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**Theories of Justice, Human Rights and the  
Constitution of International Markets**

Ernst-Ulrich Petersmann

**BADIA FIESOLANA, SAN DOMENICO (FI)**

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European University Institute  
Badia Fiesolana  
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## THEORIES OF JUSTICE, HUMAN RIGHTS AND THE CONSTITUTION OF INTERNATIONAL MARKETS

*Prof. Dr. Ernst-Ulrich Petersmann\**

According to John Rawls, "justice is the first virtue of social institutions, as truth is of systems of thought."<sup>1</sup> This contribution argues that human rights, constitutional democracy and the legal constitution of international markets for mutually beneficial cooperation among citizens across frontiers offer a convincing framework for a modern, international theory of justice that takes into account the globalization of human rights and the need for non-discriminatory, rules-based market competition coordinating the global division of labor among producers, investors, traders and consumers around the globe. Theories of justice and of human rights<sup>2</sup> often neglect that markets are inevitable consequences of the protection of human rights and, in order to create the resources necessary for enjoying human rights and coordinate autonomous conduct of free people, need to be legally constituted so as to limit "market failures" and provide "collective public goods".<sup>3</sup> The contribution describes the emergence of international constitutional law – not only in the law of international organizations constituting legislative, executive and judicial organs with mutual "checks and balances", but also by means of universal recognition of "inalienable" human rights, additional constitutional rights, *ius cogens* and *erga omnes* obligations in general international law. The need for, and difficulties of, "constitutionalizing" foreign policies and international economic markets as well as "political markets" (e.g. for collective public goods) are discussed in the context of a theory of justice aimed at protecting human dignity and human rights at home and abroad.

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\* Professor of International and European Law in the European University Institute and its Robert Schuman Centre for Advanced Studies at Florence, Italy. Former professor at the University of Geneva (Switzerland) and its Graduate Institute of International Studies, and former legal adviser in the German Ministry of Economic Affairs, GATT and the WTO.

<sup>1</sup> J.Rawls, A Theory of Justice, 1973, at 3.

<sup>2</sup> This contribution uses the terms human rights and constitutional rights interchangeably in view of the "human right to democratic governance" (see below), which includes a right of citizens to define their respective national and international human rights through constitutional contracts and "constitutional conventions" like the two European Conventions which, in December 2000, adopted the European Charter of Fundamental Rights (Official Journal of the EC of 18 December 2000, C 364/1-21) and, in June/July 2003, the Draft Treaty establishing a Constitution for Europe (whose Part II includes the EU Charter of Fundamental Rights).

<sup>3</sup> For a criticism of the neglect of economic individual rights and of the perception, widespread especially among Anglo-Saxon human rights specialists, of individuals as mere objects of economic government policies, see E.U.Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, in: European Journal of International Law 2002, 845-851.

## I. JUSTICE AS OBJECTIVE OF NATIONAL AND INTERNATIONAL LAW

The UN Charter, the Treaty establishing the European Union (EU), the Draft Treaty establishing a Constitution for Europe submitted to the European Council on 18 July 2003, as well as numerous other international treaties and national constitutions refer to "justice" as a central objective of international and national law. International legal theory suggests that also *compliance* with international rules (i.e. rule of law) depends no less on the perceived legitimacy of the international rules<sup>4</sup> than on governments' cost/benefit analyses<sup>5</sup> and on the "internalization"<sup>6</sup> of intergovernmental rules into domestic laws and policy-making processes. These assumptions of legal theory are consistent with those of political science, according to which political processes tend to be determined not only by the relative power and interests of the actors (e.g. by individual and collective utility maximization), but also by rules, institutions and ideas (e.g. on "justice").<sup>7</sup>

Since the ancient Greek philosophers Plato and Aristotle, legal philosophy tends to define "justice" in terms of rational principles that "justify" the constitutional recognition of equal rights and fair procedures for the distribution of scarce resources.<sup>8</sup> Between the peace treaties of Westphalia (1648) up to the end of the East/West divide (1989), international legal theories focused on the sovereignty and consent of states and on the intergovernmental constitution of an international legal community.<sup>9</sup> The today worldwide recognition – in numerous worldwide and regional human rights conventions and other human rights instruments – of "the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and

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<sup>4</sup> Cf. T. Franck, *The Power of Legitimacy Amongst Nations* (1990) who identifies (at 24) the following four major factors for assessing a rule's legitimacy: its determinacy, rule-making process, conceptual coherence and conformity with the hierarchical rule system.

<sup>5</sup> Cf. L. Henkin, *How Nations Behave* (2<sup>nd</sup> ed. 1979) who asserts that, for reasons of cost/benefit analysis, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time' (at 47).

<sup>6</sup> Cf. H.H. Koh, *Why do Nations Obey International Law?* 106 Yale L.J.(1997), 2628, at 2646.

<sup>7</sup> See e.g. J.Goldstein/R.O.Keohane (eds.), *Ideas and Foreign Policy* (1993).

<sup>8</sup> On the ancient Greek concept of "law as participation in the idea of justice", and the need to relate justice not only to the value of equality, see. e.g. C.J.Friedrich, *The Philosophy of Law in Historical Perspective*, 1963, chapters II and XX.

<sup>9</sup> Cf. e.g. A.Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); H.Mosler, *The International Society as a Legal Community* (1980), e.g. p.15: "Any society, however unorganised it might be, must have one essential constitutional rule in the absence of which it could not be a community but simply a collection of individuals. This is the rule according to which law is created and developed."

peace in the world”<sup>10</sup> requires to base international law, public policy and "justice" on “normative individualism”, i.e. that “all human beings are born free and equal in dignity and rights” (Article 1 UDHR). Also in international economic law, values and policies must be legitimized through individual consent, equal rights and democratic procedures rather than only through utilitarian "merchants' philosophies" of maximizing individual and social "utilities" on the basis of the measuring rod of money and abstract notions of "welfare" and "economic efficiency".<sup>11</sup>

The universal recognition – for instance in national constitutions (e.g. Article 1 of the German Basic Law), EU law (e.g. Article 1 of the EU Charter of Fundamental Rights), the UDHR (Article 1) and in regional and worldwide human rights conventions – of “inalienable” human rights deriving from “human dignity” can be interpreted as requiring to interpret national and international law as a functional unity for promoting individual and democratic autonomy and diversity. In the modern globally integrated world, more than 6 billion individuals and some 200 sovereign states compete for scarce goods, services and capital. Conflicts of interests are legally and economically inevitable and ubiquitous. From a human rights perspective, “international justice” refers, above all, to human rights and democratic procedures that justify the allocation and protection of equal basic rights and the distribution of scarce resources necessary for personal self-development of individuals as morally and rationally autonomous, social human beings. The universal recognition – in all major UN human rights conventions<sup>12</sup> and UN human rights declarations - of “human dignity” as moral source and ultimate objective of “inalienable” human rights places theories of justice into a new constitutional context: Respect for, and protection of, human dignity - e.g. in the sense of moral autonomy, rational autonomy, personal and legal autonomy, equality and responsibility of individuals - and of "inalienable" human rights has become part of national and international constitutional law and must be the guiding principle for theories of justice aimed at empowerment of individuals through protection of equal basic rights, non-discriminatory competition, satisfaction of basic individual needs and democratic self-government necessary for personal self-development in dignity.

