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Abstract

Law and governance need to be justified vis-à-vis citizens in order to be accepted as legitimate and supported by civil society. This contribution argues that the legal and judicial methodologies of multilevel governance for international public goods need to be changed in order to protect basic needs and human rights of citizens more effectively. I define legal methodology in terms of the conceptions of the sources and 'rules of recognition' of law, the methods of interpretation, the functions and systemic nature of multilevel legal systems like IEL, and of the relationships between rules, principles, political and legal institutions and related practices. Section I recalls the historical evolution from 'good governance' to third-party adjudication and individual rights of access to justice. Section II discusses eight models of multilevel judicial governance in Europe. Section III uses constitutional and 'public goods' theories in order to explain the multiple functions of courts of justice and the increasing importance of judicial cooperation (comity) in protecting transnational rule of law in European and international economic law (IEL). Section IV argues that the diverse 'constitutional methods' applied by the EU Court of Justice (CJEU), the European Free Trade Area (EFTA) Court and the European Court of Human Rights (ECtHR) offer important lessons for multilevel judicial governance in IEL beyond Europe. Section V concludes by emphasizing the judicial task of administering justice in IEL and the need for limiting the existing 'legal' and 'doctrinal fragmentation' through multilevel judicial protection of transnational rule of law for the benefit not only of governments, but also of citizens as legal subjects and 'democratic owners' of IEL.

Keywords

Constitutional Methodologies; European Court of Human Rights; European Free Trade Area Court; EU Court of Justice; European law; International Economic Law; Judicial Governance; Judicial Methodologies.

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MULTILEVEL JUDICIAL GOVERNANCE IN EUROPEAN AND INTERNATIONAL ECONOMIC LAW

Prof. Dr. Ernst-Ulrich Petersmann[*]

Law and governance need to be justified vis-à-vis citizens in order to be accepted as legitimate and supported by civil society. This contribution argues that the legal and judicial methodologies of multilevel governance for international public goods need to be changed in order to protect basic needs and human rights of citizens more effectively. I define legal methodology in terms of the conceptions of the sources and 'rules of recognition' of law, the methods of interpretation, the functions and systemic nature of multilevel legal systems like IEL, and of the relationships between rules, principles, political and legal institutions and related practices. Section I recalls the historical evolution from 'good governance' to third-party adjudication and individual rights of access to justice. Section II discusses eight models of multilevel judicial governance in Europe. Section III uses constitutional and 'public goods' theories in order to explain the multiple functions of courts of justice and the increasing importance of judicial cooperation (*comity*) in protecting transnational rule of law in European and international economic law (IEL). Section IV argues that the diverse 'constitutional methods' applied by the EU Court of Justice (CJEU), the European Free Trade Area (EFTA) Court and the European Court of Human Rights (ECtHR) offer important lessons for multilevel judicial governance in IEL beyond Europe. Section V concludes by emphasizing the judicial task of administering justice in IEL and the need for limiting the existing 'legal' and 'doctrinal fragmentation' through multilevel judicial protection of transnational rule of law for the benefit not only of governments, but also of citizens as legal subjects and 'democratic owners' of IEL.

I. From 'Good Governance' to 'Judicial Governance'

Most civilizations recognize since ancient times the need for morality, good governance and justice as prerequisites for social peace. Plato, Aristotle and Cicero, for example, described the four 'cardinal virtues' of temperance, fortitude, prudence and justice as interdependent preconditions for peace both inside human minds as well as in the republic. The Latin term 'virtue' refers to the 'power' of man (= *vir*) to temper his emotions and desires, to confront uncertainty and fear with fortitude, to use rationality and reasonableness prudently, and to govern our human and social nature justly by rendering to each his due (*suum cuique tribuere*). The Latin term 'cardinal' uses the image of hinges (= *cardo*) upon which the door of moral life swings. Yet, as illustrated by Greek tragedies like *Antigone*, even virtuous kings often failed to avoid social conflicts through individual wisdom and justice. Neither king Kreon insisting on the law of the city forbidding the burial of the aggressor, nor Antigone insisting on her divine duty of burying her dead brother, were impartial and reasonable enough to reconcile their conflicting conceptions of justice so as to avoid the tragic suicides of Antigone and Haimon (i.e. the son of Kreon and fiancé of Antigone). In the tragedy of *Orest*, the circle of personal vengeance and tragic bloodbaths ended only when the goddess Athena submitted the dispute to impartial judges; as the jury could not agree on whether Orest's killing of his mother made

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him guilty of murder, the defendant was acquitted based on the principle '*in dubio pro reo*'. The Greek, Roman and Renaissance republics justified governance by the collective supply of the common good (*res publica*) within the limits of a republican constitution institutionalizing 'public reason' and protecting 'justice' for a limited number of free citizens through constitutional restraints rather than only by 'virtue ethics'. In the 21st century, governance and 'public reason' are constitutionally limited by the legal obligations of all 193 UN member states to respect, protect and fulfil 'inalienable' human rights both inside national jurisdictions as well as beyond national borders in order to establish 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 of the 1948 Universal Declaration of Human Rights = UDHR). The continuing 'human rights revolutions' at national levels (e.g. in African and Asian countries) and regional levels (e.g. in regional human rights and economic law regimes) challenge state-centred 'Westphalian traditions' of multilevel governance and legal methodology.

