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Abstract

This lecture, delivered at Copenhagen Business School on 18 November 2011, examines the legal and constitutional methodologies underlying private commercial arbitration, national, regional and worldwide adjudication in trade and investment regulation with a particular focus on 'multilevel judicial governance' inside the European Union (EU) relating to international agreements concluded by the EU and/or its member states. It explains the need for methodological legal constitutionalism in terms of theories of justice and human rights and emphasizes the customary law requirement of interpreting treaties, and settling disputes, 'in conformity with principles of justice', human rights and fundamental freedoms. Due to the 'dual nature' of modern legal systems as positive law including 'principles of justice', judges and 'courts of justice' must define their 'constitutional functions' of 'administering justice' with due regard to procedural and substantive human rights and other 'principles of justice'. The particular context of European and international economic law (IEL) calls for interpreting the 5 competing conceptions of IEL not only in terms of (1) Westphalian conceptions of 'public international law among sovereign states', (2) 'global administrative law', (3) multilevel economic regulation and (4) international commercial and 'conflicts law', but also as part of (5) multilevel constitutional rules based on respect for legitimate 'constitutional pluralism' aimed at protecting transnational rule of law for the benefit of citizens. Arguably, both human rights and the 'rule of law' requirements of EU law justify 'cosmopolitan conceptions' of IEL protecting transnational rule of law and limiting arbitrary violations of EU law and IEL by EU institutions and member states.

Keywords

Arbitration; legal and constitutional methodology; economic adjudication; EU; European Economic Area; European Convention of Human Rights; investment law; judicial governance; principles of justice; WTO law.

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CONSTITUTIONAL PROBLEMS OF MULTILEVEL JUDICIAL GOVERNANCE IN TRADE AND INVESTMENT REGULATION

Prof. Dr. Ernst-Ulrich Petersmann

'When judges sit at trial, they stand on trial' (J. Bentham)

I. Legal and Constitutional Methodology

Citizens, as social human beings, can realize their diverse plans for a 'good life' and 'social justice' only through rules-based cooperation, including economic cooperation for supplying goods and services demanded by consumers. *Governance*, in the sense of 'steering' (*gubernare*) and regulating social conduct by some authority and rules, is necessary for organizing social cooperation and limiting the ubiquity of 'market failures' and 'governance failures' resulting from abuses of power and pursuit of self-interests at the expense of other citizens. Up to World War I, national and international law in Europe were based on *methodological legal nationalism*: the state was recognized as exclusive source of public law; and the 'international law of coexistence' remained essentially an instrument of national foreign policies based on state consent, as illustrated by the use of international law for the pursuit of colonial and imperial policies and the absence of permanent international organizations. World Wars I and II, and the worldwide economic and political crises during the interwar period, revealed the existential dangers of 'Westphalian power politics' and the need for an 'international law of cooperation'[1] for the collective supply of *international public goods*, as it was progressively realized after 1945 on the basis of the UN Charter and hundreds of multilateral agreements and institutions among the today 193 UN member states. Yet, most intergovernmental agreements commit states only to certain *legal results* without challenging the sovereign freedom to decide how international obligations should be implemented inside national legal systems. It was only in the context of European economic integration and human rights law (HRL) that the postwar paradigm of *Westphalian intergovernmentalism* was progressively limited by *methodological legal constitutionalism* 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU): the law of the EU, the European Convention for the Protection of Human Rights (ECHR) and, to a lesser extent, the European Economic Area (EEA) Agreement evolved into constitutional instruments with compulsory jurisdiction of international and national courts committed to protection of fundamental rights and transnational rule of law also inside member states. In limited areas of international economic law (IEL) and HRL, the constitutional method of multilevel legal and judicial protection of cosmopolitan rights continues to be progressively extended beyond Europe. While EU law's constitutional claim of final authority was accepted within constitutional limits as legitimate 'heterarchy'[2], the 'constitutional functions' of other international guarantees of freedom, equality, transnational rule of law and international adjudication remain contested.[3]

J. Rawls' *Theory of Justice* explains why the moral justifiability and democratic legitimacy of governance and legal orders depend on constitutional, legislative, administrative and judicial

[1] On the distinction between 'international law of coexistence' and 'international law of cooperation' see: W. Friedmann, *The Changing Structures of International Law* (London: Sweet & Maxwell, 1964).

[2] Cf. D. Halberstam, Constitutional Heterarchy: The Centrality of Conflict in the EU and the USA, in: J.Dunoff/J.Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: CUP, 2009), at 326-355.

[3] Cf. E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg University Press and Boulder Press, 1991).

protection of an 'overlapping consensus' on 'principles of justice' among citizens with diverse self-interests so as to 'institutionalize public reason'. Arguably, the universal human rights obligations of all UN member states and the ever greater interdependence between national and international public goods – like liberal (i.e. liberty-based) trading, monetary, financial, environmental and rule-of-law systems for the protection of human rights and general consumer welfare of citizens - entail that also *multilevel governance* of interdependent public goods requires a 'four-stage sequence' (J.Rawls) of constitutional, legislative, executive and judicial principles, rules and institutions supported by citizens.[4] This contribution examines how the existing rules for *multilevel judicial governance* – notably for the 4 judicial functions of (1) prevention and settlement of disputes, (2) rule-clarification, (3) rule-making and (4) rule-enforcement by national and international courts based on international agreements accepted by the EU and its member states – should be construed inside the EU in light of the EU legal principle that international agreements concluded by the EU are an 'integrating part of the Community legal system' with a legal rank prior to autonomous rule-making by EU institutions.[5] Even though the Lisbon Treaty increased the scope of judicial review inside the EU[6], the subject remains important in view of the refusal by EU institutions to grant EU citizens and member states judicial remedies against violations by EU institutions of international treaty obligations (e.g. under WTO law and new free trade agreements); the obvious failures to protect rule of law (e.g. compliance with the budget and debt disciplines prescribed pursuant to Article 126 TFEU) inside the Eurozone, and the proposals by France and Germany at the EU Council meeting in December 2011 for stronger judicial supervision of compliance with the EU budget and debt disciplines, illustrate how disregard for the EU law principles of 'rule of law' (Article 2 TEU) and 'strict observance of international law' (Article 3 TEU) can undermine the legitimacy of the EU and the welfare of EU citizens.

As the legitimacy and effectiveness of law as an instrument of social governance depend on the social acceptance and support by citizens of legal principles, rules and institutions, law has to be analyzed with due regard to its social context. The context of multilevel judicial governance in IEL differs from judicial cooperation in other fields like HRL and international criminal law:

- in order to protect freedom of contract and reduce transaction costs for the billions of producers, investors, traders and consumers participating in the worldwide division of labour, IEL relies more on decentralized, market-driven information-, coordination-, steering- and sanctioning-mechanisms as well as on cosmopolitan rights (e.g. in commercial, trade, investment, intellectual property, labour, economic integration law and arbitration) than most other fields of international cooperation and regulation;
- the current European banking, monetary and sovereign debt crises illustrate the strong interdependencies between national, regional and worldwide market regulations; inadequate regulation of profit-driven 'market forces' (e.g. in globally integrated financial markets) can entail systemic violations of rule of law by private and public actors (e.g. defaulting on their contractual debt obligations);
- the large number of private and public, (sub)national and international actors participating in the legal regulation (e.g. of more than half of world trade taking place inside and among some 80'000 transnational corporations with 10 times as many subsidiaries) illustrates the need for transnational rule of law protecting not only rights of governments, but also the rights of citizens and other economic actors;

[4] On the 'four-stage sequence' of legitimate rulemaking inside constitutional democracies like the USA see: J. Rawls, *A Theory of Justice* (Cambridge: HUP, 1971), at 195 ff. On multilevel governance and multilevel constitutionalism for the collective supply of international public goods see: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart Publishing, 2012).

[5] This principle has been confirmed by ECJ jurisprudence since Case 181/73, *Haegeman*, ECR 1974, 449, paras. 2-4.

[6] Cf. A. Hinarejos, *Judicial Control in the European Union* (Oxford: OUP, 2009).

- even though IEL provides for more 'international rule-of-law institutions' (such as multilevel regulatory and judicial authorities, quasi-judicial dispute settlement procedures, supervision by international organizations) for international rule-making and dispute settlement than in other fields of international law, the prevailing 'Westphalian conceptions' of 'international law among sovereign states' offer citizens no effective legal and judicial remedies against welfare-reducing violations of UN and WTO law;
- there remains strong legal and political disagreement on whether collective supply of international public goods requires interpreting IEL as (1) international law among sovereign states (e.g. the Bretton Woods agreements), (2) global administrative law (e.g. IMF and WTO law), (3) multilevel economic regulation (e.g. in NAFTA), (4) multilevel constitutional law (e.g. in the EU) or (5) as 'conflicts law' based on principles of international private law (e.g. in commercial and investment law and arbitration)[7];
- compulsory jurisdiction and jurisprudence of international dispute settlement bodies in IEL (e.g. in the WTO, regional trade agreements, bilateral investment treaties, commercial arbitration) tend to be more developed and more frequently invoked than in most other areas of international relations;
- in view of the ubiquity of 'market failures' and 'governance failures', economic courts throughout Europe insist on the customary law requirement of interpreting treaties, and settling disputes, 'in conformity with principles of justice' and human rights, as explicitly codified in the Preamble of the Vienna Convention on the Law of Treaties (VCLT) and reflected in the increasing references (e.g. by the ECJ and EFTA Court) to the jurisprudence of the European Court of Human Rights (ECtHR). Beyond Europe, however, the prevailing 'Westphalian conceptions' of IEL often disregard this customary law requirement of 'constitutional interpretation' protecting rights of citizens.