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<sup>10</sup> This text from the Preamble of the Universal Declaration on Human Rights (UDHR,1948) has been subsequently included into most UN human rights conventions.

<sup>11</sup> Cf. e.g. R.Posner, *Economic Analysis of Law*, 2<sup>nd</sup> ed. (1977), at 10: "Efficiency means exploiting resources in such a way that 'value' – human satisfaction as measured by aggregate consumer willingness to pay – is maximized." For a criticism of Posner's theory of "justice as efficiency" and, more generally, of utilitarian theories of justice, see: T.Campbell, *Justice*, 2<sup>nd</sup> ed. 2000, chapter 6; S.C.Kolm, *Modern Theories of Justice*, 1998, Part VI.

<sup>12</sup> The 1966 Covenants on Civil and Political Rights (ICCPR), Economic, Social and Cultural Rights (ICESCR) and on Elimination of all Forms of Racial Discrimination (ICERD), the 1980 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture (CAT), and the 1989 Convention on the Rights of the Child (CRC).

The legal implications of the today universal recognition of human rights for theories of justice and for the interpretation of the UN Charter obligations have so far not been clarified.<sup>13</sup> In view of the today more than hundred international treaties and other human rights instruments re-confirming and legally applying, through worldwide and regional human rights bodies, an "inalienable core" of human rights<sup>14</sup>, there is strong evidence that many of the core human rights listed in the UDHR of 1948 have evolved into "constitutional obligations" of all UN member states and UN bodies under the UN Charter. This evolutionary change of UN law calls for "new interpretations" of some of the traditionally state-centered concepts of the UN Charter, for instance focusing not only on "state security" and "aggression" against states in the interpretation of Chapter VII but also on "human security", "democratic peace" and conditionality of UN membership on respect for human rights.<sup>15</sup> This contribution concludes that, contrary to the suggestion by John Rawls of basing "international justice" on equal freedoms of "peoples"<sup>16</sup>, human rights offer a more appropriate constitutional basis for "national" as well as "international justice."

## II. DIVERSITY AND COMMON CORE OF THEORIES OF JUSTICE AND OF HUMAN RIGHTS

Even though justice is acknowledged as a common objective in numerous international treaties and national constitutions, the legal principles and procedures for realizing justice differ from treaty to treaty and from country to country. As human rights protect individual and democratic diversity, also national and international human rights instruments reveal an enormous variety of legal definitions, legislative balancing and national and international implementation of human rights and corresponding obligations of national governments and intergovernmental organizations. *Legal theories of justice*

<sup>13</sup> The International Court of Justice (ICJ) has recognized long since that UN member states have human rights obligations also under the UN Charter: see e.g. the Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114). Yet, the expanding scope of these human rights obligations under the UN Charter remains to be clarified.

<sup>14</sup> For example, in the 1989 UN Convention on the Rights of the Child ratified by more than 190 states, the states parties recognized "that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein." On UN human rights practices see e.g.: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.6, UN 2002; P.Alston/J.Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000; *UN Manual on Human Rights Reporting*, UN 1997.

<sup>15</sup> Cf. the Report of the Commission on Human Security on *Human Security Now: Protecting and Empowering People*, UN 2003, which emphasizes that respecting human rights and promoting democratic principles are central to protection of security of peoples.

<sup>16</sup> J.Rawls, *The Law of Peoples*, 1999.

likewise differ considerably depending on their underlying worldviews and moral and legal value premises.<sup>17</sup> For instance:

- In the rights-based libertarian tradition, justice relates to "natural individual rights" and corresponding limitations on government powers in order to protect the autonomy and independence of individuals who, as explained by Kant, must be treated as ends in themselves and never merely as means for securing benefit to some other person. While Anglo-American libertarians (like John Locke and Robert Nozick) conceive human rights (e.g. to life, liberty and property) and legitimate government powers narrowly, modern European constitutional theories suggest to protect human liberty and personal self-development broadly as maximum equal freedom subject to democratic legislation that must protect and balance human rights in a non-discriminatory, necessary and proportionate manner.<sup>18</sup>
- John Rawls' conception of "justice as fairness" and "procedural justice"<sup>19</sup> proceeds from a rational constitutional choice among individuals behind a "veil of uncertainty" in order to define the basic rights and liberties of free and equal citizens in a constitutional democracy. According to Rawls' "welfare liberalism", rational citizens would give priority to maximum equal liberty as "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.<sup>20</sup> The latter "secondary principles of social justice" are rationally necessary for defining "the appropriate distribution of the benefits and burdens of social co-operation"<sup>21</sup> so as to secure a socially just distribution of welfare essential for moral and rational self-development of every person.

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<sup>17</sup> For overviews of the diverse theories of justice, with extensive references to the vast literature, see, in addition to Campbell and Kolm (above note 11), also B. Barry, *Theories of Justice* (1989); T. Morawetz (ed.), *Justice*, 1990; A. Tschentscher, *Prozedurale Theorien der Gerechtigkeit* (2000).

<sup>18</sup> Cf. E. U. Petersmann (note 3), 845-851.

<sup>19</sup> Rawls (note 1), at 85.

<sup>20</sup> Even though "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (Rawls, at 250), Rawls' concept of maximum equal liberty is narrower than Kant's moral categorical imperative (see below). Equal liberties must be protected before "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (Rawls, at 83). This "difference principle" is rationally chosen by individuals in order to limit social and economic inequalities (which inevitably result e.g. from the unequal distribution of human capacities) and provide a "social minimum" of resources for the least well-off group through what Rawls calls the "transfer branch" of government..

<sup>21</sup> Rawls (note 1), at 4.

- Utilitarian theories of justice justify individual liberty and equal opportunities for unfettered exchange between individuals not in terms of constitutional contracts, but as result-oriented mechanisms for attaining "welfare" in the sense of the greatest happiness of the greatest number. Yet, whether market-driven distributions of goods and income can maximize not only utility and efficiency, but also "justice" is disputed (e.g. by Hayek) because only human conduct but, arguably, not market-mechanisms (e.g. prices) can be "unjust".<sup>22</sup>
- Communitarian theories of justice regard all values as embedded in a particular social culture and put emphasis on "deliberative democracy" and other democratic procedures (rather than on individual freedom) for determining social and political community values, as illustrated by the socialist maxim "from each according to their ability, to each according to their needs".
- Meritorian theories of justice combine notions of equality, desert and "corrective justice" (e.g. punishment and compensation for injuries) in order to "give every man his due". Justice requires to treat individuals as rational agents responsible for their actions and therefore to reward or punish their conduct.