The worldwide recognition – in ever more constitutional and human rights instruments as well as in ever more areas of IEL – of individual rights of access to justice and judicial remedies confirms the ancient insight that human conscience (our 'internal judge'), the 'just balancing' of moral and legal principles, and social justice must be 'institutionalized' in order to prevent or settle the inevitable conflicts between human desires for scarce goods and services and other disputes among rational egoists with only limited reasonableness. Based on the Aristotelian distinctions between distributive, commutative, corrective justice and equity, the jurisprudence of national and international 'courts of justice' continues to elaborate ever more 'principles of justice' and distinct contexts of procedural justice, social and political justice, 'transitional justice' in post-conflict situations, and transnational justice responding to the challenges of globalization. The customary law rules on treaty interpretation codified in the Vienna Convention on the Law of Treaties (e.g. Articles 31-33 VCLT) and the dispute settlement rules of numerous international organizations (e.g. Article 1 UN Charter) require interpreting treaties and settling related disputes not only on the basis of the text, context, objective and purpose of the applicable rules, but also 'in conformity with the principles of justice' and the human rights obligations of governments (cf. Preamble and Article 31 VCLT). The International Court of Justice (ICJ) and numerous other international courts take 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.'[1] '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.'[2]

As the need for laboring in order to gain the resources for human survival (*animal laborans*), and the human desire for social recognition through work (*homo faber*) are essential parts of the human *vita activa*[3], economic law (e.g. contract law, property regulation, *lex mercatoria*) belongs to the oldest parts of national and international legal systems. The more the individual and social gains from international trade and from global division of labor were recognized, the more traders, producers, investors, consumers and governments strived for reducing international transaction costs through multilevel legal regulation of international economic cooperation and of related disputes. European economic and human rights courts, commercial and investor-state arbitral tribunals, and national courts recognize ever more common market rights, property rights, human and other cosmopolitan rights of citizens participating in the international division of labor. The legal recognition of 'violation complaints', 'non-violation complaints' and 'situation complaints' in GATT/WTO law (cf. Arts XXIII GATT, XXIII GATS), like the WTO provisions on 'special and differential treatment' of less-developed countries (LDCs), illustrate how the ancient distinctions between principles of distributive, corrective, commutative justice and equity continue to influence modern dispute settlement in IEL. The admission of *amicus curiae* briefs in order to take into account third party interests affected by

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

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

[3] Cf. H.ARENDT, *The Human Condition*, Chicago: University of Chicago Press, 1958.

economic disputes, the 'judicial balancing' between legal market access commitments and exception clauses (e.g. GATT Article XX) reserving sovereign rights to protect non-economic values, and the judicial interpretation of economic provisions (e.g. on technical regulations, sanitary standards, intellectual property rights) in the light of other treaty provisions protecting non-economic public interests (like protection of public health pursuant to Article 8 TRIPS Agreement) reflect the judicial task of settling disputes 'in conformity with principles of justice'. The more private and public, national and international economic regulations interact, the stronger becomes the need for multilevel dispute settlement bodies to cooperate (*judicial comity*) in protecting transnational rule of law in conformity with the 'consistent interpretation' requirements of national and international legal systems (e.g. Article 31 VCLT).

II. Competing Models of Multilevel Judicial Governance in Europe

Modern constitutional theories of justice explain why the today universal obligations to protect human rights by 'rule of law' and 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Preamble and Article 28 of the Universal Declaration of Human Rights of 1948) require 'institutionalizing public reason' by means of constitutional, legislative, administrative, judicial and international rules and institutions that must remain justifiable in terms of 'principles of justice' to which citizens can consent as protecting their common, reasonable interests.[4] The more globalization transforms *national* into *international 'aggregate public goods'* (like mutually beneficial monetary, trading, environmental and related legal systems), the more national democratic 'governments' for the collective supply of public goods must be supplemented by multilevel 'governance' of international public goods that interact both horizontally (e.g. the monetary and trading systems) and vertically (e.g. local, national, regional and worldwide markets and regulations). The European Union (EU), the European Economic Area (EEA), the EU free trade agreements with more than 100 third countries, the hundreds of bilateral investment treaties (BITs) concluded by EU member states, the European Convention on Human Rights (ECHR) and the World Trade Organization (WTO) illustrate the ever larger number of bilateral, regional and worldwide agreements with overlapping jurisdictions for legislative, administrative and judicial governance of transnational 'aggregate public goods' (like rule of law, peaceful settlement of disputes). There are today numerous competing models for multilevel 'judicial governance' of transnational disputes in Europe:

- The ICJ as 'the principal judicial organ' of the UN (cf. Article 92 UN Charter) continues to settle important international disputes among European states as illustrated by the ICJ judgment of February 2012 on Germany's complaint that Italian courts had violated the jurisdictional immunity of Germany by allowing civil claims brought against Germany in Italian courts for war crimes committed during World War II and by taking 'measures of constraint' against German property in Italy used by Germany for public policy purposes.
- Also the International Tribunal for the Law of the Sea (ITLOS) and the WTO dispute settlement panels and Appellate Body, whose jurisdictions admit complaints also by non-state actors and by international organizations (like the EU), continue to adjudicate disputes involving the EU, European states and national courts.
- The temporary International Criminal Tribunal for the former Yugoslavia (ICTY), the permanent International Criminal Court (ICC) and national courts have concurrent and complementary jurisdictions over individuals for the crimes specified in their statutes. The ICC, for example, can exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, the national courts are unwilling or unable to

[4] Cf. E.U. PETERSMANN, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford : Hart, 2012, chpts. II, III, VI.

investigate or prosecute such crimes, or a situation is referred to the ICC by the UN Security Council. The concurrent jurisdictional rules provide for powers of both the ICC and the ICTY to insist upon deferral of cases pending before national courts in favor of the international courts, which may later decide (e.g. after an indictment of the accused) to refer cases back to the national court.

