motivated to seek agreement under conditions of impartiality and terms that nobody could reasonably reject. The constitutional protection of human rights of access to justice (e.g. in the sense of individual access to legal and judicial remedies, cf. Articles 6, 13 ECHR) and of independent courts administering justice impartially, subject to ‘due process of law’, are examples of constitutional justice as multilevel judicial protection of fundamental rights and ‘rule of law’ as constitutional restraints on ‘rule by men’ and their ‘rule by law.’<sup>22</sup> The functional interrelationships between law, judges and justice are reflected in legal language from antiquity (e.g. in the common core of the Latin terms *jus*, *judex*, *justitia*) up to modern times (cf. the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). Like the Roman god *Janus*, justice and judges face two different perspectives: Their ‘conservative function’ is to apply the existing law and protect the existing system of rights so as ‘to render to each person what is his [right].’ Yet, laws tend to be incomplete and subject to change. Hence, impartial justice may require ‘reformative interpretations’ of legal rules in response to changing social conceptions of justice. As explained by R.Dworkin, courts of justice should interpret law in conformity with its rule-of-law objectives and its underlying principles of justice.<sup>23</sup> Dworkin’s ‘adjudicative principle of integrity’ requires judges to interpret law as expressing ‘a coherent conception of justice and fairness’:

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<sup>18</sup> On ‘capabilities approaches’ to the interpretation of human rights (as developed by A.Sen and M.C.Nussbaum) see: M.C.Nussbaum (2006).

<sup>19</sup> On protection of citizen rights by means of the EU Charter of Fundamental Rights see: I.Pernice, *The Treaty of Lisbon and Fundamental Rights*, in: Griller/Ziller (2008), at 235 ff.

<sup>20</sup> T.Scanlon (1998).

<sup>21</sup> B.M.Barry (1995).

<sup>22</sup> On the dialectic developments of constitutional rights and principles of justice restraining the instrumental ‘governance by law’ see already Aristotle, *The Politics and the Constitution of Athens* (1996), book III, para.16, at 1287 a-b. On ‘rule of men’ as domination, and ‘rule of law’ as non-domination, see: P.Pettit (1997). According to F.A.Hayek (1960), it is ‘because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule’ (at 153). Rule of law differs from ‘rule by law’ and ‘rule by men’ in terms of constitutional safeguards such as judicial enforcement of law vis-à-vis private persons and public authorities and judicial protection of human rights and other principles of justice. Yet, the historical division between common law and equity law in England (where the Court of Chancery provided additional remedies in certain situations if the common law courts failed to do so) illustrates the long-standing claim by theories of justice (e.g. Aristotle, *Nicomachean Ethics*, 1999, at 1137b-1138a) that equitable and reasonable interpretation and application of the law may require judges to address particular circumstances of the dispute justifying particular interpretations of ‘principles of justice’, ‘rules of reason’ and ‘rules of recognition’ in order to do justice to particular circumstances of disputes.

<sup>23</sup> R.Dworkin (2006), at 9-21.

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'Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.'<sup>24</sup>

The European Court of Justice, for example, protects the fundamental rights and human rights of 500 million EU citizens not only vis-à-vis restrictions by EU institutions and by member states, but also against abuses of power in the 'horizontal relations' among citizens (e.g. in labour markets and consumer markets).<sup>25</sup> The ever more comprehensive jurisdictions and judicial remedies inside constitutional democracies and in European courts confirm the Kantian postulate that 'perpetual peace' – both inside nations as well as across nations - requires constitutional rights and judicial protection of 'rule of law' in all social interactions of citizens, i.e. among individuals, among individuals and governments, as well as among states.<sup>26</sup> The development of the customary international law rules for the protection of aliens, which require states to provide decent justice to foreigners and 'to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected'<sup>27</sup>, into human rights of access to justice<sup>28</sup> illustrates the progressive transformation of state-centred into citizen-oriented rules also in *international law*. The ever larger number of international treaties, notably in the field of international economic and environmental law, providing for individual rights of access to courts confronts judges with a 'constitutional dilemma':