The modern universal recognition of human rights constitutionally limits the various theories of justice by recognizing common moral and legal core values (e.g. respect for human dignity, equal human worth, democratic self-government, access to courts) which - as legal entitlements of every human being independent from the benevolence of governments - go far beyond the moral principles and "global ethics" common to the various religions and moral philosophies around the world.<sup>23</sup> Justice is becoming a matter of universal and "inalienable" human rights, democratic governance and positive national and international constitutional law in order to empower and protect individual and democratic self-development across frontiers.<sup>24</sup> The legal definition of justice in terms of equal human rights is becoming ever more precise, and the legal justification of inequalities in the distribution of benefits and burdens is becoming ever more

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<sup>22</sup> Cf. F.A.Hayek, *The Mirage of Social Justice*, 1976. Also R.Nozick, *Anarchy, State and Utopia*, 1974, Part II, argues that a person's "holdings" are just if they are the result of legitimate actions in accordance with agreed rules of ownership, transfer and rectification of illegitimate transfers. The consequences of unequal, initial distribution of wealth and human capacities are ignored. For a criticism of the economists' proclivity to look at outcomes rather than at rules see G.Brennan/J.M.Buchanan, *The Reason of Rules. Constitutional Political Economy*, 1985; V.J.Vanberg, *The Constitution of Markets*, 2001.

<sup>23</sup> On the "global ethic" common to all world religions see e.g. H.Küng, *A Global Ethic for Global Politics and Economics*, 1998; H.Küng/H.Schmidt (eds.), *A Global Ethic and Global Responsibilities: Two Declarations*, 1998; *World Religions, Universal Peace, Global Ethic*, The Global Ethic Foundation 2002.

<sup>24</sup> On "justice as human rights" see Campbell (note 11), at 53-54. On fundamental rights as legal and judicial "trumps" see R.Dworkin, *Taking Rights Seriously*, 1977.



demanding. Even though democratic legislation defining, balancing and implementing human rights and constitutional rights may legitimately differ from country to country, there is an "inalienable core" of human rights that can no longer be lawfully taken away by governments. Rawlsian justice in the sense of "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation"<sup>25</sup> continues to differ legitimately from country to country. Beyond the "self-evident" rights of life, liberty and property recognized in constitutional democracies and also in the UDHR of 1948, the major unresolved problems of "international justice" relate to the *international* legal definition and constitutional and judicial protection of non-discriminatory conditions of competition and of fair equality of opportunities among individuals and peoples in economic markets no less than in "political markets" - i.e. the national and international constitution of markets across frontiers.

### III. JUSTICE AS EMPOWERMENT AND PROTECTION OF INDIVIDUALS THROUGH CONSTITUTIONAL RIGHTS: THREE BASIC PRINCIPLES

The diverse "principles of justice" and "methods of justification" offered by modern liberal (i.e. liberty-based) "theories of justice" tend to focus on three basic problems of "macro-justice" in societies (as distinguished from "micro-justice" in individual cases): (1) principles and rules for the just allocation of equal freedoms and other basic rights to individuals in order to protect "human dignity" and peaceful cooperation among free citizens; (2) principles and rules for the just distribution of scarce resources through private competition and governmental correction of "market failures"; (3) principles and rules for a just constitutional order protecting general citizen interests against "government failures".

#### 1. Maximum Equal Freedoms as First Principle of Justice

In accordance with Aristotle's *Nicomachean Ethics* according to which "justice is equality" based on formal principles (e.g. *idem cuique*) as well as substantive principles (e.g. *suum cuique*), human rights require justice to be legally constituted by the protection of equal basic rights: The liberal claim, in Article 1 of the French Declaration of the Rights of Man and the Citizen of 1789, that "All men are born and remain free and equal in their rights", has become universally recognized in numerous UN human rights instruments: "All human beings are born free and equal in dignity and rights" (Article 1 UDHR). If the modern, universal recognition of "inalienable" core human rights is recognized as a new "constitutional contract" fundamentally changing the traditionally state-centered

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<sup>25</sup> Rawls (note 1), at 7.

structures and contents of public international law, maximum equal freedoms as first principle of justice no longer depends on "contractarian" or "non-contractarian thought-experiments" (e.g. on "natural rights")<sup>26</sup> but has become a matter of positive national and international law.

The French Declaration defined liberty in terms of maximum equal freedom: "Liberty is the power to do anything which does not harm another; hence the only limits to the exercise of each man's natural rights are those which secure to other members of society the enjoyment of the same rights. These limits may be fixed only by statute law" (Article 4). This constitutional guarantee of equal individual freedom subject to democratic legislation is recognized in most constitutional democracies, and also in international human rights law, either in terms of individual rights to maximum equal freedom (e.g. Article 2:1 German Basic Law) or in terms of a constitutional requirement, often unwritten (e.g. in the constitutional law of the US and some other Anglo-Saxon countries), of a legislative basis for restrictions of freedom and other human rights (e.g. Article 29 UDHR).<sup>27</sup> Respect for maximum equal "liberties to be" is of existential importance for personal self-development in dignity and, as explained in *Immanuel Kant's* moral theory of the "categorical imperative"<sup>28</sup> as well as in *John Rawls'* theory of justice<sup>29</sup>, constitutes the first principle of justice. "Liberties to be" must be distinguished from *instrumental freedoms* (e.g. "liberties to have", produce, acquire, sell or consume) which may have a price rather than "dignity"

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<sup>26</sup> The two "original positions" used by J.Rawls for modeling negotiations on a national constitutional contract among parties representing citizens (Rawls, note 1, chapter III) and negotiations on an international constitutional contract among parties representing "liberal" or "decent peoples" (Rawls, note 16, chapter 3) are contractarian theories which, similar to non-contractarian theories e.g. on "natural rights", emphasize the need for higher-level "constitutional rules" limiting post-constitutional "lower-level law" without basing their theories on positive national and international law, as it is done in this contribution.

<sup>27</sup> Cf. e.g. F.L.Morrison/R.E.Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws of the US*, in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law*. 1993, at 92; C.B.Macpherson, *The Life and Times of Liberal Democracy*, 1977, at 7.

<sup>28</sup> On Kant's moral "categorical imperatives" for acting in accordance with universal laws ("Act only in accordance with that maxim through which you can at the same time will that it become a universal law"), for respecting human dignity by treating humanity as an end in itself ("So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means"), and for respecting individual autonomy ("the idea of the will of every rational being as a will giving universal law") and individual right ("Any action is right if it can coexist with everyone's freedom according to a universal law"), and on Kant's theory of the antagonistic human nature promoting market competition and national and international constitutional guarantees of equal freedoms, see e.g. A.W.Wood, *Kant's Ethical Thought*, 1999. Kantian legal theory gives priority to a legal duty of states to ensure conditions of maximum law-governed freedom over moral "duties of benevolence" to provide for the needs of the citizens (cf. A.D.Rosen, *Kant's Theory of Justice*, 1993, at 217; P.Guyer, *Kant on Freedom, Law and Happiness*, 2000, at 264 *et seq.*).