Arguably, the context of IEL illustrates the need for 'cosmopolitan' rather than only 'Westphalian conceptions' of IEL. As illustrated by Mohammed Bouazizi, the young Tunisian street vendor whose protests against arbitrary market restrictions triggered Tunisia's human rights revolution in 2011, arbitrary political oppression of individual economic freedom may justify a human rights revolution. The street protests in EU countries against the Eurozone crisis likewise suggest that the arbitrary violations of the budget and debt disciplines inside the European monetary union challenge the legitimacy of economic regulation leading to unnecessary banking crises, sovereign debt and social crises. As national and international legal systems are less about discovering 'scientific truth' than about 'public reason' for resolving social problems, it is ever more important to insist on 'constitutional interpretation' for the benefit of citizens and to clarify the 'constitutional functions' of 'courts of justice' for protecting human rights and transnational rule of law in the international division of labour. This contribution discusses constitutional problems confronting national and international tribunals in transnational economic and human rights adjudication, notably in multilevel judicial governance in Europe and in worldwide IEL. It argues that - as the unnecessary poverty in so many countries is due to 'governance failures', and the human right 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 Universal Declaration of Human Rights 1948) risks being undermined by 'Westphalian conceptions' of IEL - citizens have reason to insist on more cosmopolitan conceptions of IEL recognizing citizens as legal subjects and 'democratic owners' of governance institutions and focusing on protection of consumer welfare, cosmopolitan rights and transnational rule of law for the benefit of citizens. Similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways, private and public, national and international lawyers should acknowledge that their different conceptions of IEL as (1) public international law, (2) 'global administrative law', (3) 'conflicts law', (4) multilevel constitutional regulation or (5) multilevel economic regulation of the

[7] Cf. Petersmann (note 4), chapter I.

economy need to be integrated in order to protect the welfare of citizens more coherently. Arguably, like the interdependencies between private and public autonomy in legal protection of human rights, the private law and public law dimensions of the regulation of trade and investments are often inseparable. Just as human rights protect both private and public autonomy, most economic transactions among citizens take place from a *private law perspective* of traders, producers, investors and consumers; they derive their value from respect for 'normative individualism'. Transnational economic adjudication must protect private rights and judicial remedies in conformity with human rights and constitutional principles of justice. The ever increasing importance of multilevel judicial governance in European and IEL raises multilevel constitutional problems, which need more public discussion in order to be supported by the 'public reason' of citizens.

II. The 'Dual Nature' of Modern Legal Systems: Judges and 'Courts of Justice' as Guardians of Justice?

Law and governance need justification. EU law includes numerous references to justice (e.g. in Articles 2, 3 TEU, 67 ff TFEU), including guarantees of 'courts of justice' (Articles 251 ff TFEU) and of fundamental rights to justice (cf. Articles 47 ff of the EU Charter of Fundamental Rights). The ancient symbols and narratives of the independent, impartial judge administering justice by 'weighing' the arguments of both sides (*justitia* holding the scales) and enforcing the existing law (*justitia* holding the sword), like the common linguistic core of the legal terms *jus, judex* and *justitia* (or *justice* and the designation of judges as *Lord Justice*), recall the longstanding European traditions of recognizing justice as the main objective of law. Ancient Greek law, for example, conceived 'justice as a prerequisite to living a civic life, to living in community' (Plato); law was defined as 'participation in the idea of justice'.[8] Since the 'human rights revolutions' during the 18th century up to the universal recognition – in the UN Charter and numerous UN human rights instruments - of human rights as 'foundation of freedom, justice and peace in the world' (Preamble UDHR), ever more national constitutions and international agreements justify law and governance in terms of principles of justice, human rights, democratic self-governance and 'courts of justice' for the peaceful settlement of disputes and protection of rule of law. The today universal 'commitment towards the full realization of all human rights for all, which are universal, indivisible, interrelated, interdependent and mutually reinforcing'[9], and the derivation of human rights from respect for human dignity, entail the incorporation of ever more civil, political, economic, social and cultural human rights and related 'principles of justice' (like respect for human dignity, popular self-determination, democratic governance, legal and judicial accountability, individual access to 'courts of justice') into positive national and international legal systems. Hence, also in EU law, the mandates of national and EU courts of justice depend not only on specific legislative or treaty rules but also on how courts interpret their inherent powers and relevant 'principles of justice', for instance in their 'horizontal cooperation' with other institutions and courts (e.g. the EFTA Court and ECtHR) as well as in their 'vertical cooperation' among national and European courts.

The '*solange* principle' conditioning the cooperation by national constitutional courts with the ECJ and the judicial 'proportionality balancing' of civil, political, economic and social rights reflect

[8] Cf. C.J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: Chicago University Press, 1963), chapters II and XX.

[9] See UN Resolution 63/116 on the 60th Anniversary of the UDHR adopted on 10 December 2008. In conformity with the 1776 US Declaration of Independence and the 1789 French Declaration of the Rights of Man and of the Citizen, numerous UN human rights instruments recognize the 'inherent nature' of human rights deriving simply from being born into the human family, regardless of any government or court action or inaction.

'constitutional justice' as a systemic principle of European law.[10] As the relations between European and many *international courts* - like the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), WTO dispute settlement bodies and arbitral tribunals - are not specifically regulated in EU law, the legal relevance of international dispute settlement rulings (e.g. by the ITLOS, the WTO Appellate Body) and arbitral awards inside EU law must be determined with due regard to principles of justice as integral parts of European law. The worldwide recognition of international 'courts of justice', of human rights of access to justice[11] and of private arbitration – internationally recognized, coordinated and enforced on the basis of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and other multilateral agreements like the 1965 World Bank Convention establishing the International Center for the Settlement of Investment Disputes (ICSID) – illustrates that 'constitutional justice' (e.g. in the sense of independent, impartial 'courts of justice' administering procedural as well as substantive 'principles of justice') has become an integral part also of international law. Arguably, regardless of whether international arbitration is conceived as (1) a component of the national legal order at the seat of arbitration (assimilating the arbitrator to a national judge), as (2) being anchored in a plurality of national legal orders (e.g. of all states recognizing and enforcing the arbitration award) or as (3) a transnational arbitral legal order (e.g. being part of transnational commercial and investment law), arbitrators and courts should interpret their powers to adjudicate, the applicable rules and procedures governing the arbitration process and the legal effects of the award with due respect not only for the legal autonomy of the parties and of the arbitrators, but also for the interrelationships of the national and international legal systems involved and for legitimately diverse legal conceptions of international arbitration.[12]

Modern conceptions of law perceive legal systems as a union of 'primary rules of conduct' and 'secondary rules' of recognition, change and adjudication.[13] They emphasize that legal systems consist not only of *rules*, but also of dynamically changing *legal practices* by private and public legal actors who often justify legal claims and interpretations of rules by invoking *legal principles*. Hart claimed that international law 'resembles, (…) in form though not at all in content, a simple regime of primary or customary law' and, due to its incomplete 'secondary rules', a 'primitive legal order'.[14] Yet, in contrast to some areas of international law where third-party adjudication remains an exception to the rule of 'auto-interpretation', many areas of modern international law – like HRL and IEL – are today characterized by an ever stronger role of national and international courts in clarifying, progressively developing and enforcing transnational rule of law for the benefit of citizens, thereby transforming regional HRL and IEL into more developed legal systems than in other areas of the Westphalian 'international law among sovereign states'. Many national and international lawyers define law also today by 'the prophecies of what courts will do in fact' (US Supreme Court justice O.W.Holmes), and by how courts of justice will apply legal rules (e.g. 'general principles of law' in terms of Article 38 ICJ Statute).

Constitutions, laws and international agreements tend to be 'incomplete'; they cannot regulate all potential legal and political conflicts. Most legal principles (like justice and equality) and many rules (like human rights) use words with 'open texture' and meanings to be clarified through interpretation by legislatures, governments, courts and 'deliberative democracy'. The arguments of *legal positivism* – that legal rules and principles derive from human enactment pursuant to formal law-creating processes and 'rules of recognition' (H.L.A.Hart) that distinguish 'ought' (which is desirable) from 'is' (which legally exists) and law from other social rules – can no longer obviate the normative question of how incomplete systems of legal rules and principles *ought* to be interpreted in order to

[10] Cf. E.U.Petersmann, Human Rights, International Economic Law and 'Constitutional Justice', in: *EJIL* 19 (2008), 769-798.

[11] Cf. F.Francioni (ed), *Access to Justice as a Human Right* (Oxford: OUP, 2007).

[12] Cf. E.Gaillard, *Legal Theory of International Arbitration* (Leiden : Nijhoff Publishers, 2010).

[13] Cf. H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 1994), chapter V.

[14] Hart (note 13), at 214.

realize their declared legal objectives most effectively (such as protecting human rights and 'sustainable development'). The human rights jurisprudence of European courts confirms that the recognition of *jus cogens* and of other legal hierarchies (e.g. of constitutional over legislative and administrative rules) may justify judicial findings that unjust rules (e.g. UN Security Council decisions disregarding human rights) may not be a valid part of positive European law. As explained by Hart, a conception of valid law is to be identified, *inter alia*, by the criteria provided in the rules of recognition and their interpretation by citizens, governments and courts demonstrating that a legal system is accepted as such. The recognition of valid 'law' may also depend on conceptions of justice justifying human rights. The multilevel human rights obligations of states constitutionally limit the 'rules of recognition' by permitting recognition of only such rules and institutions as legitimate and/or valid that respect constitutional rights and 'principles of justice' as defined in democratic lawmaking and judicial proceedings.[15] Hence, the dual nature of modern legal systems – i.e. as positive law (e.g. represented by authoritative issuance and social efficacy of rules) as well as 'inalienable' human rights and open-ended 'principles of justice' – is of crucial importance for legal interpretation and dispute settlement, not only inside constitutional democracies[16] but also in international HRL and IEL regulating the transnational cooperation among citizens within constitutionally defined restraints. For instance, the transformation of moral human rights (e.g. as tacitly accepted in discourse and reasoning among human beings accepting one another as autonomous and equal 'discursive creatures') into *positive rules* of constitutional law, HRL and IEL never obviates *normative questions* of how positively agreed, cosmopolitan rights should be interpreted in order to actually realize and 'optimize' human rights and other principles of justice. Modern constitutional theory explains why protection of justice, human rights and legal security require institutionalizing respect for reasonable 'constitutional pluralism', deliberative democracy and legal and judicial 'balancing' of competing rights supported by 'public reason'.