- The CJEU consists of several hierarchically structured sub-courts including the Court of Justice, the General Court and other specialized courts (like the Civil Service Tribunal); it cooperates with national courts in the context of the preliminary ruling procedure (Article 267 TFEU) in order 'to ensure that in the interpretation and application of the Treaties the law is observed' (Article 19 TFEU). EU law is enforced through a combination of legal and judicial remedies on national levels and on the EU level based on multilevel legal and judicial cooperation. EU law provides for direct and indirect actions that EU institutions, EU staff members, individual and juridical persons, member states and national courts may bring before the CJEU, as well as for legal arguments that may be used before national courts (e.g. Article 277 TFEU: plea of illegality; duties of consistent interpretation, duties to request preliminary rulings from the CJEU) and before the CJEU (e.g. legal primacy and direct effect of EU law). In the absence of specific EU rules, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).
- The EFTA Court has been established in 1994 with jurisdiction for judicial interpretation and enforcement of the law of the EEA in the 3 EFTA states Iceland, Liechtenstein and Norway. Its statute and rules of procedure are modeled on those of the CJEU and provide individuals, economic operators, member states, national courts and the EFTA Surveillance Authority with broad access to the EFTA Court by means of actions for failure to fulfill obligations; disputes between EFTA states regarding the interpretation or application of EEA law; actions for annulment of a decision, or for failure to act, brought by an EFTA state or a natural or legal person against the EFTA Surveillance Authority; and jurisdiction for advisory opinions on the interpretation of the EEA Agreement upon a request of a national court of an EEA/EFTA state. Even though – according to the EFTA Court – EEA law does not include the supranational EU law principles of legal primacy, direct effect and direct applicability, the close collaboration among the CJEU and the EFTA Court has so far preserved a level playing field for individuals and economic operators throughout the common market in conformity with the explicit EEA commitments to maintain 'legal homogeneity' in the application of EU-EEA common market rules.
- The ECtHR interacts with national courts in all member states of the ECHR in the interpretation and protection of the human rights, fundamental freedoms and judicial remedies guaranteed for more than 800 million citizens in the 47 ECHR member countries. Due to the more than 250'000 complaints before the ECtHR since 1959, the issuance of some 1500 substantive judgments annually, and the transformation (in 1998) of the initially optional into compulsory jurisdiction of the Court for individual applications, judicial protection of the Convention rights has become more effective in all national jurisdictions, thereby strengthening also rights-based constitutionalism. Like the CJEU and the EFTA Court, the ECtHR has often used 'dynamic' and 'evolutionary interpretation' methods for interpreting and protecting fundamental rights. Another common experience of these three European courts has been that infringement proceedings among states have remained rare, and the large numbers of complaints from self-interested individuals have helped all three courts to interpret and develop their interrelated treaty instruments as 'living' and 'constitutional instruments' requiring effective protection of fundamental rights for the benefit of citizens. Yet, unlike in complaints to the CJEU and the

EFTA Court, individual access to the ECtHR requires prior exhaustion of local remedies; the ECtHR emphasizes the principle of subsidiarity in interpreting ECHR rights and the 'margin of appreciation' afforded national authorities in the first instance.

- International commercial arbitration has become a generally accepted method of resolving international business disputes throughout Europe. Due to the modernization of domestic legislation regulating arbitration in many countries of the world, the development of institutional arbitration (e.g. administered by the International Chamber of Commerce, the London and Stockholm Courts of Arbitration, WIPO arbitration rules), international model agreements and 'model clauses' for arbitration (e.g. UNCITRAL arbitration rules) and the accession of ever more countries to relevant international conventions (like the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), commercial arbitral tribunals adopt thousands of arbitral awards year by year. They often involve four different legal systems: (1) the law governing recognition and enforcement of the agreement to arbitrate; (2) the law regulating the actual arbitration proceeding; (3) the rules which the arbitral tribunal has to apply to the substantive matters in dispute before it; and (4) the law governing recognition and enforcement of the award of the arbitral tribunal. Courts often disagree on whether international arbitration should be conceived as a component of the national legal order at the seat of arbitration (assimilating the arbitrator to a national judge), as being anchored in a plurality of national legal orders (e.g. of all states recognizing and enforcing the arbitration award), or as a transnational arbitral legal order (e.g. being part of transnational commercial and investment law). Yet, arbitrators and courts increasingly 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. In a judgment of 1 June 1999, the CJEU confirmed the power of national courts to annul arbitration awards that fail to comply with prohibitions of EU law that are part of national rules of public policy.[5]
- The Permanent Court of Arbitration – which was established by the 1899 Hague Convention for the Pacific Settlement of International Disputes as an optional dispute settlement mechanisms – continues to be used for the settlement of inter-state disputes also among EU member states (as illustrated by the 2006 *IJzeren Rijn* arbitral tribunal award in a dispute between Belgium and the Netherlands over the costs of the reactivation of an old railway line, called the Iron Rhine). It also assists in investor-state and other international arbitrations. Based on the 1965 World Bank Convention on the Settlement of Investment Disputes, the International Centre for the Settlement of Investment Disputes was established in 1966 and assists in the administration of hundreds of investor-state arbitral proceedings involving, *inter alia*, also EU member states. In the *Eastern Sugar* and *Eureko* investment arbitrations, the arbitral tribunals rejected legal claims that the accession to the EU had entailed the legal termination of *intra*-EU BITs among EU member states pursuant to Articles 30 and 59 of the VCLT.[6] In addition to arbitration based on bilateral agreements, arbitration is also provided for in regional agreements (like the 1994 Energy Charter Treaty) and worldwide agreements (like the WTO Agreement on Preshipment Inspection, the Law of the Sea Convention).