<sup>29</sup> See e.g. J.Rawls (note 1), chapter II.

(in Kant's terms). Yet, also economic liberties (such as free choice of one's profession) and property rights have an "inalienable" core in view of their existential necessity for personal self-development. As respect for human dignity requires to treat human beings as ends in themselves and as legal subjects rather than mere objects of government policies (or as means to securing benefits to some other person), individuals should be recognized as legal subjects in all fields of international law, just as they are recognized as citizens and holders of individual rights in all fields of EU law and of constitutional democracies.<sup>30</sup> Hence, whereas some Anglo-American constitutional theories (e.g. by J.Locke, R.Nozick) on inalienable human rights to life, liberty and property tend to conceptualize individual liberty narrowly (e.g. in terms of basic personal freedoms of bodily movement and democratic liberties)<sup>31</sup>, EC law rightly recognizes individual producers, investors, traders, consumers and other "EU citizens" as legal subjects of European integration law inside the EC.

Maximum equal freedoms are, thus, no longer only a matter of moral judgment and of rational constitutional choice but are positively recognized in national constitutions of EU member states as well as in European constitutional law. For instance, in Article 1 of the German Basic Law of 1949, "(t)he German people ... acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" (para.2). The "basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law" (para.3). Maximum equal freedoms are recognized as individual rights and objective constitutional principle in Article 2: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law" (para.1). According to the EU Treaty (Article 6) and the Charter of Fundamental Rights of the EU, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity" (Preamble of the EU Charter) which serve as legal basis for specific dignity rights (chapter I), liberty rights (chapter II), equality rights (chapter III), solidarity rights (chapter IV), citizen rights (chapter V) and access to justice guarantees (chapter VI of the EU Charter of Fundamental Rights).

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<sup>30</sup> According to the German Constitutional Court (Bundesverfassungsgericht Entscheidungssammlung Vol. 27, 1 at 6), the "maxim 'man must always be an end in itself' applies without limitation for all areas of law; for the dignity of a human being as a person, which cannot be lost, exists precisely in the fact that he continues to be recognized as an autonomous personality." Cf. D.Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, in: 3 *Global Jurist Frontiers* 1-103 (2003).

<sup>31</sup> Cf. e.g. Campbell (note 11), at 56-59.

## 2. Social Solidarity Rights as Secondary Principle of Justice

Wherever existential liberty rights are protected, markets and competition emerge spontaneously in response to consumer demand for scarce goods and services. Based on “the principle of an open market with free competition” (cf. Articles 4,98,105,157 EC) and “freedom to conduct a business in accordance with Community law and national laws” (Article 16 of the EU Charter), national and European constitutional law in the EU protect free movement of goods, services, persons, capital, related payments and non-discrimination as individual fundamental rights and corresponding government obligations so as to guarantee an “internal market ... without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Article 14). Just as “human dignity” is indivisible, the “indivisibility” of all human rights is recognized in EU law as well as in international law.<sup>32</sup> The market freedoms guaranteed by the EC Treaty constitution can be understood as specific manifestations of “freedoms of trade”<sup>33</sup> deriving ultimately from an indivisible, basic “right to liberty” (Article 6 of the EU Charter of Fundamental Rights).<sup>34</sup> The progressive extension of international legal and judicial guarantees for mutually beneficial economic cooperation among citizens across frontiers is the central objective of WTO law and of the already more than 250 free trade area, customs union and other economic integration agreements concluded by WTO Members.

In constitutional democracies and also in EC law, the “process freedoms”<sup>35</sup> are supplemented by numerous rules and government interventions aimed at correcting “market failures” and supplying “public goods”, such as “a system

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<sup>32</sup> E.g. in the Preamble of the EU Charter of Fundamental Rights (above note 2) and in numerous universally approved UN resolutions like the 1993 Vienna Declaration of the World Conference on Human Rights (cf. paragraph 5: “All human rights are universal, indivisible, and interdependent and interrelated”). Cf. E.U.Petersmann, On 'Indivisibility' of Human Rights, in: *European Journal of International Law* 2003, 381-385.

<sup>33</sup> See e.g. Case 240/83, *ADBU*, ECR 1985 531, para.9: “the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.” Especially the freedom of movements of workers and other persons, access to employment and the right of establishment have been described by the EC Court as “fundamental freedoms” (Case C-55/94, *Gebhard*, ECR 1995, I 4165, para.37) or “a fundamental right which the Treaty confers individually on each worker in the Community” (Case 22/86, *Heylens*, ECR 1987, 4097, para.14). The ECJ rightly avoids “human rights language” for the constitutional “market freedoms”, the right to property and the freedom to pursue a trade or business in EC law.

<sup>34</sup> See e.g. the individual right to general freedom of action and free development of a person’s personality in Article 2:1 of the German Basic Law which has been recognized by the courts to protect also individual rights e.g. to import and export goods and services subject to democratic legislation. On the legal and procedural advantages and problems of such a broad constitutional guarantee of general individual freedom see e.g. Robert Alexy, *Theorie der Grundrechte* (1994), Chapter 7.

<sup>35</sup> Cf. S.C.Kolm (note 11), at 13.

ensuring that competition in the internal market is not distorted” (Articles 3g, 81 *et seq.* EC), “environmental protection ... with a view to promoting sustainable development” (Articles 6, 174 *et seq.*), “fundamental social rights” (Articles 136 *et seq.*), health and consumer protection (Articles 152 *et seq.*). As market-based distributions may not enable every individual to live a life in dignity, European constitutional law recognizes, at national and EU levels, a variety of solidarity obligations to promote satisfaction of basic needs.<sup>36</sup> The EC’s wasteful and discriminatory agricultural policy illustrates, however, that the EC’s redistributive policies do not focus on the “maximin principle” of “maximizing the minimum” of the most deprived people, which various theories of justice postulate as secondary “principle of justice”<sup>37</sup>.

While the core of *existential equal liberties* is recognized as “inalienable”, *instrumental market freedoms* are much more subject to legal regulation balancing diverse human rights and private and public interests.<sup>38</sup> Where respect for and protection of “human dignity” are recognized as constitutional obligations of governments (as e.g. in Article 1 of the German Basic Law and in Article 1 of the EU Charter of Fundamental Rights), respect for the core of economic liberty rights (e.g. free choice of profession), and protection of social human rights to satisfaction of the basic needs (“distributive justice”), can be interpreted as legal consequences of an “indivisible” obligation to protect individual self-development in dignity.<sup>39</sup> The social solidarity rights necessary for enabling personal self-development of every individual in dignity may legitimately differ from country to country depending on the available resources and the democratic preferences of the local, national or international communities concerned.

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<sup>36</sup> Cf. e.g. Articles 27-36 of the EU Charter of Fundamental Rights (above note 2).