III. Justice as Constitutional Restraint of Legal Governance Systems?

According to John Rawls, 'justice is the first virtue of social institutions, as truth is of systems of thought.'[17] Arguably, the moral and human rights imperative to respect each person's dignity entails moral and legal obligations to justify restrictions of human freedom and to help all persons to have access to national as well as international, just institutions protecting their basic human rights.[18] Rawls' *Theory of Justice* explains why, in view of 'the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body' and in view of the 'reasonable disagreement' among citizens with often conflicting conceptions for a good life and political regulation, the democratic exercise of coercive power over one another is 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.'[19] As principles of justice and human rights say little about the optimal institutional design of

[15] In order to avoid legal uncertainty, only violations of human rights, constitutional rights and other forms of 'extreme injustice' are likely to affect the validity of legal rules; cf. R. Alexy, *The Argument from Injustice* (Oxford: OUP, 2010).

[16] Cf. R.Alexy, The Dual Nature of Law, in: Ratio Juris 23 (2010), 167-182, who concludes that 'legal positivism is an inadequate theory of the nature of law' (at 180). Arguably, the inclusion of human rights and principles of justice into modern international and constitutional law permits accommodating the dual nature of law within a broader concept of positive law.

[17] Rawls (note 4), at 3.

[18] Cf. A.Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (Oxford: OUP, 2004), at 86-88.

[19] J. Rawls, *Justice as Fairness: A Restatement* (ed. by E.Kelly, Cambridge: HUP, 2001), at 41.

governance systems and of IEL, comparative analyses of national constitutions reveals an enormous diversity of constitutional and institutional approaches also among constitutional democracies, for instance regarding the role of domestic courts and the regulation of the relationships between national and international economic regulation.[20] The success of constitutional democracies in collective supply of *national public goods* is increasingly being undermined by the failures of the prevailing 'Westphalian system' of 'international law among sovereign states' to protect interdependent, *international public goods* like human rights and liberal trading, monetary and financial systems. Is such an imperfect and often unjust international order the inevitable fate of humanity?

Just as theories of justice differ considerably according to their underlying value premises, so do the diverse individual and democratic preferences and rational self-interests of people and governance institutions often entail conflicting views as to how constitutional and other legal principles of justice and governance powers should be construed. For instance[21]:

- *Rights-based theories of justice* give constitutional priority to 'inalienable' human rights and constitutional limitation of government powers so as to protect the autonomy and independence of individuals who, as Kant explained, must be treated as ends in themselves and never merely as means for securing benefit to another. For instance, Article 6 EU named liberty as the first principle upon which the EU was founded, prior to 'respect for human rights and fundamental freedoms, and the rule of law'. The EU Charter of Fundamental Rights, as incorporated into EU law by the Lisbon Treaty, protects comprehensive dignity rights, freedoms, equality and solidarity rights, citizen rights and 'rights to justice'. Non-European countries, by contrast, often limit rights-based constitutionalism by prioritizing civil and political over economic and social rights (e.g. in Anglo-Saxon democracies), or civil, economic and social over political rights (e.g. in communist countries). Notwithstanding the commitment in UN human rights instruments to protection of the 'indivisibility' of human rights, countries with limited, rights-based constitutionalism often refuse ratifying, e.g., the 1966 UN Convention on Civil and Political Rights (which has not been ratified by, e.g., Asian countries like China), or the 1966 Convention on Economic, Social and Cultural Rights (which has not been ratified by, e.g., NAFTA countries like Canada and the USA).
- According to John Rawls' constitutional theory of *'justice as fairness'* and '*procedural justice*', reasonable citizens would give priority to maximum equal liberty as the 'first principle of justice', but would also recognize the 'principle of fair equality of opportunity' and a 'difference principle' within a system of equal basic rights. The 'second principle of social justice' is necessary for defining 'the appropriate distribution of the benefits and burdens of social co-operation'[22] so as to reduce the arbitrary effects of the distribution of 'natural primary goods' (like individual health and intelligence, natural resources inside countries) and promote a just distribution of 'social primary goods' (like constitutional rights, income and wealth). As national welfare, according to Rawls, depends more on a country's social institutions than on its natural resources, each people can agree on social and constitutional arrangements that provide its citizens with the natural and social goods essential for satisfying basic needs.[23]
- *Utilitarian theories of justice* justify individual liberty and equal opportunities for exchange and competition among individuals not in deontological terms of equal freedoms or constitutional contracts, but as result-oriented mechanisms satisfying individual preferences and promoting

[20] Cf. the comparative legal and interdisciplinary analyses in: M. Hilf/E.U. Petersmann (eds), *National Constitutions and International Economic Law* (The Hague: Kluwer Publishers, 1993).

[21] For a detailed discussion of the following overview see: Petersmann (note 4), Chapter VI.

[22] Rawls (note 4), at 4.

[23] See J.Rawls, *Law of Peoples* (Cambridge: HUP, 1999), at 37-38, 106-120 ('the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources', at 117).

'welfare' (e.g. in the sense of the greatest happiness of the greatest number). For instance in Anglo-Saxon constitutional systems prioritizing civil and political human rights over economic and social rights, economic legislation and administration are influenced more by utilitarian theories (e.g. on promotion of consumer welfare through non-discriminatory conditions of competition, promotion of 'producer welfare' through trade protectionism) than by fundamental rights.

- *Communitarian theories of justice* regard all values as embedded in a particular social culture. Rather than individual freedom, they emphasize 'participatory', 'representative' and 'deliberative democracy' and other procedures for determining social and political community values, as illustrated by the socialist maxim (e.g. in Article 6 of China's Constitution of 1982): 'from each according to his ability, to each according to his work'. For example, a national communitarian concept of economic justice may object to international trade liberalization if the domestic 'winners' benefiting from trade gains do not compensate the domestic 'losers' bearing the adjustment costs.
- *Merit-based theories of justice* combine notions of equality, desert and 'corrective justice' (e.g. punishment and compensation for injuries) in order to 'give everyone his or her due'. Justice requires treating individuals as rational agents responsible for their actions, and merits reward or punishment for conduct. Many economists, for example, argue, that social and economic inequalities among developed and less-developed countries are *not* the result of inherent differences in their natural endowments (*i.e.* an arbitrary distribution of natural primary goods in terms of Rawls' theory of justice); rather, 'rich countries are rich because their citizens produce more per head, not because they have secured privileged access to 'the planet's goods', or to its resources.'[24]

The legitimate diversity of constitutional traditions and theories of justice illustrates the need to respect 'reasonable disagreement'. Yet, the interdependencies between national and international public goods entail a need to 'institutionalize public reason' beyond constitutional democracies for protecting *international public goods* in conformity with the human rights obligations of all UN member states also in transnational relations. For instance, even though the UN Charter protects 'sovereign equality' of states (Article 2 UN Charter), it also recognizes that *normative legitimacy* (in contrast to *factual legitimacy* deriving from tradition, charisma or power) depends on 'We the Peoples of the United Nations' (Preamble UN Charter) and on respect for the human rights of individuals as the ultimate sources of values and units of moral concerns. The more justice becomes a matter of multilevel protection of human rights and constitutional empowerment and protection of individual and democratic self-development, the more urgent becomes the need for constitutional reforms of Westphalian conceptions of states as the only subjects of international law. As illustrated by the EU Charter of Fundamental Rights and by the UN Security Council resolutions on 'duties to protect', normative 'duties to protect human rights and other principles of justice' more effectively in national and international legal systems are increasingly accepted as integral parts of the existing human rights obligations of European and UN member states.

[24] D.Henderson, *The Role of Business in the Modern World: Progress, Pressures and Prospects for the Market Economy* (London: Institute of Economic Affairs, 2004), at 83.

IV. Do 'Constitutional Justice' and Human Rights Require Cosmopolitan IEL?

Since Aristotle's *Politeia,* the idea of 'constitutional justice' in the sense of legal and judicial protection of 'rule of law' for the benefit of citizens as a constitutional restraint of the 'rule by men' and their 'rule by law' belongs to the oldest paradigms of 'justice.'[25] The 'Westphalian international law among sovereign states' up to World War I did not provide for permanent worldwide institutions; and the institutions established after World War I (like the League of Nations) and after World War II (like the UN) were inspired by ideals of intergovernmental 'social engineering' that failed to realize many of the 'grand strategies'. As illustrated in *Table 1* and predicted by Kant's constitutional theory, it was essentially only in regional human rights and economic integration regimes - as well as in functionally limited, commercial and investment arbitration regimes - with institutional 'checks and balances' and multilevel judicial protection of cosmopolitan rights that intergovernmental power politics was progressively transformed into transnational rule of law for the benefit of citizens. Arguably, cosmopolitan legal orders based on multilevel judicial protection of human rights and other cosmopolitan rights of citizens – like the common market law of the EU and the EEA, the multilevel legal and judicial protection of human rights in the context of the ECHR, and transnational commercial and investment law providing for the multilevel judicial protection of economic freedoms, property rights and transnational rule of law by arbitral tribunals and national courts - can limit abuses of power and protect transnational rule of law for the benefit of citizens more effectively than intergovernmental power politics disregarding the need for 'constitutional justice' beyond state borders. As discussed below, 'constitutional interpretations' of international economic and human rights agreements by national and European courts of justice – like the EU Court (ECJ), the EFTA Court and the ECtHR - for the benefit of citizens are more consistent with principles of justice than the selfish attempts by intergovernmental institutions to limit their legal and judicial accountability vis-à-vis citizens for their often arbitrary violations of international rule of law.

The UN Charter, the customary methods of treaty interpretation, and the statutes and procedures of many international courts require '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' (Preamble VCLT). The VCLT refers, *inter alia*, to

> 'principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all' (Preamble).[26]

The globalization of economic, environmental, legal and technological cooperation and of human rights continues to promote new modes of legal and 'constitutional' reasoning (e.g. on the human

[25] 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 Kant's moral justification of 'public justice' as a 'condition which reason, by a categorical imperative, makes it obligatory for us to strive after' in order to guarantee to all men equal maximum liberties as a human right, see: I. Kant, *The Metaphysics of Morals* (translated by M.Gregor, Oxford: OUP, 1991), at 120-129.