- On the one side, citizens increasingly invoke specific treaty rules (e.g. relating to human rights, labour rights, intellectual property rights, investor rights, trading rights, fishing rights, protection of the environment) in national and international courts.
- On the other side, most intergovernmental treaties do not offer effective individual legal and judicial remedies<sup>29</sup>; hence, national, European and international judges are increasingly confronted with legal claims that intergovernmental treaty rules on the protection of individual rights - e.g. in UN human rights conventions, conventions on intellectual property rights adopted in the context of the World Intellectual Property Organization, in conventions on labour and social rights adopted in the context of the International Labour Organization, rules of the World Trade Organization, regional trade agreements on individual freedoms of trade and in investment treaties protecting investor rights - should be legally protected by judges as justifying not only rights of governments, but also *individual rights* and legal remedies against arbitrary violations by governments of their international treaty obligations to the detriment of domestic citizens.

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<sup>24</sup> R.Dworkin (1986), at 225, 243.

<sup>25</sup> Cf. B. De Witte, Balancing of Economic Law and Human Rights by the European Court of Justice, in: Dupuy/Francioni/Petersmann (2009), 197-207.

<sup>26</sup> Cf. I.Kant, Perpetual Peace, in: Kant Political Writings (1991), at 98 f.

<sup>27</sup> J.Paulsson (2006), at 7, 36.

<sup>28</sup> Cf. F.Francioni (2007).

<sup>29</sup> Cf. J.Dugard, First Report on Diplomatic Protection (International Law Commission UN Doc. A/CN.4/506, 2000), para. 25: 'To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right to individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.'

According to Rawls, ‘in a constitutional regime with judicial review, public reason is the reason of its supreme court’; it is of constitutional importance for the ‘overlapping, constitutional consensus’ necessary for a stable and just society among free, equal and rational citizens who tend to be deeply divided by conflicting moral, religious and philosophical doctrines.<sup>30</sup> Also in international law, the UN Charter (Article 1) and the Vienna Convention on the Law of Treaties (VCLT) recall the general obligation under international law ‘that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (VCLT, Preamble). The ECJ, the European Court of Human Rights (ECtHR) and the European Free Trade Area (EFTA) Court successfully transformed the intergovernmental European Community (EC) treaties and the ECHR into constitutional orders founded on respect for human rights.<sup>31</sup> Their ‘judicial constitutionalization’ of intergovernmental treaty regimes was accepted by citizens, national courts, parliaments and governments because the judicial ‘European public reason’ protected more effectively individual rights and European ‘public goods’ (like the EC’s common market). The ‘*Solange* method’ of cooperation among European courts ‘as long as’ constitutional rights are adequately protected, reflects an ‘overlapping constitutional consensus’ on the need for ‘constitutional justice’ and judicial cooperation (comity) in the multilevel judicial protection of rule of law in European integration.

## 6. Progressive ‘Constitutionalization’ of Legal and Social Relationships through Participatory Justice with Due Regard for ‘Reasonable Disagreement’

The legitimate diversity of national democratic constitutions illustrates that the transformation of ‘principles of justice’ into constitutional, legislative, administrative and judicial rules and institutions may legitimately vary among constitutional democracies according to their democratic preferences and historical experiences. The diversity of national and international human rights instruments and related constitutional guarantees likewise confirms that the two Rawlsian principles of justice – maximum equal liberties and a ‘difference principle’ protecting the least advantaged in societies – can be specified by very diverse civil, political, economic, social and cultural liberty rights and corresponding governance obligations depending, *inter alia*, on the respective constitutional traditions, democratic preferences and economic resources of the people concerned. For example, while multilevel cooperation among national and international courts in Europe in their clarification and judicial protection of international guarantees of freedom (e.g. in the EC Treaty, the EEA Agreement, the ECHR) have promoted a progressive ‘constitutionalization’ of ‘international law among sovereign states’ for the benefit of constitutional rights of European citizens, judicial cooperation among international and national courts outside Europe protecting individual rights remains limited to a few areas such as international criminal law (where national and international criminal courts increasingly cooperate in protecting victims’ rights), international investment law (where national courts recognize and enforce transnational investor-state arbitral awards), regional economic and human rights law (e.g. in a few regional human rights courts and regional free trade areas with regional economic courts as in the Andean Common Market and MERCOSUR ).