[5] Case C-126/97, *Eco Swiss China Time Ltd v Benetton*, ECR 1999 I-03055.

[6] Cf. A.REINISCH, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations', in: *Legal Issues of European Integration* 39 (2012), 157-178.

III. Multilevel Judicial Protection of Transnational Rule of Law in IEL?

The multiple judicial remedies constrain *rule by law* for the benefit of *rule of law* as a constitutional principle of democracies, European law and human rights law. They are increasingly supplemented also by guarantees of *individual access to justice* and judicial remedies.[7] Yet, even though the Lisbon Treaty on European Union (TEU) is explicitly based on 'rule of law' (Article 2) and 'strict observance of international law' (Article 3), the CJEU continues to cooperate with only few other international courts (like the EFTA Court, the ECtHR); notwithstanding a few references to ICJ and WTO adjudication in order to justify judicial interpretations, the CJEU refuses to apply legally binding dispute settlement rulings by the WTO and ITLOS against the EU and EU member states.[8] Inadequate cooperation among international courts is also due to the fact that their compulsory jurisdiction tends to be accepted by states only in specific treaty regimes with precise and limited, reciprocal rights and obligations; the general jurisdiction of the ICJ under the 'optional clause' is accepted by only about one third of the 193 UN member states. The impact of multilevel economic regulation on economic operators entails increasing submission of economic disputes to international jurisdictions, 'forum shopping' and multiple complaints in competing jurisdictions (e.g. regional economic courts and WTO dispute settlement proceedings) with occasionally incoherent judgments (e.g. in the *Lauder* and *CME* investment arbitrations against the Czech Republic, the WTO and CJEU dispute settlement rulings against the EU import restrictions for bananas).[9] In economic treaty regimes with compulsory jurisdiction (like the WTO, NAFTA, the EU), the contracting states insist on their power of 'authoritative interpretations', of changing judicial interpretations by treaty amendments, and of non-compliance with international judgments. Beyond IEL, further judicialization of international relations through worldwide treaties and courts is resisted by most governments.

The more globalization transforms *national* into *international 'aggregate public goods'* (like transnational legal security as an 'intermediate public good'), the stronger becomes the need for reviewing legal methodologies and for reforming the economic, political and legal policies of multilevel governance institutions so as to better fulfill their legal obligations to protect human rights and self-determination of peoples. The less national parliaments control rulemaking in international economic organizations, the more important becomes multilevel judicial protection of cosmopolitan rights and of transnational rule of law for the benefit of citizens. Notwithstanding their often diverse mandates, international courts tend to perform multiple functions, e.g. as dispute settlers, guardians of the credibility of legal commitments, 'exemplars of public reason' (J.Rawls) and governance institutions clarifying vague rules, producing new 'legal knowledge' (e.g. through impartial fact-finding and hearing of experts), remedying negative externalities (like treaty violations distorting competition), protecting 'principles of justice' and rule of law. As international economic transactions tend to be based on individual acts of producers, traders, investors and consumers, cooperation between international and domestic courts and arbitral tribunals is of crucial importance for IEL and transnational rule of law. The individual access to the CJEU, the EFTA Court, the ECtHR, investment and commercial arbitration offers empirical evidence that 'constitutional' and 'cosmopolitan' conceptions of IEL (e.g. by European courts, investor-state arbitral jurisprudence) can protect basic needs and fundamental rights of citizens more effectively than alternative IEL regimes based on 'Westphalian conceptions' of international law among states and power-oriented conceptions of IEL.

There is increasing agreement on *taxonomic* and *sociological conceptions of IEL*. Legal systems are perceived as a union of 'primary rules of conduct' and 'secondary rules' of recognition, change and

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[7] Cf. PETERSMANN (note 4), chapter V.

[8] Cf. E.U.PETERSMANN, 'Can the EU's Disregard for "Strict Observance of International Law" (Article 3 TEU) Be Constitutionally Justified?' in: M.BRONCKERS/V.HAUSPIEL/ R.QUICK (eds), *Liber Amicorum for J. Bourgeois* (Cheltenham: Elgar, 2011), 214-225.