[26] Arguably, this Preamble text refers not only to the preceding sub-paragraph on 'conditions under which justice and respect for the obligations arising from treaties can be maintained', but also to 'principles of justice and international law', in conformity with the recognition in numerous legal systems that human rights constitute not only individual rights, but also corresponding obligations of governments and 'principles of law' to be taken into account in legislation, administration, adjudication and international treaty interpretation pursuant to Article 31 VCLT.

rights responsibilities of governments and NGOs) differing from the 'legal formalism' reflected in some of the 'conflict rules' in the VCLT (like *pacta sunt servanda*, *lex specialis*, *lex posterior*, *lex superior*). Just as the successful 'judicial transformation' of the intergovernmental treaties establishing the EC, the EEA and the European Convention of Human Rights (ECHR) into cosmopolitan legal systems has protected fundamental rights and citizen welfare more effectively (cf. *Table 1*), the future legitimacy and effectiveness of UN law and IEL will depend on re-interpreting their international obligations for the benefit of

citizens and their human rights. In many UN member states, governments remain the main violators of human rights and the main obstacle to mutually welfare-increasing cooperation among citizens across national frontiers. Hence, international legal safeguards are needed not only in relations among states, but also for the protection of citizens against their own governments (e.g. violating the fiscal, debt and monetary disciplines of EU law). The more justice is recognized as an agreed objective of national and international law, the more justice-related claims will be raised also in *international* rule-making and dispute settlement proceedings, for instance in investor-state arbitration, regional courts and human rights bodies. The common 'constitutional core' of theories of justice – in spite of the legitimate

diversity of conceptions of justice - can be defined in terms of basic human rights, which increasingly limit the power-oriented, positivist traditions and conceptions of international law and may justify 'cosmopolitan interpretations' reconciling state sovereignty, popular sovereignty and 'individual sovereignty' by re-interpreting state-centred international law rules for the benefit of citizens and their human rights. By challenging state-centred traditions and vested interests protected by the traditional 'international law among states', citizens may ultimately learn - through public discourse, struggles for justice and 'trials and errors' - how to defend their human rights and democratic self-government more effectively against the ubiquitous abuses of foreign policy powers undermining the supply of international public goods demanded by citizens.

Table 1: From 'Westphalian IEL' to Regionally or Functionally Limited 'Cosmopolitan IEL'

Westphalian IEL	focuses on reciprocal rights/obligations among 'sovereign states' and separation of international from national legal systems, usually (e.g. in UN law) without compulsory jurisdiction for peaceful settlement of disputes; the treatment of citizens as mere objects of international law, the lack of effective protection of 'transnational rule of law' and of human rights, and ineffective parliamentary and democratic control of UN law in many states undermine the moral and democratic legitimacy of 'Westphalian international law'.
Cosmopolitan IEL	focuses on rights and obligations of individuals and their multilevel legal and judicial protection across national frontiers in conformity with UN and WTO law; it protects transnational rule of law and strengthens the 'constitutional limits' of state sovereignty, popular sovereignty and 'constitutional justice', for instance in regional EU law, EEA law and the ECHR.
EU law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of multilevel constitutional principles (e.g. of legal primacy, direct effect and direct applicability of EU legal rules) and EU institutions.
EEA law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of more deferential constitutional principles (e.g. of quasi-primacy and quasi-'direct applicability' of EEA rules after their incorporation into domestic law) and EEA institutions.
ECHR law	has evolved into a multilevel legal and judicial system protecting human rights and access to justice in the legal and judicial systems of the 47 member states for the benefit of more than 800 million citizens.
Law merchant (*lex mercatoria*)	continues to evolve into cosmopolitan commercial, investment and arbitration law with multilevel judicial protection of individual freedoms (e.g. of contract), property rights and transnational rule of law empowering citizens.

V. Do Human Rights Require Multilevel Constitutionalism Based on Respect for Constitutional Pluralism?

The 'globalization' of international economic, environmental, political and legal relations, and its ever larger impact on the legal regulation and social stability inside states, have transformed national constitutions into 'partial constitutions' that can no longer effectively protect general citizen interests in ever more areas of social life without international law and international organizations as essential instruments for 'multilevel governance' for the collective supply of *international public goods* (like international rule of law, a mutually beneficial division of labour, transnational protection of human rights). Even though conceptions of 'international justice' in transnational relations among individuals as well as among states tend to be more controversial than inside countries, the human rights objective of individual and democratic self-government protected by rule of law and by 'access to justice' requires extending constitutional safeguards to mutually beneficial, transnational cooperation among citizens.

Immanuel Kant was the first legal philosopher who extended his constitutional conception of law (as 'the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom'[27]) and of 'rule of law' to international law. In his proposals for *Perpetual Peace: A Philosophical Sketch* (1795), Kant explained why - in order to institute lasting peace among rational, antagonistic egoists with limited reasonableness and 'unsocial sociability' (I. Kant) - 'all men who can at all influence one another must adhere to some kind of civil constitution' of the three following types:

> '(1) a constitution based on the civil rights of individuals within a nation (*ius civitatis*);
>
> (2) a constitution based on the international rights of states in their relationships with one another (*ius gentium*);
>
> (3) a constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influence, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).
>
> This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to avoid.'[28]

Kant was also the first legal philosopher emphasizing what most politicians and lawyers outside Europe continue to ignore to date, i.e. that the 'problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.'[29] Kant's proposals for 'horizontal' and 'vertical' separation and limitation of legislative, executive and judicial powers by multilevel constitutional restraints were aimed at institutionalizing and promoting 'public justice' limiting legislative, administrative and judicial regulation of what equal freedoms and other 'principles of justice' require in real word conflicts and contestation. According to Kant, it is only through antagonistic, historical learning processes that individuals and states can be expected to progressively transform the lawless state of nature into law-governed national, transnational and international relations protecting 'conditions

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[27] I. Kant, The Metaphysics of Morals, in: Kant Political Writings (ed. by H.Reiss, Cambridge: CUP, 1970), at 133. Kant follows from his moral 'categorical imperative' that 'every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*' (at 133). Arguably, this 'categorical imperative' also justifies constitutional protection of equal freedoms of trade subject to appropriate regulation.

[28] Cf. I. Kant, Perpetual Peace: A Philosophical Sketch, in: Kant (note 27), at 98.

[29] Cf. I. Kant, Idea for a Universal History with a Cosmopolitan Purpose, in: Kant (note 27), at 47.

under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.'[30]

In EU law, EEA law as well as in the context of the ECHR, the ECJ, the EFTA Court and the ECtHR have interpreted the international EC and EEA agreements, as well as the ECHR, as 'constitutional instruments' that were progressively transformed – in close cooperation with national courts, national parliaments and civil society – into effective, multilevel legal and judicial guarantees of equal freedoms, human rights and rule of law for the benefit of some 500 Million EU citizens and some 800 million citizens in the 47 ECHR member states. The 'coherence of the judicial system of the European Union does not rest solely on the Community courts, but rather on the interlocking system of jurisdiction of the Community courts and the national courts which is cemented together by the principle of upholding the "rule of law" in the Union legal order.'[31] In conformity with the Kantian conception of multilevel constitutional protection of human rights as the most effective safeguard of 'democratic peace' inside and among republican states, the European integration agreements have become the most effective 'peace treaties' ever concluded among European states, offering European citizens more freedom, welfare, rule of law and transnational, individual rights than citizens ever enjoyed before.

In the UN Charter, all UN member states reaffirmed – on behalf of 'We the peoples of the United Nations' – their 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' so as 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' (Preamble). Yet, as long as UN human rights conventions do not provide for effective judicial remedies and only about one third of UN member states submit to the compulsory jurisdiction of the ICJ, the UN objective 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes' (Article 1 UN Charter) is not effectively secured. Most countries distrust 'rule of international law' and prefer the 'realistic' view that governments should pursue 'international rule of law', submitting to 'rule of international law' only 'as long as' international law rules remain consistent with the constitutional guarantees of human rights, democracy and justice in domestic jurisdictions. The legitimate diversity of domestic constitutional traditions even among constitutional democracies (i.e. 'constitutional pluralism') entails that protection of 'international rule of law' may be influenced by diverse judicial conceptions of human rights.

The diverse forms of multilevel constitutionalism in the EU, in the EEA as well as in the implementation of the ECHR have contributed to 'demystifying the state and the state constitution'[32] by demonstrating the need for multilevel 'constitutional checks and balances' on discretionary foreign policy powers. They have contributed not only to more transparent, more inclusive and more constitutionally restrained decision-making in intergovernmental, parliamentary and judicial bodies of European organizations and regulatory agencies for the collective supply of international public goods. The transformation of the ECHR, the EC, EU and EEA treaties into 'constitutional instruments' with supra-national courts for the protection of rights of citizens has also brought about fundamental changes in *national* constitutional systems across Europe, for instance by liberalizing welfare-reducing border discrimination and protecting cosmopolitan rights. National courts inside EU member states, like the German Constitutional Court in its 'Lisbon Treaty judgment' of 30 June 2009 on the constitutional limits for Germany's participation in EU integration, emphasize the constitutionally

[30] I. Kant, *The Metaphysics of Morals* (note 25), at 230.

[31] K.Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, in: *CMLR* 44 (2007), 1625, at1659.

[32] A. Peters, The Merits of Global Constitutionalism, in: *Indiana Journal of Global Legal Studies* 16 (2009), 397 ff, at 402.

limited powers and limited democratic legitimacy of international organizations.[33] The EU Charter of Fundamental Rights explicitly confirms that the national, international and transnational protection of human rights and constitutional rights in European law is 'founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' (Preamble). Similar to multilevel constitutionalism inside federal states limiting multilevel governance at local, state and federal levels in order to protect equal rights of citizens, human rights require multilevel constitutional restraints also of the pervasive abuses of *foreign policy powers* at transnational levels by means of international law and institutions protecting cosmopolitan rights and transnational rule of law across frontiers. The less national parliaments control rule-making in worldwide organizations, the more it is necessary to protect participatory and 'deliberative democracy' based on cosmopolitan rights, rule of law beyond state borders and compliance with treaties ratified by national parliaments. As 'market failures' and 'governance failures' originate in the rational egoism and limited reasonableness of individuals, they must be limited – as explained by Kant – by multilevel constitutional guarantees of equal rights and transnational rule of law in all human interactions at national, transnational and international levels.