<sup>37</sup> See e.g. J.Rawls (note 1), chapter II.

<sup>38</sup> Cf. E.U.Petersmann, Human Rights and Liberalisation of Markets: The Social Responsibility of International Organisations to Make Competition and Social Rights Mutually Consistent, in: *The State and New Social Responsibilities in a Globalising World*, Council of Europe 2003, 61-76.

<sup>39</sup> Cf. *The Principle of Respect for Human Dignity*, Council of Europe 1999. Whereas most courts have avoided legal definitions of the concept of “human dignity” (such as whether “human dignity” should be understood as an “intrinsic value” inherent to personhood or as an “extrinsic value” dependent on merit or achievement), the German Federal Constitutional Court has determined human dignity not only in negative terms (i.e. by deciding case-by-case on infringements) but also by adopting the “object formula”: “it contradicts human dignity to turn man into an object within the state” (Bundes- verfassungsgericht Entscheidungssammlung Vol. 27, 1 at 6). On the judicial protection of maximum equal freedoms also in terms of economic liberty rights by the German Constitutional Court see e.g. C.Starck, *Constitutional Definition and Protection of Rights and Freedoms*, in: C.Starck (ed), *Rights, Institutions and Impact of International Law according to the German Basic Law* (1987), 20-46.

### 3. Constitutional Rights to Democratic Governance and Constitutional Order as Third Principle of Justice

National and international human rights law recognizes (e.g. in Article 29 UDHR) the need for democratic legislation and constitutional rules protecting, implementing and balancing human rights (e.g. on the basis of constitutional principles of non-discrimination, necessity, proportionality, due process of law, individual access to courts and democratic governance).<sup>40</sup> The democratic balancing processes, implementing legislation and institutions may legitimately differ from country to country depending on the preferences of their citizens and of their democratic institutions. They must be guided, however, by human rights - not only in their function as *individual rights* (e.g. of a "negative", "positive", procedural or participatory nature) and corresponding obligations of national governments and intergovernmental organizations to respect and protect human rights, but also as *objective principles* of constitutional order to be respected by public and private actors in all areas of the polity and of the economy.<sup>41</sup> As emphasized by the European Court of Human Rights, human rights treaties have become part of an objective "constitutional order" based no longer exclusively on states, but also on individuals as legal subjects.<sup>42</sup>

Human rights, and the reciprocal obligations of governments, do not end at national borders. UN human rights law recognizes that "everyone is entitled to a social and international order in which the rights and freedoms ... can be fully realized".<sup>43</sup> Enjoyment of human rights depends on production and distribution of scarce goods and services whose availability, quality and accessibility can be increased through international trade. As the division of labor necessary for satisfying consumer demand requires constitutional rules limiting "market failures" and enabling the collective supply of "public goods" (such as "democratic peace"), UN human rights instruments also rightly emphasize that "democracy, development and respect for human rights and fundamental

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<sup>40</sup> On the emerging "human right to democratic governance" see e.g. T.M. Franck, The Emerging Right to Democratic Governance, in: American Journal of International Law (AJIL) 46-91 (1992); G.H.Fox/B.R.Roth (eds), Democratic Governance and International Law, 2000; E. Stein, International Integration and Democracy: No Love at First Sight, 489-532 (2001). On empirical evidence that democracies very seldom fight each other, and on the reasons why constitutional democracy and accountability tend to limit abuses of foreign and military policies, see e.g.: P.K.Huth/T.L.Alee, The Democratic Peace and Territorial Conflict in the 20<sup>th</sup> Century, 2002.

<sup>41</sup> On these various "individual" and "objective" functions of human rights see e.g. Starck (note 39) and Alexy (note 34).

<sup>42</sup> Cf. European Court of Human Rights, judgment on *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, para.75.

<sup>43</sup> Article 28 of the UDHR. See also U.N. General Assembly Declaration 41/128 of December 4, 1986 on the "Right to Development".

freedoms are interdependent and mutually reinforcing.”<sup>44</sup> The widespread poverty and human rights violations outside the 30 market-based democracies cooperating in the Organization for Economic Cooperation and Development (OECD) demonstrate, however, that these human rights objectives and constitutional democracy are not effectively realized in many UN member states. In contrast to the "human rights conditionality" of EU membership (as illustrated by Articles 6,7 and 49 of the EU Treaty), the human rights obligations of all UN member states are not effectively protected and enforced in many states.

#### IV. THE EC AND WTO AGREEMENTS AS "INTERNATIONAL ECONOMIC CONSTITUTIONS"

Chapters I to III concluded that in modern international law, as inside constitutional democracies and in EU law, justice as a legal concept must be defined and legally protected by constitutional guarantees of human rights and citizen rights. As human rights protect individual and democratic diversity, effective protection of human rights gives inevitably rise to market-based information-mechanisms and coordination-mechanisms whose proper functioning requires national and international constitutional constraints of “market failures” as well as of “government failures” in economic markets no less than in “political markets”.

##### 1. The EC Treaty as a Regional 'Economic Constitution'

According to Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789, „a society where rule of law and human rights are not secured, or the separation of powers is not established, has no constitution at all.“ The EC Court of Justice (ECJ) emphasizes that the EC is "a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".<sup>45</sup> The EC Treaty's legal and judicial guarantees of freedom, non-discrimination, consumer-driven competition, democratic governance and judicial protection of individual rights in the internal market assert legal primacy, direct effect and “direct applicability“ for the benefit of EC citizens, and have set up a comprehensive constitutional system of horizontal and vertical, legal and institutional checks and balances aimed at protecting equal individual rights. The EC and EU Treaties thus serve as

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<sup>44</sup> Vienna Declaration (note 32 above), paragraph 8. These interrelationships are explained in: E.U.Petersmann, Constitutional Economics, Human Rights and the Future of the WTO, in: Swiss Review of International Economic Relations (Aussenwirtschaft) 58 (2003), 49-91.

<sup>45</sup>Case 294/83, *Les Verts*, ECR 1986, 1339, consideration 23.

- an “economic constitution” for “an open market with free competition” (Article 4) as well as
- a “political constitution” guaranteeing human rights, democratic governance and an "area of freedom, security and justice" in the EU (cf. Articles 2,6,7,49 EU Treaty).

The EU Charter of Fundamental Rights of December 2000, and its incorporation into the draft constitutional treaty for the EU of July 2003, confirm the ECJ’s often-repeated statement that “fundamental rights form an integral part of the general principles of law ...; for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.”<sup>46</sup> EU law also illustrates that the lack of a *demos* at the international level is no reason for limiting democratic participation by individuals and by non-governmental organizations in inter-governmental decision-making processes that affect individual rights and social welfare.