[9] Cf. N. LAVRANOS, *Jurisdictional Competition. Selected Cases in International and European Law* (Groningen: Europa Law, 2009).

adjudication[10] that dynamically interact with changing *legal practices* by private and public actors, who often justify legal claims and interpretations of rules by invoking *legal principles*. There is also agreement on the need for proving positive law as social facts that must be distinguished from normative proposals for changing the existing rules. Yet, governments, national and international courts and private actors increasingly disagree on which *doctrinal conceptions* and *ideal conceptions* should guide the interpretation and development of IEL. For instance:

- Most governments perceive **IEL as a part of public international law** regulating the international economy on the basis of 'sovereign equality of states', related 'Westphalian value premises' (e.g. protecting rulers and their financial dealings regardless of their democratic legitimacy), UN law (e.g. IMF and World Bank law) and the WTO.
- **Global administrative law (GAL)** conceptions aim at limiting abuses of power by emphasizing multilevel administrative law principles underlying the law of international organizations (e.g. the Bretton Woods institutions, WTO) such as principles of transparency, legal accountability, limited delegation of powers, due process of law and judicial remedies.
- **Multilevel regional IEL** is often limited to constitutional democracies (e.g. in NAFTA) prioritizing *national* constitutional, competition and environmental regulations and judicial remedies subject to limited international legal restraints.
- EU law – and to a lesser extent also EEA law – have adopted **multilevel constitutional IEL** for the regulation of their common markets and related fundamental rights of citizens.
- Transnational commercial and investment law and arbitration emphasize the reality of **'legal pluralism'** and the advantages of coordinating competing jurisdictions through 'conflict of law' principles and approaches.

The five competing conceptions of IEL prioritize different value premises (such as state sovereignty, multilevel administrative or constitutional law principles, constitutional nationalism, international private law principles). Their different narratives are due to different legal doctrines, policy approaches and justifications of IEL (e.g. in utilitarian or 'deontological' terms). Yet, 'doctrinal eclecticism' and related interest group politics undermine the legitimacy, legal coherence and political effectiveness of multilevel IEL regulation. Limiting the existing 'fragmentation' (e.g. in legal conceptions and regulation of IEL) and the ubiquity of abuses of public and private power in transnational financial, trade and environmental regulation requires stronger compliance with the customary law requirements of justifying IEL in terms of inclusive 'principles of justice' and human rights rather than only in terms of alleged 'state interests', national administrative law principles, domestic interest group politics and 'conflicts of law' principles. Arguably, the customary rules of treaty interpretation (as codified in the VCLT) and the 'rules of recognition' (as codified in UN law) require reconciling the five IEL conceptions in mutually coherent ways based on 'principles of justice' and human rights limiting abuses of government powers. Courts of justice should impartially and independently interpret, justify and develop IEL reconciling the doctrinal perspectives in order to protect transnational rule of law for the benefit of citizens cooperating in the global division of labor. Cooperation among national and international courts and the 'consistent interpretation' requirements of national and international legal systems (cf. Article 31 VCLT) can assist in complying with the customary law requirements of interpreting treaties and settling disputes 'in conformity with principles of justice' and the human rights obligations of all UN member states to protect 'rule of law'. Multilevel judicial protection can strengthen the human rights obligations of all UN member states and their related 'sovereign responsibilities' and 'duties to protect' basic needs and fundamental rights of citizens; yet, it must respect legitimate 'constitutional pluralism' and the only limited 'overlapping consensus' on 'principles of justice' among governments and citizens with reasonably diverse conceptions of a 'good life' and 'political justice'.

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

IV. Legitimately Diverse 'Constitutional Methodologies' of the CJEU, the EFTA Court and the ECtHR

Legal and judicial methods of conceptualizing legal sources, rules of recognition and methods of interpretation often differ in national and international jurisdictions. The distinction by Dworkin of the following 'four stages of legal theory' illustrates how much doctrinal concepts of law depend on judicial clarification of 'principles of justice':

- at the 'semantic stage', legal terms (like justice, liberty, equality, democracy, rule of law) tend to be 'interpretive concepts' which people share even if they disagree about the criteria for identifying injustice and for applying such 'interpretive concepts'; hence, a 'useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures';[11]
- at the 'jurisprudential stage', the legal interpreter must search for the values that supply the best interpretation of the aspirational values of legal concepts like rule of law, including the 'ideal of political integrity' as a requirement of governing 'through a coherent set of political principles whose benefits extend to all citizens' and legitimize coercive power of states;[12]
- at the 'doctrinal stage', the 'truth conditions of propositions of law' must be constructed 'in the light of the values identified at the jurisprudential stage' so that legal justifications fit the practice as well as the values that the practice serves (e.g. the constitutional and procedural practices in which legal claims are embedded);[13]
- at the 'adjudicative stage', courts of justice deploying the monopoly of coercive power must impartially and independently review whether the enforcement of the law in particular cases by political officials is legally justified by 'the best interpretation of legal practice overall';[14] according to Dworkin's 'adjudicative principle of integrity', judges should interpret law - in conformity with its objectives of legality, rule-of-law and its underlying constitutional principles of justice - 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.'[15]

The codification of the customary rules of treaty interpretation in the VCLT provides for interpretation based on text, context, objective and purpose (cf. Articles 31-33) 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (Preamble VCLT). In contrast to the interpretation methods practiced in many national jurisdictions and in view of the lack of parliamentary lawmaking in most international organizations, the preparatory drafting history is recognized only as a 'supplementary means of interpretation' (cf. Article 32). Hence, claims that judges must respect the often uncertain meaning that some government officials may have intended for treaty texts - rather than explore the most coherent interpretations benefitting citizens in conformity with 'principles of justice' justifying the respective treaty obligations – remain contested, notably in case of multilateral 'legislative treaties' that were initially negotiated by only few governments without a formal record of the drafting history and have subsequently been ratified by national parliaments in many other countries. As the human rights obligations of UN member states and their guarantees of democratic governance require recognizing citizens as co-authors of

[11] R.DWORKIN, *Justice in Robes*, Cambridge: Harvard University Press, 2006, at 12.