VI. Access to Justice as a Human Right: Judicial Duties to Administer Justice

National and international human rights instruments recognize that human rights 'should be protected by rule of law' and by public justification of governmental restrictions of human freedom (cf. the Preamble and Article 29 UDHR). The increasing protection – e.g. in national constitutions and international human rights instruments - of access to justice as a constitutional and human right of citizens to be protected by independent courts administering justice impartially subject to 'due process of law'[34], requires multilevel judicial protection of fundamental rights and 'rule of law' constraining the 'rule by men' and their 'rule by law.'[35] As illustrated by the jurisprudence of European Courts (e.g. in the ECJ's *Kadi* judgments), legitimate transnational rule of law may be different from intergovernmental 'international law among states' if the latter fails to remain justifiable in terms of principles of justice, such as access to justice and to legal and judicial remedies against public and private abuses of power: 'The real question is not whether judicial review is democratically legitimate, but how judicial institutions ought to be structured to best serve their democracy-enhancing and rights-protecting purpose'.[36]

The right of citizens to justification of governmental restrictions of individual freedoms can be seen as one of the most basic human rights that is of crucial importance for effective enjoyment of other human rights such as access to justice and democratic participation.[37] Arguably, the legitimacy of

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[33] An English translation of the judgment of the Constitutional Court is available under: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en. html).

[34] See note 11. Examples include Article 8 UDHR, Article 13 ECHR, Art.47 EU Charter of Fundamental Rights, Arts. 3 and 7 African Charter of Human and People's Rights, Arts. 8 and 25 Inter-American Charter of Human Rights.

[35] On 'rule of men' as domination, and 'rule of law' as non-domination, see: P.Pettit, *Republicanism: A Theory of Freedom and Government* (1997). 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.

[36] Cf. M. Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, in: *Law & Ethics of Human Rights* 4 (2010), Issue 2.

[37] Cf. R.Forst, *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Frankfurt: Suhrkamp Verlag, 2007).

international legal regimes without a unitary *demos* may be better evaluated by 'principles of transnational justice' (e.g. in terms of legal and judicial protection of human rights, rule of law, individual access to courts) than in terms of state-centred, democratic principles which – like equal voting powers of citizens – do not exist in international legal regimes.[38] One of the advantages of broad constitutional guarantees of equal freedoms as 'first principle of justice' (as reflected, e.g., in Article 2 of the German Basic Law and in the broad scope of fundamental freedoms protected by EU law) is that they entail comprehensive 'rights to justification' of all governmental restrictions of human freedom. Such justifications, their 'contestation' and judicial review at the request of citizens promote 'public reason' in support for the inevitable 'balancing' – in a world of scarce resources and unlimited human demand - of civil, political, economic and social human rights by democratic legislation, administration and judicial review: 'If Socrates was right to insist that the practice of contestation he engaged in deserves the highest praise in a democratic polity, it is equally true that a well structured and appropriately embedded court engaged in rights-based proportionality review deserves to be embraced as a vital element of liberal constitutional democracy.'[39] In the context of such review, justice and judges face - like the Roman god *Janus* - competing perspectives: 'Conservative justice' requires applying the existing law so as to protect the existing system of rights and 'to render to each person what is his [right].' Yet, laws tend to be incomplete and subject to change. Hence, equity may require 'reformative justice' interpreting 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 as expressing 'a coherent conception of justice and fairness':

> '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.'[40]

The ECJ, for example, protects 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). 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'[41], into human rights of access to justice, and the recognition of individual 'trading rights', property rights and judicial remedies in ever more trade agreements (like the 2001 WTO Protocol on the Accession of China) and in more than 2700 bilateral investment treaties (BITs), confront 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 individuals effective legal and judicial remedies; hence, national, European and international judges are increasingly confronted with legal claims that intergovernmental treaty rules - e.g. in UN human rights conventions, conventions on intellectual property rights adopted in the context of the 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 (WTO), regional trade

[38] Cf. J.Neyer, Not Democracy: Legitimacy in the European Union, in: *Journal of Common Market Studies* 48 (2010), 903-921.

[39] Kumm (note 36).

[40] R.Dworkin, *Law's Empire* (Cambridge: HUP, 1986), at 225, 243; idem, *Justice in Robes* (Cambridge: HUP, 2006), at 9-21.

[41] J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005), at 7, 36.

> agreements on freedoms of trade and 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 international treaty obligations to the detriment of domestic citizens.

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.[42] The ECJ, the ECtHR and the EFTA Court successfully transformed the international EC, EEA treaties and the ECHR into constitutional orders founded on respect for human rights. 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' in Europe on the need for 'constitutional justice' and judicial cooperation (comity) in the multilevel judicial protection of rule of law in European integration. Also beyond European law and jurisprudence, the ICJ refers not only to requirements of 'proper administration of justice' in clarifying procedural principles of due process of law (such as equality between the parties, specification of legal claims, effects of non-appearance in the court, inherent powers and duties to indicate provisions measures)[43]; the Court also takes it for granted that:

> 'Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.'[44]'Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.'[45]

The more IEL rules refer to 'equity', 'public order' and 'public morals', prohibit 'denial of justice', prescribe 'due process of law' and standards of 'fairness', and require treaty interpretations and dispute settlement 'in conformity with principles of justice' and human rights, the more economic courts are confronted with questions of procedural and substantive justice, e.g. in their clarification of incomplete dispute settlement procedures and their judicial balancing of private and public interests in investment disputes, or of limitations of market access commitments by national public interest regulation protecting public health and public morals.[46]

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[42] J. Rawls, *Political Liberalism* (Cambridge: HUP, 1993), at 231 ff.

[43] For references to the relevant ICJ jurisprudence see, e.g., G.Ziccardi Capaldo (ed), *Repertory of Decisions of the International Court of Justice 1947-1992, Vol II* (1995), at pp.777, 781, 825, 855, 935.

[44] North Sea Continental Shelf, Judgment ICJ Reports 1969, pp. 48-49, para. 88.

[45] Continental Shelf (Tunisia v Libyan Arab Jamahiriya, Judgment ICJ Reports 1982, p.60, para. 71.

[46] For case studies on 'balancing' in WTO jurisprudence see: E.U.Petersmann, Administration of Justice in the WTO: Did the WTO Appellate Body Commit 'Grave Injustice'? in: *The Law and Practice of International Courts and Tribunals* 8 (2009) 329-373; S.Cho, Global Constitutional Lawmaking, in: *University of Pennsylvania Journal of International Law* 31(2010), 621-678.

VII. Transnational Rule of Law Requires 'Consistent Interpretations' and Cooperation among Courts

Theories about the legitimate functions of courts, of judicial protection of rule of law and of judicial review of governments' compliance with international legal obligations vary among jurisdictions depending on their respective conceptions of democracy, constitutionalism and international law. For example:

- conceptions of democracy as rule by present majorities have criticized judicial review as a 'deviant institution in the American democracy' whose 'countermajoritarian difficulty' requires constitutional justification, for example by the legitimacy of judicial protection of constitutional minority rights;[47] similarly, proponents of democratic self-governance by collective decisions of citizens have warned that judicial review risks to entail paternalistic rule by 'a bevy of Platonic Guardians';[48]
- defenders of human rights counter that judicial discourse is better capable than political discourse among periodically elected politicians to find the right answers for the interpretation of constitutional and human rights;[49]
- supporters of rights-based constitutional democracy justify judicial review by the judicial protection of the constitutional rights of 'the governed' and of other constitutional principles vis-à-vis their encroachment by governments;[50]
- if democracy is defined by the aim 'that collective decisions be made by political institutions whose structure, composition and practices treat all members of the community, as individuals, with equal concern and respect', then judicial review can be viewed as a necessary 'forum of principle' enhancing constitutionally limited democracy and protecting equal citizen rights;[51]
- proponents of deliberative constitutional democracy argue that, 'in a constitutional regime with judicial review, public reason is the reason of its supreme court';[52] constitutional review can ensure that the procedural conditions of democratic legitimacy – basic rights to private and public autonomy – have been fulfilled.[53]

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[47] Cf. A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Barr of Politics* (2nd ed. 1986), at 16, 23.

[48] L. Hand, *The Bill of Rights* (1958), at 73.

[49] Cf. M. J. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

[50] Cf. A.S. Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (1988), at 4: 'A 'democratic' constitution embodies a conception of the fundamental rights and obligations of citizens and establishes a judicial process by which rights claims may be litigated.'

[51] Cf. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996), at 21 ff, 344: 'Individual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.'

[52] Rawls (note 42), at 231 ff.

[53] Cf. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), at 279: 'If one understands the constitution as an interpretation and elaboration of a system of rights in which private and public autonomy are internally related (and must be simultaneously enhanced), then a rather bold constitutional adjudication is even required in cases that concern the implementation of democratic procedure and the deliberative form of political opinion- and will-formation.'

As international court decisions are legally binding and assert legal precedence over domestic law, justification of their constitutional legitimacy is important. Arguably, the 'constitutional coherence' pursued by the 'Kantian imperative' of multilevel constitutional guarantees of equal freedoms complements the 'consistent interpretation requirements' recognized in national and international legal systems: just as national legal systems should be interpreted in conformity with the international legal obligations of the country concerned, so must international treaties be construed in conformity with all other international legal obligations and constitutional principles of justice, as recognized in the VCLT.[54] Similar to J. Rawls' argument that - once citizens have agreed on reciprocal protection of equal freedoms and other principles of justice (as, e.g., in the 1776 US Declaration of Independence) - the next constitutional task is 'to choose a constitution and a legislature to enact laws..., all in accordance with the principles of justice initially agreed upon'[55], modern constitutions also recognize that international law and participation in international organizations are of constitutional importance for securing collective supply of international public goods demanded by citizens. The more the power-oriented 'Westphalian system' of 'international law among sovereign states' fails to protect interdependent public goods – like human rights, international rule of law and a liberal (i.e. liberty-based) trading and payments system -, the more justifiable becomes multilevel judicial protection of cosmopolitan rights and transnational rule of law for the benefit of citizens.