## 2. The WTO Agreement as a Worldwide 'Economic Constitution'

The ever increasing number of international treaties constituting worldwide organizations, the legal primacy of their respective “constitutional charters” over “secondary law” and – in case of the UN Charter – also over other conflicting treaty rules (cf. Article 103 UN Charter), and the separation and mutual “checks and balances” among the legislative, executive and judicial organs of international organizations – sometimes with compulsory international jurisdiction (e.g. in the WTO and the Law of the Sea Convention) - have promoted the emergence of “international constitutional law” also on the worldwide level.<sup>47</sup> This progressive “constitutionalization” is not limited to international treaty law but – as illustrated by the universal recognition of *ius cogens*<sup>48</sup>, of *erga omnes* obligations<sup>49</sup> and of an “inalienable core” of human rights – extends also to general international law.

The law of some worldwide and regional organizations - such as the UN Charter and the constitutions of the International Labor Organizations (= ILO), the World

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<sup>46</sup> Cf. G. de Burca, Fundamental Rights and Citizenship, in: B. de Witte (ed.), Ten Reflections on the Draft Constitutional Treaty for the EU (2003), 11-44.

<sup>47</sup> Cf. e.g. C.Walter, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, in: 44 German Yearbook of International Law (2001), 171-201; E.U.Petersmann, Constitutionalism, International Law and “We the Peoples of the United Nations”, in: H.J.Cremer *et alii*, Tradition und Weltoffenheit des Rechts, Festschrift für Steinberger (2001), 291-320.

<sup>48</sup> Cf. e.g. Article 53 of the Vienna Convention on the Law of Treaties.

<sup>49</sup> Cf. International Court of Justice Rep. 1970, 3,32 (Barcelona Traction case).



Health Organization (= WHO) and the UN Education, Scientific and Cultural Organization (= UNESCO) explicitly refer to human rights. Yet, the general international law requirement to construe international treaties in conformity with general international law rules applicable among the parties concerned<sup>50</sup> requires to construe also the law of other international organizations in conformity with the human rights obligations of their member states. Conventional and general international law thereby interact dynamically, especially on the level of human rights and constitutional rules. For instance, the Declaration on Fundamental Principles and Rights at Work adopted by all ILO members in June 1998, recognizes “that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.”<sup>51</sup>

The 1994 Agreement establishing the WTO includes all 4 categories of constitutional elements in modern international law: (1) It constitutes international organs with legislative, executive and judicial powers which interact in an interdependent legal framework of “checks and balances”; (2) in the event of a conflict between the WTO Agreement and any of the numerous multilateral trade agreements annexed to it, “the provisions of this Agreement shall prevail to the extent of the conflict” (Article XVI:4); (3) the substantive WTO guarantees of freedom of trade, non-discriminatory conditions of competition, rule of law and access to courts serve “constitutional functions” for protecting freedom, non-discrimination, rule of law and access to courts not only in intergovernmental relations among states, but also in “cosmopolitan relations” among competing producers, investors, traders, consumers and their respective governments at home and abroad;<sup>52</sup> and (4) the compulsory jurisdiction of WTO dispute

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<sup>50</sup> Cf. Article 31 of the Vienna Convention on the Law of Treaties which, according to the WTO Appellate Body, reflects customary rules of international treaty interpretation.

<sup>51</sup> Cf. the text reproduced in: Human Rights in International Law, Council of Europe (2000), 71-75.

<sup>52</sup> As goods and services are produced and consumed by individuals, WTO dispute settlement panels have emphasized that “one of the primary objects of the GATT/WTO ... is to produce certain market conditions which would allow ... individual activity to flourish” by protecting the international division of labor against discriminatory trade restrictions and other distortions, cf.: United States – Sections 301-310 of the Trade Act of 1974, Panel report adopted on 27 January 2000, WT/DS152/R, paras. 7.73 *et seq.*

settlement bodies has given rise to hundreds of WTO dispute settlement proceedings and WTO jurisprudence clarifying and further developing WTO rules, thereby progressively extending legal security and rule of law across frontiers. Like e.g. the German Constitutional Court<sup>53</sup>, the ECJ and the European Court of Human Rights<sup>54</sup>, WTO dispute settlement bodies increasingly apply also general international law principles (e.g. of good faith, proportionality, due process of law) that are not specifically mentioned in WTO law. Human rights, however, are neither referred to in the “WTO Constitution” nor, so far, in the legal findings of WTO dispute settlement bodies.<sup>55</sup>

## V. THE HUMAN-RIGHTS APPROACH TO WTO LAW ADVOCATED BY THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS

Neither the UN Charter nor the law of UN specialized Agencies guarantee a stable legal framework for a welfare-increasing, international division of labor based on rule of law and compulsory international jurisdiction for the peaceful settlement of disputes. For more than half a century, UN law has manifestly failed to realize, in the majority of its 191 UN member states, its declared objectives of “universal respect for, and observance of, human rights and fundamental freedoms for all” and “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations” (Article 55 UN Charter). Recent UN resolutions recognize the interrelationships between human rights, consumer-driven competition and citizen-driven democracies.<sup>56</sup> The numerous non-democratic UN member governments have, however, so far prevented the UN and UN Specialized Agencies from following the approach of regional organizations in Europe and North America to explicitly condition market integration on respect for human rights and constitutional democracy. Some UN bodies (like the IMF and the World Bank) have committed themselves to principles of “good governance”, yet without linking such *benevolent government approaches* to respect for human rights, consumer-driven competition, democratic governance and constitutional restraints. Government discretion to define the “public interest” in a manner discriminating among

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<sup>53</sup> See e.g. the recent decision of the Federal Constitutional Court in a complaint by a German citizen against the European Patent Office in Munich (cf. *Neue Juristische Wochenschrift* 2001, 2705-2706) in which the Court emphasized its task to ensure respect for human rights and fundamental freedoms “in Germany”, but dismissed the constitutional complaint on the ground that the international legal order of the European Patent Organization offered standards of legal and judicial review that were sufficiently equivalent to those in German law.

<sup>54</sup> For references to the relevant case-law see Walter (note 47) and Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations*, in: Jean Monnet Working Paper 7/2001 Harvard Law School, at 24-25.

<sup>55</sup> Cf. E.U. Petersmann, *Human Rights and the Law of the WTO*, in: *Journal of World Trade* 2003, 242-281.

<sup>56</sup> See e.g. the Vienna Declaration above note 30.

domestic citizens and reducing consumer-welfare prevails in most UN member states: *foreign policy discretion* to apply discriminatory and welfare-reducing border restrictions; *parliamentary discretion* to redistribute income among domestic citizens through discriminatory regulation of the domestic economy in favor of powerful producer interests; and *judicial discretion* to interpret and apply domestic law without regard to the international legal obligations of states or the EC.