[12] *Id*., at 13.

[13] On the two tests of 'fit' and 'value' as 'different aspects of a single overall judgment of political morality' and 'best justification' of legal practices see *id*., 15-17.

[14] *Id*., at 18, 25.

[15] R.DWORKIN, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) 225, 243.

representative lawmaking, the citizen-driven and rights-based nature of international economic cooperation may justify 'constitutional interpretations' protecting cosmopolitan rights, general consumer welfare and transnational rule of law for the benefit of citizens rather than special interests of government officials (e.g. to avoid judicial accountability) and of 'rent-seeking' interest groups.

EU law, EEA law and human rights illustrate how global economic regulation and multilevel human rights regimes entail multi-layered legal systems with multiple 'sources of law' and 'rules of recognition' that dynamically evolve in response to adjudication and democratic discourse. EU law, for example, can be perceived as one multi-layered legal system built on 27 national legal systems and the Lisbon Treaties incorporating additional treaty regimes (like EEA law, the ECHR, the WTO obligations of the EU and all EU member states) with multiple judicial systems. The accession of the EU to the ECHR will further strengthen the legal status and enforcement of ECHR rights as integral parts also of EU law and national legal systems. If legal and judicial methodologies are viewed from the perspective of globalization and the evolution of IEL and human rights into one multilevel legal order, then 'rule of law and respect for human rights' (Article 2 TEU) and 'strict observance and the development of international law' (Article 3 TEU) by international organizations like the EU are becoming ever more important for collective supply of international 'aggregate public goods'. 'Cosmopolitan constitutionalism' and multilevel protection of transnational 'rule of law' for the benefit of citizens are more coherent legal paradigms and 'principles of justice' protecting the common interests of citizens in IEL than 'state sovereignty' based on 'legal nationalism'.[16] As in common law traditions, judge-made law has become an important source of European economic and human rights law. Also UN law does not limit the 'sources of law' and 'rules of recognition' to 'international conventions … recognized by states' (Article 38,a Statute of the ICJ); the additional sources – like '(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) …judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law' (Article 38 ICJ Statute) – may depend no less on recognition by citizens, civil society, parliaments and courts of justice than on claims by diplomats that they control the *'opinio juris sive necessitatis'* as traditional gate-keepers of 'Westphalian international law among states'. The multiplicity of EU governance institutions – without one single 'EU government' – governing in 23 official languages in diverse national jurisdictions with diverse democratic traditions (e.g. in terms of 'majoritarian' versus 'constitutional democracies') complicates the constitutional task of promoting one shared 'public reason' and 'overlapping consensus' (J.Rawls) among 27 national governments, EU institutions and 500 million EU citizens with diverse conceptions for a good life and 'social justice'. Whereas national judges in common law and Scandinavian countries continue to focus on the parliamentary drafting history in order to establish the intentions of national legislators, the CJEU seems to take into account the preparatory work of EU primary and secondary legislation only rarely (e.g. pursuant to Article 52:7 of the EU Charter of Fundamental Rights) without hardly ever referring to the VCLT and its Article 32 concerning 'supplementary means of interpretation'. The traditional methods of textual interpretation offer only rarely the decisive argument in the jurisprudence of European courts.

A. Judicial Methodologies applied by the CJEU

As many EU treaty provisions use vaguely drafted 'interpretive concepts' (like non-discrimination, 'rule of law', 'customs union', 'common market', 'distortion of competition') and provide for new forms of multilevel lawmaking and adjudication, the 'constitutional principles' of EU law (like legal primacy, direct effect, direct applicability of precise and unconditional EU rules) were justified and developed by the CJEU on the basis of 'teleological' and 'systemic' rather than merely textual interpretations. The CJEU also emphasizes the need for balancing economic and other fundamental

[16] On 'cosmopolitan constitutionalism' see PETERSMANN (note 4), chapters II-IV.