Governments and international courts can enhance the legitimacy of judicial review not only by promoting due process of law, transparent and inclusive judicial procedures (e.g. admitting *amicus curiae* briefs by adversely affected third parties), and by institutionalizing dialogue between legislative and judicial branches (as in the WTO Dispute Settlement Body's review and approval of all WTO dispute settlement reports) as well as with civil society (as in the WTO's annual public *fora* with civil society representatives). Constitutional justice may also require promoting citizen-oriented interpretations of intergovernmental guarantees of human rights, economic freedom, non-discrimination and rule of law in international cooperation among citizens. Following the post-war recognition of human rights and other 'principles of justice' as integral parts of national and international legal systems, ever more national and international courts throughout Europe have interpreted international guarantees of freedom, non-discrimination and rule of law for the benefit of citizens even if the international rules were addressed to states without explicitly providing for cosmopolitan rights:

> 'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne v Sabena* [1976] ECR 455, par. 31). Such consideration must, *a fortiori*, be applicable to Article 48 of the Treaty, which … is designed to ensure that there is no discrimination on the labour market'.[56]

Judges may lack competence to declare intergovernmental guarantees (e.g. of human rights, private 'trading rights' and intellectual property rights protected in WTO law, investor rights protected in BITs) to have 'direct effect' for the benefit of individuals inside domestic legal systems. But just as *domestic judges* should proceed from the assumption that domestic rules must be construed in conformity with the international legal obligations of the country concerned, so should *international judges* prevent and settle international economic disputes by interpreting domestic laws in conformity with international legal obligations of the country concerned. Both national and international judges may have to review whether 'general justice' (e.g. in the sense of rule-following and precedent-following) needs to be tempered by principles of 'particular' and 'reformative justice' (e.g. in terms of

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[54] On the 'consistent interpretation principle' see: A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford : OUP, 2011), 139-165; E.U.Petersmann, International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation, in: S.Joseph/D.Kinley/J.Waincymer (eds), *The WTO and Human Rights* (Cheltenham: Edward Elgar, 2009), 69-90.

[55] Rawls (note 4), at 13.

[56] Cf. Case C-281/98, *Angonese* [2000] ECR I-4139.

equity and 'compensatory justice principles' responding to injustices). In case of tensions between 'formal justice' (e.g. in the sense of impartial and consistent administration of laws whatever their substantive principles) and 'distributive justice' (e.g. in the sense of reasonable justifications of treating different cases differently), international economic and human rights courts should examine – like European courts – the potential impact of human rights and other 'principles of justice' (e.g. of non-discrimination, necessity, proportionality) on the interpretation of economic rules and on judicial justifications of judgments.[57] Linking *international guarantees* of freedom, non-discrimination, rule of law and social justice to the interpretation of corresponding *domestic law guarantees* based on the 'consistent interpretation principle' has proven to be a legitimate and efficient instrument for promoting cosmopolitan reforms of trade and investment law.[58] Following the numerous reports by the UN High Commissioner for Human Rights advocating a 'human rights approach' to interpreting and developing IEL, WTO Director-General P. Lamy's has courageously acknowledged that trade liberalization and human-rights-consistent interpretations of WTO rules will enhance the interests and welfare of citizens.[59] Principle-oriented judicial interpretations and dispute settlements, with due regard to the human rights obligations of governments, provide the most independent and impartial procedures for promoting 'constitutional coherence' and synergies of the institutionally fragmented, international and domestic legal regimes governing international economic relations. The more national and international regulation of public goods interact horizontally as well as vertically due to 'globalization', the more national and international legal systems and 'courts of justice' must take into account the 'consistent interpretation' requirement of national and international legal systems so as to protect transnational rule of law with due respect for human rights, legitimate constitutional pluralism and other constitutional 'principles of justice'.

[57] The literal meaning of the Latin word 'justificare' – i.e. to make just – underlines the importance of judicial justifications for the administration of justice. The WTO Appellate Body report on *US-Zeroing* (WT/DS294/AB/R of 14 May 2006) rightly emphasized (at paras. 160, 161) the obligation of courts and of WTO panels to treat like cases alike and, hence, promote coherent interpretation and application of the law in order to meet the legitimate expectations of governments and individuals in rule of law.

[58] Cf. Petersmann (note 3).

[59] Cf. Cf. Pascal Lamy, *Globalization and Trade Opening Can Promote Human Rights*, speech delivered on 5 June 2009 at the University of Geneva. On 'human rights approaches' to IEL see Petersmann (note 4), Chapters IV and VII.

VIII. Building-Blocks for a Constitutional Theory of Multilevel Judicial Governance

The preceding sections argued that – in view of the multilevel human rights obligations of UN member states and the ubiquity of abuses of public and private power in mutually beneficial economic cooperation among citizens across frontiers - national and international jurisdictions have legal duties to protect transnational rule of law for the benefit of citizens and their human rights by means of mutually 'consistent interpretations', 'judicial comity' and 'judicial balancing' of competing human rights, constitutional and cosmopolitan rights and jurisdictional claims. In the judicial cooperation among national and European courts, national judges conceive themselves not only as *national courts* enforcing national laws, but also as *Community courts* enforcing EU and ECHR obligations for the benefit of European citizens. Similar to multilevel guarantees of human rights, also IEL guarantees of freedom, non-discrimination, transnational rule of law and respect for sovereign rights to protect non-economic public interests can serve 'constitutional functions' for protecting 'principles of justice' in the transnational division of labour among citizens. The need for reconciling and 'balancing' economic principles and rules with all other constitutional principles is recognized in the customary law requirement of interpreting international treaties 'in conformity with the principles of justice' and human rights (cf. Preamble of the VCLT). Similarly, the 'consistent interpretation requirement' is based on a legal presumptions that may be overturned if domestic parliaments deliberately decide to violate international law. Respect for legitimate 'constitutional pluralism' requires deference for legitimately diverse conceptions in constitutional democracies of the interrelationships between political, economic and judicial institutions, as illustrated by the diverse constitutional and judicial traditions of protecting and 'balancing' constitutional and economic rights in transnational economic relations (e.g. in NAFTA, EU and EEA law, regional human rights treaties and human rights jurisprudence). A coherent theory justifying multilevel judicial protection and mutually 'consistent interpretations' of transnational rule of law in IEL should, *inter alia*, respect the following 'constitutional principles':

1. Respect for the Legitimate Diversity of Principles of 'Procedural' and 'Substantive Justice'

As explained in Sections I to III, the 'dual nature' of modern legal systems based on 'principles of justice' entails that the legitimacy of law, governance and adjudication derives from 'constitutional justice' (e.g. as illustrated by the ancient Virtue of Justice, modern theories of constitutional justice and 'public reason') no less than from 'democracy', as illustrated by the human rights of 'access to justice' requiring governments to protect independence and transparency of courts and of their 'due process of law'. J.Rawls' theory of justice explains why courts of justice may be more principled 'exemplars of public reason' than political institutions governed by majority decisions influenced by organized interest groups. The 'judicial transformation' of the ECHR and of the international EC and EEA agreements into 'constitutional orders' confirms that 'multilevel judicial governance' can often protect cosmopolitan rights and transnational rule of law more effectively than Westphalian power politics. The inadequate constitutional and competition rules in IEL raise difficult jurisdictional questions about the judicial task of administering justice (e.g. in case of 'denial of justice', discriminatory trade protection, 'regulatory takings', 'nullification of legitimate expectations') and of clarifying general legal principles (e.g. of 'fair and equitable treatment', prohibition of 'anti-competitive practices', 'adequate compensation'). Respect for legitimate 'constitutional pluralism' may require international courts to respect legitimately diverse traditions of principles of 'procedural justice'.[60] Also the substantive 'principles of justice' underlying UN human rights law may be

[60] Cf., e.g., L.B.Solum, Procedural Justice (*University of San Diego Public Law and Legal Theory Research Paper Series: Working Paper* 2, 2004), who distinguishes between an 'accuracy model' (assuming that the aim of dispute resolution is correct application of the law to the facts), a 'balancing model' (assuming that the

construed in diverse ways, as illustrated by the more comprehensive human rights guarantees in European law compared with Anglo-Saxon democracies that prioritize civil and political rights and 'parliamentary freedom', or with Asian countries prioritizing certain economic and social rights. The legal and judicial protection of cosmopolitan 'trading rights', 'intellectual property rights' and individual access to independent courts in WTO law (e.g. in the WTO Protocol on China's WTO membership), of investor rights in BITs, labour rights in ILO law and of 'corporate social responsibilities' in UN law illustrates the increasing recognition by governments that IEL must be designed to protect individual producers, investors, traders and consumers.

2. The 'Consistent Interpretation Principle', 'Judicial Comity' and 'Multilevel Judicial Cooperation'

Just as commitments in national constitutions to respect for international law justify a presumption of interpreting national law in conformity with self-imposed international legal obligations, so does customary international law require interpreting international treaties – and implementing them in domestic law 'in good faith' - in conformity with other international legal obligations, human rights and 'principles of justice' (cf. Preamble and Art. 31 VCLT). The need for legal and judicial 'balancing' of civil, political, economic, social and cultural rights makes judicial 'balancing' and protection of rights the 'ultimate rule of law'[61], notably in IEL reconciling economic freedoms with non-economic values and policy objectives subject to requirements of transparency, non-discrimination, 'suitability', necessity, 'proportionality *stricto sensu*' and legal accountability.[62]

Modern constitutions and international agreements acknowledge the need to coordinate and regulate the relationships between national and international legal systems in view of their increasing interactions, overlaps and competing claims to legal authority. Hence, 'the globalization of the law …imposes the recognition and adjustment of each legal order to the plurality of equally legitimate claims of authority made by other legal orders'.[63] Respect for legitimate constitutional diversity may require not only respecting the 'internal point of view' of legal systems.[64] The 'permanent fact of reasonable pluralism' (J. Rawls) may also justify diverse conceptions of transnational 'rule of law' due to the absence of a shared political conception of justice. Claims of jurisdiction over transnational situations

> 'must be accompanied by a commitment to take into account the potential effects of the decision of a particular legal order in other legal orders. In reality, the global law arising from the regulation of transnational situations ends up being a product of the interaction between different national and international legal orders. In this context, any judicial body (national or international) must reason and justify its decisions in the context of the global legal order in which they are impacting'. 'Such

(Contd.)

aim of dispute settlement procedures is to strike a fair balance between the costs and benefits of adjudication), and a 'participation model' of dispute settlement (assuming that the very idea of a correct outcome must be understood as a function of process that guarantees fair and equal participation). As it is usually a condition for the fairness of a dispute settlement procedure that those who are to be finally bound shall have a reasonable opportunity to participate in the proceedings, the 'participation principle' requires rights of participation (e.g. in the form of notice and opportunity to be heard) that must be satisfied in order for a procedure to be considered fair.