Participation and legal protection of citizens are the legitimizing factors in the elaboration of Rawlsian principles of justice, in judicial protection of human rights as well as in democratic legislation transforming general principles of justice and human rights into specific rules and institutions for peaceful cooperation among citizens. The pervasive reality of conflicts of interests *among* individuals competing for scarce resources, like the often unconscious conflicts *inside* the human mind (e.g. among rational egoism, limited reasonableness, emotional passions and unconscious instincts of

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<sup>30</sup> J.Rawls (1993), at 231 ff.

<sup>31</sup> Cf. E.U.Petersmann, Human Rights, International Economic Law and ‘Constitutional Justice’, EJIL 19 (2008) 769-798.

individuals), require dispute prevention and dispute resolution through 'pre-commitment' to constitutional rules and dispute resolution procedures not only in 'political markets' (e.g. so as to protect citizens against abuses of government powers), but also in private markets (e.g. so as to protect employees in labour markets and consumers in economic markets against abuses of private economic power and 'information asymmetries'). Political markets, labour markets and economic markets for private goods and services reveal similar 'market failures' that must be constitutionally restrained by constitutional rules of a higher legal rank (e.g. for protecting equal freedoms and non-discriminatory competition) as well as by 'participatory justice institutions' (e.g. for parliamentary and judicial protection of citizen-driven 'deliberative democracy', consumer-driven market competition and 'freedom of commercial speech'). The increasing calls for 'transforming social relationships through participatory justice' - beyond 'deliberative democracy', participatory democratic self-governance and adversarial judicial procedures - reflect the perennial task of progressively 'constitutionalizing' public and private law systems in order to prevent and resolve social conflicts (e.g. by promoting public and private 'mediation' procedures reflecting constitutional values like rule of law, dialogue among the disputants and voluntarily agreed dispute settlements aimed at 'consensus-based justice').<sup>32</sup> Conflicts of interests are not only enduring features of all societies; rules and procedures for peaceful conflict resolution based on 'participatory justice' also offer opportunities for continuously reviewing, adapting and developing rules, institutions and 'justice systems' in response to citizens calling for ever more comprehensive guarantees of 'social justice'.

## **7. The Future of European Constitutional Law and 'Social Justice'**

Following the rejection (in popular *referenda* in France and the Netherlands) of the 2004 Treaty establishing a Constitution for Europe, the 2007 Lisbon Treaty on the European Union was presented as an international treaty without 'constitutional character'. Yet, – both in terms of a formal, positivist concept of constitution (e.g. as referring to the long-term, basic rules of a higher legal rank constituting the governance system for a political community) as well as in terms of a substantive concept of democratic constitutionalism (e.g. as referring to constitutional citizen rights and basic rules constituting legislative, executive and judicial self-governance) – the Lisbon Treaty codifies and further develops European constitutional rules as they had been acknowledged already in the 2001 Nice Treaty on the EU (e.g. Article 6) and are now being further developed in the TEU (e.g. its Title I) as amended by the Lisbon Treaty. The diverse constitutional structures of the ECHR, of EU law and of EEA law (as interpreted by its EFTA Court) illustrate the legitimately diverse forms of multilevel 'constitutional pluralism' in European integration. As long as the European courts continue their successful cooperation with national courts, their multilevel judicial interpretation and protection of the ECHR, of the EU Treaty and EEA agreement as 'constitutional instruments' will continue to constitutionally limit private and public legal practices; it seems inconceivable today that the EU courts, the EFTA Court and the European Court of Human Rights (ECtHR) could ever abandon their constitutional commitment to judicial protection of fundamental rights protected by EU law, EEA law and the ECHR.<sup>33</sup> The case-law of the European courts on 'horizontal protection' of fundamental rights also in private relations among citizens in economic and labour markets, like the explicit recognition (e.g. in the Preamble to the EU Charter of Fundamental Rights) that European fundamental rights 'entail responsibilities and duties with regard to other persons, to the human community and to future generations', confirm that the 'principles of justice' and constitutional restraints of European law limit also *private law* systems and private legal practices (e.g. in commercial, corporate and competition law, consumer law, labour law, contract law, family law) across EU member states. Without such

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<sup>32</sup> Cf. Transforming Relationships through Participatory Justice (Law Commission of Canada: Ottawa 2003).