rights against each other, without giving automatic preference to one over the other, on the basis of 'meta-teleological interpretations' (e.g. justifying the interpretation by the explicit aims of EU law), 'autonomous interpretations' (e.g. of legal concepts like 'courts' entitled to request 'preliminary rulings' pursuant to Article 267 TFEU) or comparative 'consensus interpretations' (e.g. justifying an independent 'EU meaning' of certain EU legal concepts based on the common denominator accepted in the national legal systems of EU member states) rather than merely on the basis of the treaty text, subject to different degrees of judicial deference regarding EU interpretations of fundamental rights in order to respect legitimate 'constitutional diversity' at national levels.[17] The particular context of EU law (e.g. equal treatment of men and women in the common market, free movement of service providers and other persons) and of its national implementation has a strong bearing on judicial protection of fundamental rights (e.g. the scope of labor rights used to restrict competition from foreign service providers by means of strike actions). Governmental restrictions of fundamental rights must be justifiable on the basis of general principles of EU law such as non-discrimination, 'proportionality' (sub-divided into principles of suitability, necessity and proportionality *stricto sensu*) and legally recognized public interests. In policy areas like European competition, common market and foreign trade law, legal and judicial interpretations are often shaped by policy objectives of the EU institutions, like promoting economic efficiency or price stabilization in common agricultural markets. As some national courts continue to insist on sovereign rights of member states to scrutinize whether EU acts are '*ultra vires*', violate the 'national constitutional identity' (cf. Article 5 TEU) or fail to protect constitutional safeguards equivalent to national fundamental rights[18], judicial reasoning and 'judicial dialogues' are important for promoting 'judicial comity', national compliance with EU law as interpreted by EU courts, and the search for 'the best fit' of judicial interpretations. For instance, the *Mangold* judgement by the CJEU on age discrimination in employment - which was widely criticized for exceeding the borderline separating law from policy - was reluctantly accepted by the German Constitutional Court as a 'methodologically justifiable development of the law'[19]; such conditional cooperation among supreme courts illustrates that the validity and legitimacy of legal rules may depend no less on respect for legitimately diverse legal methodologies than on the outcome of judicial decisions. By connecting novel interpretations to the aims of EU law and of national constitutional systems, national authorities may find it easier to accept the reasonableness of judicial determinations as integral parts of their existing EU legal obligations.[20] If the 'constitutional traditions common to the member states' or international agreements and related jurisprudence binding on the EU do not justify uniform 'autonomous interpretations' of EU legal concepts, the CJEU often deliberately refrains from interpreting EU legal terms (such as 'public order', the right of access to courts and to a fair trial) in an autonomous, uniform manner so as respect legitimately diverse legal traditions in member states interpreting equivalent notions in conformity with their national constitutional values in their respective legal systems.[21] But the CJEU has, so far, refrained from developing an autonomous 'margin of appreciation doctrine' for exercising deference in its interpretation of EU provisions in favor of diverse legal and judicial interpretations by national authorities.

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[17] Cf. J.GERARDS, 'Judicial Argumentation in Fundamental Rights Cases – the EU Court's Challenge', in: U.NEERGARD/R.NIELSEN (eds), *European Legal Method in a Multilevel EU Legal Order*, Copenhagen: DJOF Publishing, 2012, 27-70.

[18] Cf. the Lisbon judgment of the German Bundesverfassungsgericht of 30 June 2009, BVerfGE 123, 267.

[19] Case C-144/04 *Mangold* ECR 2005 I-9981; BVerfGE 2 BvR 2661/06 of 6 July 2010 ('Dem Gerichtshof ist auch die Rechtsfortbildung im Wege methodisch gebundener Rechtsfortbildung nicht verwehrt').

[20] An example is the justification by the CJEU of the need for European 'uniform interpretations': 'According to settled case law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question', Case C-373/00, *Truly*, ECR 2003 I-1932, para. 35.

[21] Cf. GERARDS (note 17), at 47.

B. Judicial Methodologies applied by the EFTA Court

The Preamble of the EEA Agreement states that 'in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition'. In conformity with the general legal homogeneity requirement in Article 1 EEA Agreement – and notwithstanding the limitation of the judicial homogeneity requirement in Article 6 EEA Agreement to interpreting EEA rules in accordance with the relevant rulings of the CJEU given prior to the date of signature of the EEA Agreement – the EFTA Court continues to interpret EEA law in conformity with relevant rulings by the CJEU given after that date. In the *L'Oréal* case of 2008, for instance, the Court inferred from the homogeneity principle 'a presumption that provisions framed in the same way in the EEA Agreement and EU law are to be construed in the same way, even if 'differences in scope and purpose may under specific circumstances lead to a difference in interpretation'; the Court gave up its previous legal interpretation in the *Maglite* case and followed the different, subsequent interpretation by the CJEU in the *Silhouette* case by finding that Article 7 of the Trade Marks Directive prevented also EEA member states from applying – in their relations with third countries – the doctrine of 'international exhaustion'.[22] Also the CJEU – even though it is under no corresponding 'homogeneity obligation' to take EFTA Court precedents into account in its interpretation of EEA law as an integral part of the EU legal system – supports the legal homogeneity of EU and EEA law by explicitly referring to - and often following – EFTA Court jurisprudence which, due to the lack of legislative powers of EEA institutions, applies a more deferential approach regarding domestic enforcement of implemented EEA rules without following the CJEU jurisprudence on legal primacy and direct effect of EU law.[23]

C. Judicial Methodologies applied by the ECtHR

The ECtHR stresses its subsidiary role in relation to the primary responsibility of ECHR member states to respect, protect and fulfill the Convention rights and obligations. As the Court refuses to act as a 'court of fourth instance', it emphasizes the 'margin of appreciation' of states to make their own choices in regulating and reconciling fundamental rights. As national authorities are generally better placed than the ECtHR to make factual assessments and assess the appropriate 'balancing' of competing fundamental rights with due regard to societal interests, the ECtHR tends to review only whether national limitations of fundamental rights are necessary and effective means for realizing public interests, or whether they are 'manifestly unreasonable' or disregard 'reasonable alternatives'.[24] The Court emphasizes that effective and practical protection of the Convention rights requires interpreting the ECHR in an evolutive and dynamic fashion 'in the light of present day conditions'.[25] The central values mentioned in the Preamble of the ECHR – like respect for human dignity, personal autonomy, democracy and pluralism – are regularly invoked in order to justify evolutive interpretations and effective protection of fundamental rights. Just as only 'marginal review' has sometimes been criticized as condoning 'fundamental rights relativism', broad judicial determinations by the ECtHR of some fundamental rights notions (like the right to property, the right to respect for one's private life) - and the related expansion of supranational jurisdiction to review national

[22] Case E-10/07, *L'Oréal*, EFTA Ct Reports 2008, 258.