UN human rights bodies often include non-democratic governments and neglect the functional interrelationships between human rights, consumer-welfare and democracy.<sup>57</sup> For example, a 2001 report for the UN Commission on Human Rights discredited the WTO as “a veritable nightmare” for developing countries and women<sup>58</sup> without regard to the numerous “public interest provisions” in WTO law that enable WTO Members to fulfill their human rights obligations in conformity with WTO law. In response to the widespread criticism of the anti-market bias of such “nightmare reports”, the UN High Commissioner for Human Rights has recently published three more differentiated reports analyzing human rights dimensions of the WTO Agreements on Trade-Related Intellectual Property Rights (TRIPS)<sup>59</sup>, the Agreement on Agriculture (AOA)<sup>60</sup> and the General Agreement on Trade in Services (GATS)<sup>61</sup>. The reports call for a “human rights approach to trade” which

- "(i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
- (ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (iii) emphasizes the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
- (iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;

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<sup>57</sup> Cf. Petersmann (above note 54). In 2002, the UN Commission on Human Rights was presided by Libya, a country known for its disregard of human rights.

<sup>58</sup> Preliminary report on “Globalization and its impact on the full enjoyment of human rights”, ECOSOC document E/CN.4/Sub.2/2000/12 of 15 June 2000, at paragraph 15. Apart from a reference to patents and their possibly adverse effects on pharmaceutical prices (depending on the competition, patent and social laws of the countries concerned), the report nowhere identifies conflicts between WTO rules and human rights.

<sup>59</sup> The Impact of the Agreement on Trade-Related Aspects of Intellectual Property rights on Human Rights, E/CN.4/Sub.2/2001/13 (27 June 2001).

<sup>60</sup> Globalization and its Impact on the Full Enjoyment of Human Rights, E/CN.4/2002/54 (15 January 2002).

<sup>61</sup> Liberalization of Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9 (18 June 2002).

- (v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
- (vi) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization."<sup>62</sup>

The High Commissioner emphasizes the human rights obligations of all WTO Members deriving, *inter alia*, from the ratification, by every WTO member state, of one or more of the six major worldwide UN human rights conventions.<sup>63</sup> The reports differentiate between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfill human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As enjoyment of human rights (e.g. to food, health, education and development) depends on availability, accessibility, acceptability and quality of traded goods and services, the relevance of WTO rules on market access, on limitations of "market failures" (e.g. in case of essential services, anti-competitive price-increases or out-put restrictions) as well as of "government failures" for the protection and fulfillment of human rights is acknowledged and discussed. The reports rightly underline that, what are referred to - in numerous WTO provisions - as *rights* of WTO Members to regulate, may in fact be *duties* to regulate under human rights law (e.g. so as to protect and fulfill human rights of access to water, medicines, health and educational services at affordable prices). The UN High Commissioner suggests to recognize promotion of human rights as an objective of the WTO so as to ensure that trade rules and policies advance the protection and promotion of human rights.

## VI. NEED FOR CLARIFYING THE HUMAN RIGHTS OBLIGATIONS OF INTERNATIONAL ORGANIZATIONS

In Europe, human rights have become recognized as "constitutional restraints" on government powers not only at the national level but also at the level of international organizations which exercise government powers collectively through intergovernmental, parliamentary or judicial organs. Long before human rights were explicitly incorporated into the primary law (e.g. Article 6 EU) and secondary law of the EU, the EC Court of Justice had construed the common human rights guarantees of EC member states as constituting general constitutional principles limiting the regulatory powers also of the EC.<sup>64</sup> The

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<sup>62</sup> Document E/CN.4/Sub.2/2002/9, p.2.

<sup>63</sup> See above not 12.

<sup>64</sup> In *Internationale Handelsgesellschaft* (Case 11/70, ECR 1970, 1125,1134), the ECJ held that respect for human rights forms an integral part of the general principles of Community law: "the protection of such rights, whilst inspired by the constitutional traditions common to the

European Court of Human Rights has likewise held: “Where States establish international organizations, or mutatis mutandis international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the (European Convention on Human Rights) if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”<sup>65</sup>

The UN Charter includes explicit human rights obligations for UN member states (e.g. in Articles 55,56) which, in case of conflict, assert legal primacy over other international treaties (cf. Article 103). The UN institutions (e.g. the ICJ) have, however, failed so far to specify the exact scope of the expanding human rights obligations of all UN member states and UN organs under the UN Charter. The law of many UN specialized agencies (such as the IMF and the World Bank) and of other worldwide organizations (such as the WTO) does not mention human rights. Yet, all their member states have accepted human rights obligations under international treaty law as well as under general international law. All UN Members have also recognized, for instance in various UN resolutions like the UDHR of 1948, that "(e)veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28 UDHR). Hence, the UN resolutions on the "right to development" define development in terms of fulfillment of basic needs and human rights.<sup>66</sup> If, as universally recognized in Principle 1 of the "Rio Declaration" of the UN Conference on Environment and Development of 1992, "(m)an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", such rights and "sustainable development" must be respected and promoted not only by national governments but also by intergovernmental organizations.

Even though 191 states have ratified the UN Convention on the Rights of the Child (1989), only 137 have accepted the UN Covenant on Economic, Social and

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Member States, must be ensured within the framework of the structure and objectives of the Community" (paras.3-4).

<sup>65</sup> European Court of Human Rights, Application No.43844/98, *T.I. vs. United Kingdom*, Admissibility Decision of 7 March 2000, , 4 *European Human Rights Law Review* (2000) 429-430. In *Matthews v. UK*, the European Court of Human Rights found the United Kingdom in violation of the human right to participate in free elections of the legislature even though the law which denied voting rights in Gibraltar implemented a treaty concluded among EC member states on the election of the European Parliament: “there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to ‘secure’ the rights (under the ECHR) in respect of European legislation in the same way as those rights are required to be ‘secured’ in respect of purely domestic legislation”. Cf. European Court of Human Rights, judgment of 18 February 1999 on complaint No. 24833/94, see: *Europäische Grundrechtszeitschrift (EUGRZ)* 1999, 200.

<sup>66</sup> See e.g. UN General Assembly Declaration 41/128 of 4 December 1986 on the ‘Right to Development’.

Cultural Human Rights (ICESCR, 1966). The UN Convention on the Human Rights of Migrant Workers and their Families has been ratified so far by only 20 UN member states. Following the example of the 1998 ILO Declaration on Fundamental Principles and Rights at Work which clarified the constitutional obligations of all ILO member states to respect certain ILO core labor standards regardless of their ratification of the respective ILO conventions concerned, the UN and the ICJ should likewise clarify the extent to which UN member states and international organizations are obliged today, under the UN Charter and under general international law, to respect and protect civil, political, economic and social human rights (e.g. those recognized in the UDHR) even if they have not ratified the relevant UN human rights conventions concerned.