<sup>33</sup> On the perennial 'constitutional problems' of European integration law see: E.U.Petersmann, The Reform Treaty and the Constitutional Finality of European Integration, in: Griller/Ziller (2009), at 337-358.

safeguards of ‘constitutional justice’ and of ‘participatory justice’, the power asymmetries, information asymmetries and other ‘market failures’ in political markets, economic markets and labour markets would risk undermining the European ideals of citizen-driven democratic self-governance, consumer-driven market competition and collective bargaining among employers and employees.

The reality of moral, religious, political and legal pluralism, and the need for constitutional legitimacy of European governance on behalf of 500 million European citizens living in 27 nation states, is even more obvious in transnational European integration than inside nation states; both require respect for reasonable, political disagreement and for the social reality of ‘pluralism’ (as explicitly recognized in Article 2 TEU), which often reflects moral disagreement and legitimately diverse social and legal traditions. The Rawlsian theory of justice emphasizes that - in view of the ‘fact of reasonable pluralism’ and ‘the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body’ - the democratic exercise of coercive power over one another is democratically legitimate only when ‘political power ... is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.’<sup>34</sup> The judicial activism of the European Court of Justice in protecting non-discrimination and social integration of EU citizens exercising their EU market freedoms and claiming access to universal services, like the ECJ judgments (e.g. in the *Viking* and *Laval* cases) about the need for reconciling (‘balancing’) the EC ‘market freedoms’ with the rights of trade unions, illustrate that - in disputes over social justice - the exercise of judicial power and judicial reasoning must be justified with due regard to agreed ‘principles of justice’, such as the Lisbon Treaty’s new commitment to a ‘highly competitive social market economy’ (Article 3 TEU) or the ‘dignity rights’ protected in Title I of the EU Charter of Fundamental Rights (which might justify interpreting ‘common market freedoms’ and the ‘liberty rights’ protected in Title II of the Charter in terms of autonomy-based ‘positive liberties’).<sup>35</sup>

The Lisbon Treaty’s emphasis on, *inter alia*, the constitutional principles of respect for societal ‘pluralism’ (Article 2 TEU), limited conferral of powers, subsidiarity and proportionality (cf. Article 5 TEU) suggests that EU law may continue to have only a limited impact on private law systems (e.g. for promoting ‘contractual justice’ by means of legal protection of weak parties in contract law, consumer law, labour law and tenancy law). Even if EC legal acts (e.g. EC Directives on harmonization of certain areas of private law like corporate social responsibility) and court decisions are legally binding on their respective addressees, they may be questioned by citizens and political parties if their constitutional legitimacy is not justified in terms of protecting essential interests of EU citizens. Hence, in their judicial interpretation of EU rules and their systemic interrelationships (e.g. between European and national competition laws, labour laws and private law rules), judges must respect legitimately diverse traditions of interpreting and applying ‘principles of justice’ in domestic laws (such as conventional justice in the sense of rule-following, egalitarian justice in the sense of treating like cases alike, distributive justice in conformity with basic needs justifying limited redistribution of income, retributive justice in the sense of just compensation or punishment, reciprocal justice in the sense of mutual advantage, procedural justice and individual justice as protected by human rights). In ‘vertical disputes’ among citizens and governments (such as investment disputes in national courts and investor-state arbitration inside the EU), the legitimate functions of courts, their judicial ‘balancing’ of relevant ‘principles of justice’, and the limits imposed by constitutional rights and competing jurisdictions may differ from those in ‘horizontal disputes’ among governments (e.g. in the ECJ) or in private commercial arbitration. Just as European integration law protects European citizens against harmful border discrimination by national governments, so can legal EU

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<sup>34</sup> J.Rawls (2001), at 41.

<sup>35</sup> On competing constitutional conceptions of liberty rights see, e.g.: K.Möller, Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights, in: *Oxford Journal of Legal Studies* 29 (2009), 757-786.



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harmonization of national social and private rules help overcome harmful biases in national social and private law systems (e.g. exclusionary trade union practices preventing competition by posted workers from new EU member states as in the *Laval* and *Viking disputes* in the ECJ). Whether, to what extent and in which areas European integration requires, or justifies, harmonization of private law systems remains contested and needs to be legally and judicially clarified with due regard to the 'principles of justice' and limited scope of European constitutional law.

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