[23] For details see: O.I.HANNESSON, *Giving Effect to EEA Law – Examining and Rethinking the Role and Relationship between the EFTA Court and the Icelandic National Courts in the EEA Legal Order*, Florence : EUI doctoral thesis, 2013.

[24] Cf. J.CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden: Nijhoff, 2009.

[25] ECtHR, *Tyrer v UK*, judgment of 25 April 1978, No. 5856/72, Series A, Vol. 26, para. 31.

limitations of such rights - have also been criticized as 'judicial overreach'.[26] The variable intensity of judicial review may depend on the importance of the right affected and on comparative evaluations of diverse national constitutional traditions. In the case of *Vo* concerning the question from which moment onwards an unborn baby should be recognized as a 'person' protected by the right to life (Article 2), the ECtHR referred to the divergence of opinions on this issue in national legal systems and expressly refused to adopt a uniform legal interpretation on this issue, thus respecting member states' discretion to determine themselves whether persons should be legally protected only from the moment of their birth or already from an earlier moment after their conception.[27]

V. The Judicial Task of Administering Justice and Enforcing 'Public Reason'

The multilevel judicial governance by the CJEU, the EFTA Court, the ECtHR and national courts suggests that their common focus on teleological and 'systemic' (e.g. comparative) rather than merely textual interpretations of European treaties is more in line with the customary methods of international treaty interpretation[28] than with the judicial methods applied by national courts (such as judicial deference towards parliamentary majority decisions, focus on preparatory work of statutes in order to respect the intentions of the legislator). Yet, in contrast to many worldwide jurisdictions, all three European tribunals emphasize their 'constitutional embeddedness' and commitment to protect human rights and other constitutional principles common to their member states. Such constitutional restraints have not prevented the active use of judicial powers for limiting abuses of power, protecting 'new' fundamental rights of EU citizens, and promoting new forms of 'integration through law' and incremental (small 'c') 'constitutionalization' of multilevel governance, with due respect for national constitutional diversity as a positive European value.

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'.[29] In US antitrust law as well as in European economic law, individual plaintiffs invoking and enforcing competition and common market rules have been likened to 'attorney generals' promoting 'community interests' rather than pursuing only individual self-interests.[30] Following the recognition of human rights and other 'principles of justice' as integral parts of national and international legal systems, ever more national and international courts throughout Europe 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

[26] Cf. M.BOSSUYT, 'Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', *Human Rights Law Journal* 28 (2007), 321-332.

[27] ECtHR, *Vo v France*, judgment of 8 July 2004, No. 53924/00, Reports 2004-VIII.

[28] The CILFIT formula – according to which 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of the Community as a whole, regard being had to the objectives thereof' (Case 283/81, *CILFIT*, ECR 1982, 3415, para. 20) – is fully consistent with the interpretation methods codified in Article 31 VCLT.

[29] R. JHERING, *The Struggle for Law*, Chicago: Callaghan, 1915, chapters II to IV.

[30] This conception was emphasized by the CJEU in its *Van Gend en Loos* judgment (Case 26/62, ECR 1963, 1), where the CJEU stated that 'the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States'.

> 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'.[31]

Arguably, the increasing legal and judicial guarantees of 'access to justice' and of cosmopolitan rights offer individuals similar instruments to enforce IEL in decentralized and de-politicized ways against illegal government restrictions and irresponsible interest group politics. The need for legal and judicial 'balancing' of civil, political, economic, social and cultural human rights makes 'constitutional justice' (e.g. multilevel constitutional protection of equal freedoms and human rights) and multilevel judicial protection of transnational rule of law on the basis of 'legal balancing' the 'ultimate rule of law'.[32] This is also true for IEL reconciling economic freedoms with non-economic rights and public interests subject to requirements of transparency, non-discrimination, 'suitability', necessity, 'proportionality *stricto sensu*' and legal accountability. Legal and judicial protection of cosmopolitan rights promotes not only more inclusive 'public reason' and more democratic conceptions of the relevant 'rules of recognition' as 'tests' for legitimate interpretations of IEL and justifications of its principled coherence with human rights and other 'principles of justice'. It also justifies reviewing the 'Westphalian methodologies' of WTO dispute settlement bodies and 'investor biases' in investment arbitration in order to protect reasonable citizen interests more effectively. As national parliaments have not transferred any powers to the EU for arbitrary violations of international law, the CJEU should also protect EU citizens against welfare-reducing violations of the EU's WTO obligations rather than disregard legally binding WTO dispute settlement rulings on the ground that EU politicians prefer 'freedom of maneuver'[33] to violate international law without any evidence that illegal trade restrictions can serve legitimate 'Community interests'.-

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

[32] Cf. D.M.BEATTY, *The Ultimate Rule of Law*, Oxford: OUP, 2004.

[33] This term continues to be used by both the political EU institutions and the CJEU (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.