[61] Cf. D.M.Beatty, *The Ultimate Rule of Law* (Oxford: OUP, 2004).

[62] On 'proportionality balancing' in international economic adjudication see: Petersmann (note 4), Chapter VIII.

[63] M.P.Maduro, Legal Travels and the Risk of a Legal Jet-lag: The Judicial and Constitutional Challenges of Legal Globalization, in: M.Monti *et alii* (eds), *Economic Law and Justice in Times of Globalization* (Baden-Baden: Nomos, 2007), 175-190, at 177.

[64] Cf. N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999), who distinguishes between the 'internal point of view' of legal systems and their frequent acknowledgement of other, overlapping legal systems without necessarily requiring that one be legally subordinate or hierarchically inferior.

> decisions must be grounded in a doctrine that could be applied by any other court in a similar situation, including, in this context, the court of a different legal order.'[65]

The latter claim – i.e. that courts of justice should justify their settlement of transnational legal disputes in terms of 'universalizable principles' of justice – can be justified most convincingly by the judicial functions of administering justice as well as by the common human rights obligations of all UN member states to promote 'rule of law' within the limits of legitimate 'constitutional pluralism'. *Political* governance institutions often assert discretionary foreign policy powers in view of the weak constitutional restraints of foreign policy discretion under national constitutions. Yet, if individuals are acknowledged as 'primary subjects' of IEL and courts of justice as the most principled 'constitutional guardians' of individual rights against abuses of power, human rights require treating governments as constitutionally limited agents and trustees of the people. Judicial settlements of transnational economic disputes case-by-case and transnational 'judicial dialogues' offer more flexible instruments for adjusting fragmented legal systems than 'constitutional claims' of legal hierarchies. Constitutional justice requires that judicial rule-clarification remains contestable by other constitutionally legitimate modes of clarifying, developing and changing 'public reason' through public deliberation, rulemaking and rule-application.

3. Democratic Legitimacy of Judicial Rule-Clarification

By interpreting, clarifying and progressively developing the contested meaning of rules and principles, judicial decisions narrow the scope of competing interpretations, produce legal effects and stabilize normative expectations beyond individual disputes, as acknowledged in Article 38 ICJ Statute (referring to judicial decisions as 'subsidiary means for the determination of rules of law'). From the perspective of human rights and 'constitutional justice', judicial protection of human rights and other cosmopolitan rights – like judicial review of the 'constitutionality' of majority legislation and of administrative decisions – can serve 'democratic functions' and limit democratic deficits especially in intergovernmental rule-making that eludes effective parliamentary control and is often dominated by vested interest groups (including diplomatic self-interests in limiting legal and judicial accountability vis-à-vis citizens). HRL and IEL are increasingly shaped by judge-made law resulting from interactions among multilevel rulemaking, judicial review and governmental acceptance and implementation of judicial decisions. As illustrated by the 'zeroing jurisprudence' of the WTO Appellate Body and its systemic impact on WTO panel and national jurisprudence in WTO member countries, judicial precedents and citations - not only of the legally binding *ratio decidendi*, but possibly also of non-binding *obiter dicta* of national and international judgments (e.g. in their judicial balancing and 'proportionality analyses') – may influence 'public reason', law-making and administrative decisions and contribute to making human rights (e.g. of access to justice) more effective.[66]

4. Democratic Legitimacy of Judicial System-Building

The *multilevel judicial governance* in IEL and regional HRL clarifies not only specific rules. Notwithstanding the lack of legally binding precedents (*stare decisis*), the jurisprudence by the WTO Appellate Body, ICSID arbitration and annulment awards, EU and EFTA Court judgments and the ECtHR (e.g. its 'pilot judgments') also promote 'systemic coherence' and 'judicial dialogues' (e.g. on standard-setting precedents and 'judicial balancing methods') in multilevel judicial protection of rule

[65] Maduro (note 63), at 177.

[66] The WTO dispute settlement jurisprudence on 'zeroing practices' in the context of 'fair price comparisons' required by WTO antidumping rules is discussed by: Cho (note 45).

of law and cosmopolitan rights.[67] Such 'judicial development of the law' may be no less justifiable for clarifying 'incomplete agreements' and promoting 'public reason' in judicial interpretation of vaguely formulated, general principles (such as BIT obligations of 'national treatment', 'fair and equitable treatment' and 'full protection and security' of foreign investors, treaty exceptions for sovereign rights to protect 'public morals' and 'public order') than legislative and administrative rule-making. In contrast to political decisions, judicial decisions tend to be justified more transparently on grounds of legal principles, with due regard to all interests affected, as protecting constitutional rights and transnational rule of law. As EU Law incorporates international legal obligations as 'integral parts of the Community legal system', the overall coherence of the national, international and communitarian layers of the EU legal order may be maintained more coherently by principle-oriented, judicial clarification case-by-case than by intergovernmental and parliamentary, political decisions, e.g. in national parliaments, the European Parliament and through inter-parliamentary cooperation (e.g. in the WTO).

Consumer welfare and human rights are neither mentioned nor effectively protected in the Bretton Woods Agreements and GATT/WTO law. Hence, most citizens remain 'rationally ignorant' towards intergovernmental rulemaking (e.g. in the WTO, BITs, UN environmental negotiations, violations of EMU obligations) and non-transparent economic adjudication (e.g. by WTO panel reports with more than 1'000 pages of legal findings) that remain incomprehensible for many laymen. Also most parliaments no longer effectively control the obvious 'governance failures' to protect general citizen interests in IEL; as many parliamentarians depend on domestic political support from protectionist constituencies, neither the US Congress nor the European Parliament have pushed for successful conclusion of the WTO's Doha Round negotiations since 2001. In the Eurozone crises, most of the adversely affected citizens lack effective remedies (e.g. against losses of jobs and pension funds caused by persistent violations of the EU Treaty's fiscal and debt disciplines in some EU countries) and feel exploited by systemic 'problems of high debt, corruption and clientelism'[68] cultivated even inside European constitutional democracies like Greece. The more rule of law and consumer welfare are neglected by intergovernmental economic regulation, the more may judicial protection of cosmopolitan rights (e.g. of access to transparent judicial procedures, submission of *amicus curiae* briefs), judicial 'balancing' of economic and non-economic interests, and other 'judicial checks and balances' of government powers be constitutionally justifiable. Even if WTO rules, BITs, arbitration agreements and certain other areas of IEL fail to specifically mention human rights and consumer welfare, 'constitutional justice' calls for interpreting the inherent powers of judges broadly so as to protect all affected interests and human rights more effectively.

[67] Cf. Petersmann (note 10) and S.W.Schill, System-Building in Investment Treaty Arbitration and Lawmaking, in : *German Law Journal* 12 (2011), 1083-1110.

[68] G.Rahman, *How to tame the Greek beast?* in: Financial Times, 26 July 2011, at 7.

IX. 'Cosmopolitan' versus 'Westphalian Conceptions' of Economic Adjudication Inside the EU: Quo Vadis?

Multilevel judicial protection and enforcement of transnational commercial law by national courts and privately agreed, commercial arbitration remain the most successful example of cosmopolitan economic law.[69] Compared with regional economic integration and human rights conventions outside Europe, the multilevel legal and judicial protection of the common market freedoms and fundamental rights of EU law, EEA law and of the human rights guarantees in the ECHR[70] have been uniquely successful in terms of protecting cosmopolitan rights and transnational rule of law due to their citizen-driven nature as 'Kantian, cosmopolitan legal orders'.[71] The supranational principles of EU law (like legal primacy with direct effect and direct applicability inside national legal systems) did not prevent some of the Anglo-Saxon and Nordic EU member states with constitutional traditions of 'majoritarian democracy' (rather than 'constitutional democracy' with active judicial review of democratic legislation) to continue their national constitutional traditions of judicial deference towards democratic legislation and to request less frequently preliminary rulings by the ECJ (pursuant to Article 267 TFEU).[72] The fact that neither EEA law nor the ECHR rely on the supranational principles of EU law illustrates that multilevel judicial governance, cooperation among national and international courts and citizen-driven enforcement of cosmopolitan rights can be designed and successfully implemented in legitimately diverse ways. Yet, the Eurozone crises also illustrate two 'constitutional problems' characteristic of many discretionary, common policies of the EU:

- There are glaring gaps between the statutory objectives (e.g. the fiscal, budgetary and debt disciplines prescribed pursuant to Article 126 TFEU) and agreed policy objectives of the EU (like transforming the EU into the most competitive economy by 2014) and the reality of the common monetary and trade policies.[73]
- These apparent 'governance failures' result from widespread disregard for 'the rule of law' requirement (Article 2 TEU): just as Eurozone member states like Greece and Italy persistently violate the EU Treaty's fiscal, budget and debt disciplines, there have been more than 40 GATT/WTO dispute settlement findings of illegal EU trade and agricultural restrictions/distortions (e.g. regarding sugar, bananas, genetically modified agricultural products, aircraft) disregarding 'strict observance of international law' (Article 3 TEU). In order to limit their legal and judicial accountability vis-à-vis EU citizens, the political and judicial EU institutions often deny citizens effective legal and judicial remedies for protecting 'strict observance of international law' (Article 3 TEU): The political EU institutions claim 'freedom of

[69] On the key principles of transnational commercial law and arbitration see, e.g.: A.Redfern/M.Hunter, *Law and Practice of International Commercial Arbitration* (London : Sweet & Maxwell, 3rd ed. 1999).

[70] Cf. H.Keller/A.Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008).

[71] Cf. A.Stone Sweet, A Cosmopolitan Legal Order : Constitutional Pluralism and Rights Adjudication in Europe, forthcoming in: *Journal of Global Constitutionalism* March 2012.

[72] Cf. M.Wind, *Sovereignty and European Integration : Towards a Post-Hobbesian Order* (London : Palgrave Macmillan, 2001), who argues that the low number of references from Danish and Swedish courts to the ECJ reflect the traditional reluctance in these homogenous 'unitary states' towards 'constitutional democracy' and towards supranational legal systems that are perceived as undue restraints on majoritarian, parliamentary politics and on the existing 'corporatist structures' in these countries.

[73] The fiscal and budgetary disciplines (e.g. 3% for the ratio of the annual budget deficit to GDP at market prices; 60% for the ratio of government debt to GDP at market prices) are specified in Protocol No. 12 on the excessive deficit procedure (cf. OJ C83, 30 March 2010, p. 279) as part of EU primary law (cf. Article 51 TEU).

maneuver'[74] in the sense of 'freedom to violate the international law obligations of the EU' even if, for instance, the mutually agreed 'reasonable period' for implementing legally binding WTO dispute settlement rulings has expired without any evidence submitted by the EU institutions that welfare-reducing, illegal trade restrictions by the EU can serve legitimate 'Community interests'.[75] EU institutions also deny EU traders and consumers adversely affected by EU rule-violations any financial compensation for their injury suffered (e.g. as a result of lawful trade sanctions adopted by third WTO member states in response to EU violations of WTO law).[76] Arguably, empowering EU citizens as self-interested guardians of the rule of law (e.g. by enabling them to invoke precise and unconditional WTO prohibitions of welfare-reducing trade restrictions in national and European courts based on the 'consistent interpretation principle') would offer an effective 'democratic remedy' against arbitrary violations of EU law (including treaty obligations ratified by parliaments for the benefit of EU citizens); it could also promote the treaty objective of taking 'decisions … as closely as possible to the citizens of the Union' in conformity with the EU 'principles of subsidiarity and proportionality'.[77]

Arbitrary disregard by EU institutions for 'the rule of law' risks further undermining the democratic legitimacy of EU law, alienating EU citizens and weakening – rather than strengthening – EU majority politics: 'democratic government, if nominally omnipotent, becomes as a result of unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support'.[78] Unfortunately, there are increasing indications that disregard for rule of law in the EU's common monetary, trade and agricultural policies risks spilling-over into other, discretionary EU policies:

- The Greek government's 'insolvency' (e.g. in the sense of the unwillingness or inability to pay one's debt) will amount to 'a breach of the law and regularly a breach of contract' that 'disregards one of the basic principles for the functioning of a society: *pacta sunt servanda*. This principle is not only a demand of justice but also of efficiency'[79] and of the EU's rule of law requirement. Notwithstanding the finding by the ECJ that the EU Council decision discontinuing the 'excessive government deficits procedure' (Article 126 TFEU) against France and Germany violated EU law[80], the Lisbon Treaty considers a default of a member state as primarily a problem of *prevention* and, ultimately, an internal problem of the defaulting state and of its respective creditors. Article 122, para. 2 TFEU limits financial assistance to 'exceptional

[74] This term continues to be used by both the political EU institutions and the ECJ (e.g. in Joined cases C-120 and C-121/06 P, FIAMM [2008] ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

[75] Cf. E.U.Petersmann, Can the EU's Disregard for 'Strict Observance of International Law' (Article 3 TEU) be Constitutionally Justified? in: I. Govaere/R.Quick/M.Bronckers (eds), *Trade and Competition Law in the EU and Beyond* (Cheltenham: Elgar Publishing, 2011), at 214-225.

[76] Cf. M. Dani, 'Remedying European Legal Pluralism: The *FIAMM* and *Fedon* Litigation and the Judicial Protection of International Trade Bystanders', in *EJIL* 21 (2010), pp. 303–40 (discussing various ways of promoting 'indirect effect of WTO rules' based on consistent treaty interpretation of EU law in conformity with the corresponding WTO rules and principles, 'judicial comity' between the ECJ and other international courts, a new EU liability regime for lawful conduct, or by enabling EU member states to challenge EU breaches of WTO rules in the ECJ).

[77] Cf. Article 5 TEU and Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality.

[78] F.A. von Hayek, *Law, Legislation and Liberty: Vol. 3* (London: Routledge, 1982), at 99.

[79] C. H. Siekmann, Life in the Eurozone with or without Sovereign Default? in: F.Allen/E.Carletti/ G.Corsetti (eds), *Life in the Eurozone with or without Sovereign Default?* (Philadelphia: FIC Press, 2011), at 13 ff. Siekmann argues that 'a default of a Member State would be the result of an illegal budgetary policy of the respective state but it would not infringe the law of the EU when the Union or its Members let it happen' (at p. 34).

[80] Cf. Case C-27/2004, Commission vs Council, judgment of 13 July 2004, reported and commented upon in: *European Journal of Economic Law (Europäische Zeitschrift für Wirtschaftsrecht)* 2004, at 465.

occurrences' beyond the control of a member state; Article 125 TFEU prohibits bailouts by EU institutions within the Eurosystem, arguably including a long-term continuation of the indirect purchasing of government bonds from over-indebted Eurozone member states as practiced by the European Central Bank since summer 2010. Claims (e.g. by Ireland) of 'reckless lending' offer no legally recognized justification of defaulting on contractual debts.

- In *Intertanko*, the ECJ extended its judicial refusal to review the legality of EU acts in the light of WTO law to the EU's obligations under the UN Convention on the Law of the Sea: 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State'.[81] As in its WTO jurisprudence, the ECJ's acceptance of the EU Commission's claims to 'judicial immunity' inside the EU is unconvincing in terms of EU constitutional law. The ECJ's refusal to cooperate with worldwide economic courts might be justifiable in individual cases if EU institutions can demonstrate that EU compliance with rule of law, and its judicial protection for the benefit of EU citizens, could undermine legitimate 'Community interests' in WTO and UNCLOS dispute settlement proceedings (e.g. if complaints by EU citizens could prejudge intergovernmental WTO dispute settlement proceedings). Yet, as EU law prevents EU member states from invoking judicial remedies in the WTO and UNCLOS against EU majority decisions violating international legal obligations to the detriment of the interests of outvoted EU member states, the ECJ's refusal to review complaints challenging EU violations of international law denies 'access to justice' and 'rule of law'. As the legitimacy of EU law derives from respect for constitutional rights of EU citizens (such as 'freedom to conduct a business in accordance with Union law' as protected by Article 16 of the EU Charter of Fundamental Rights), illegal trade protectionism by the EU at the expense of EU citizens – in manifest violation of international treaties ratified by parliaments for the benefit of EU citizens - undermines also the constitutional legitimacy of the EU. From a citizen perspective, the self-interests of the EU's political institutions (e.g. in avoiding legal, judicial and financial liability *vis-à-vis* EU citizens) and of EU courts (e.g. in limiting the influence of WTO and ITLOS jurisprudence on the ECJ's jurisdiction) should not prevail over the constitutional rights of EU citizens to transnational rule of law. Protection of rule of law in conformity with international treaty obligations ratified by all parliaments inside the EU for the benefit of their citizens would better respond to the explicit rule-of-law requirements in EU and WTO law (e.g. in Article XVI:4 WTO Agreement and the WTO guarantees of individual access to domestic legal and judicial remedies).
- The 'new generation of free-trade agreements' negotiated by the EU in the context of its 'Global Europe strategy' respond to the 'politicization' of trade policy-making inside the EU (e.g. resulting from the co-decision-making powers of the European Parliament) by providing for explicit trade provisions denying private legal and judicial remedies against treaty violations.[82]

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[81] Case C-308/06, [2008] ECR I-4057, para. 64.

[82] On the EU's negotiations of free trade agreements with, *inter alia*, Canada, the MERCOSUR member states, China, India and Korea see: European Commission, *Report on Progress Achieved on the Global Europe Strategy 2006-2010*, SEC (2010) 1268/2 (Brussels 9 November 2010). Article 8 of the EU Council Decision of 16 September 2010 on the signing, on behalf of the EU, and provisional application of the EU free trade agreement with Korea (OJ 2011 L127/1) states: 'This Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals'. Similar draft provisions are included into other free trade agreements (e.g. Article 14.15 of the Draft EU-Canada Comprehensive Economic and Trade Agreement). On the enhanced politicization of EU trade and investment policies resulting from the European Parliament's involvement in the co-decision-making procedures see the empirical evidence and theoretical explanations by, e.g.: D.Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, in: *Aussenwirtschaft* 66 (2011), 211-257.

- Similarly, the EU Commission proposals for terminating BITs and investor-state arbitration in relations among EU member states aim at limiting private legal and judicial remedies against international treaty violations without offering investors equivalent remedies in EU courts.[83]

The EU has acquired unique Community powers due to successful 'constitutional' and 'cosmopolitan' legal strategies applied in European integration. Yet, the obvious 'governance failures' in the context of the common monetary and trade policies of the EU risk entailing a return to 'Westphalian power politics' also inside the EU driven by self-interests of politicians, EU bureaucracies and 'rent-seeking' interest groups in avoiding legal and judicial accountability for their violations of the 'rule of law' principles of EU law. EU citizens have reasons to fear that the European banking-, sovereign debt-, economic growth- and social adjustment crises cannot be resolved by bureaucratic 'top-down governance' without respect for 'the rule of law and respect for human rights' (Article 2 TEU), including 'strict observance and the development of international law' (Article 3 TEU) and of the 'freedom to conduct a business in accordance with Union law' (Article 16 EU Charter of Fundamental Rights). Almost a century ago, the German jurist R.Jhering noted that the 'life of the law' often depends on citizens struggling for their rights; such 'struggle for his rights' may be a 'duty of the person whose rights have been violated' as well as a 'duty to society'.[84] The Eurozone crisis is a reminder that EU citizens need to continue 'struggling for their rights' as vigilant guardians of rule of law so that European integration law can function as a 'cosmopolitan model' for the 'international law of the future'. This contribution has argued that European constitutional law requires national and European courts of justice to protect such 'struggles for justice' and for 'the rule of law'; the EU law requirement of 'strict observance of international law' (Article 3 TEU) should be construed for the benefit of EU citizens as justifying individual rights to 'consistent interpretation' of EU law in conformity with the EU's international treaty obligations (e.g. under WTO law) to protect economic freedom, non-discriminatory conditions of competition and transnational rule of law in mutually beneficial economic cooperation among citizens across frontiers.

[83] Cf. Lavranos, *Member States' BITs: Lost in Transition?* (29 September 2011), available at SSRN: http://ssm.com/abstract=1935625.

[84] R. Jhering, *The Struggle for Law* (Chicago: Callaghan, 1915), chapters II to IV. A similar 'natural duty of justice' requiring citizens 'to support and to comply with just institutions that exist and apply to us … (and) to further just arrangements not yet established' is emphasized by Rawls (note 4, at 115, 246, 334).


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