## VII. NEED FOR CLARIFYING THE RECIPROCAL RELATIONSHIPS BETWEEN MARKETS, CONSTITUTIONAL RIGHTS AND INTEGRATION LAW

Economic and political markets emerge wherever personal autonomy and diversity (e.g. of individual capacities and preferences) of investors, producers, traders, consumers and other citizens are respected. Effective protection of liberty rights, property rights, and other human rights protects also the “market forces” of individual demand and supply of scarce goods, services and job opportunities necessary for the enjoyment of human rights, and gives inevitably rise to spontaneous emergence of “equilibrium prices” coordinating demand and supply. Like families and other social institutions, markets - in their diverse functions (e.g. as information mechanism, social dialogue about values, competition among suppliers and consumers) - are inevitable complements of human rights. Their efficiency depends on the proper assignment of property rights (e.g. protecting the freedom to have and use resources exclusively), transaction rights (e.g. to acquire, sell, buy and transfer property titles in scarce resources), liberty rights (e.g. freedom of opinion, freedom of choice) and other framework rules for the individual and collective supply and consumption of private and public goods, and for the legal protection and enforcement of individual rights. The diversity of national democracies and of regional integration agreements confirms that the empowerment and protection of citizens through the legal constitution of mutually beneficial markets may differ from country to country in response to the particular value preferences and constitutional traditions of their citizens. Yet, there are common core values and functional inter-relationships between markets, basic individual rights and international integration law, which it is important to clarify and better understand.

## 1. "Normative Individualism" as Value Premise of Human Rights and Market Integration Law

Since the beginnings of written history, marketplaces have been described as cultural centers not only for the exchange of economic goods but also of social services and political ideas (e.g. the *agora* in classical Athens during the 5<sup>th</sup> century BC). Limited knowledge, scarcity of resources and the natural tendency of pursuing one's self-interest through social cooperation and division of labor prompt most individuals to specialize in the production of scarce goods and services and to exchange the fruits of their labor for other goods and services necessary for survival and personal self-development. Consumer demand, market prices and competition inform and induce investors, producers and traders to use production factors and allocate resources in a manner enabling mutually profitable exchanges and supply of demand. Also the modern globalization of markets through international movements of goods, services, persons and investments has enabled trading countries to increase their national economic welfare, to reduce absolute poverty inside countries, and to satisfy diversity of individual supply and demand for economic as well as non-economic goods and services.<sup>67</sup>

Like markets, the idea and legal recognition of "basic individual rights", "fundamental rights" and "human rights" goes back to the beginnings of written history. Precursors include the rights to asylum granted by Greek city-states; Roman citizenship rights; rights of the nobility and freedom of trade in the Middle Ages (protected e.g. in the Magna Carta of 1215); religious freedom guaranteed in the constitutional charter adopted by the Dutch provincial assembly at Dordrecht in 1572; the English *Habeas Corpus Act* of 1679 and *Bill of Rights* of 1689; the French Declaration of the Rights of Man and the Citizen of 1789; and the *Bill of Rights* appended to the US Constitution in 1791. The particular focus of liberty rights (e.g. freedom of religion, freedom of association, freedom to demonstrate, freedom of trade) was often shaped by historical events (such as the schism of the Christian church from the 16<sup>th</sup> century onwards) and by political struggles against the rulers. Liberation of citizens from discriminatory, welfare-reducing border barriers and *transnational* protection of freedom, non-discrimination, rule of law, democratic governance, social justice and mutually beneficial cooperation across frontiers are the human rights challenges of the 21<sup>st</sup> century.

The common core of markets and of human rights rests on "normative individualism", i.e. respect for personal autonomy, individual diversity and for

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<sup>67</sup> See: Globalization, Growth and Poverty: Building an Inclusive World Economy, World Bank 2001.

the dependence of values on individual preferences and consent.<sup>68</sup> The Kantian moral “categorical imperative”<sup>69</sup> of maximizing equal liberties across frontiers justifies both the human rights objective of empowering and protecting individuals through equal constitutional rights as well as the economic objective of promoting freedom of choice and satisfaction of consumer demand through voluntary exchanges and open markets. Human rights, consumer-driven economic markets and citizen-driven political markets are all designed to protect and promote “individual sovereignty” (e.g. “consumer sovereignty”, “citizen sovereignty”) based on voluntary cooperation in economic and political markets reflecting social dialogues about values. According to Kant’s legal philosophy, the antagonistic nature of diverse individual interests, and of the legal protection of equal basic rights, are likely to promote welfare-increasing cooperation and competition not only in economic markets but also in the progressive “constitutionalization” of national and international political relations among citizens and states.<sup>70</sup>

## 2. Non-Discriminatory Competition and Multi-level Constitutionalism as Common Core Values of Human Rights and Market Integration Law

Human rights proceed from the premise that human dignity entitles every human being to equal freedoms and human rights which need to be legally protected through non-discriminatory democratic legislation. Human rights include individual and democratic rights to differ from, and to compete with other people; their legal protection gives inevitably rise to competition among individuals as well as among democracies with different constitutional preferences and traditions. The resulting conflicts of interests – for instance, between utility-maximising producers and consumers in economic markets, and among citizens and self-interested politicians in political markets – create governance problems (such as non-discriminatory competition) which require constitutional restraints on abuses of power. The welfare-increasing effects of economic and political competition (e.g. as spontaneous information mechanism, “voice” and “exit options” vis-à-vis abuses of power) depend on protection of human rights and of non-discriminatory conditions of competition through an “economic constitution” no less than through a “political constitution.” The universal recognition of human rights has contributed to the universal adoption of national constitutions in almost all states of the world and, increasingly, also to the recognition of international competition rules (e.g. in EC, NAFTA and WTO law) and

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<sup>68</sup> On individuals as sources of values also in economics see e.g. Brennan/Buchanan (note 22), at 21-25; J.B.Davis, *The Theory of the Individual in Economics*, 2003.

<sup>69</sup> See above note 28.

<sup>70</sup> On the Kantian theory of national and international constitutionalism see: E.U.Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?* In: *Michigan Journal of International Law* 20 (1998), 1-30, notably at 11.



international constitutional rules (e.g. in UN human rights law, EU law) aimed at protecting non-discriminatory conditions of international trade, competition and a cosmopolitan, international "civil society" (e.g. based on human rights and non-discriminatory EU citizen rights<sup>71</sup>).

The increasing integration of national *markets* is based on regional and worldwide integration law (notably WTO law) limiting discriminatory national border restrictions and protecting non-discriminatory economic competition across frontiers. Domestic political pressures for protection of human rights, of constitutional democracy and open markets lead to the increasing "constitutionalization" of traditionally state-centered international relations, notably in European integration law and in the jurisprudence of international courts (such as the European Court of Justice, the European Court of Human Rights, WTO dispute settlement panels and the WTO Appellate Body) which promote an increasing "internationalization" of formerly domestic constitutional law concepts (like non-discrimination, necessity and proportionality of government restrictions on transnational trade). One of the most important lessons of the EC Treaty guarantees of free movement of goods, services, persons and capital and non-discriminatory competition was that international guarantees of freedom, non-discrimination and other human rights, and their judicial protection by international courts (like the EC Court and the European Court of Human Rights), can extend the protection of fundamental freedoms across frontiers and introduce *reciprocally agreed* constitutional reforms "top down" (like freedom of trade inside the EC) that are often politically impossible to realize through *unilateral* national reforms and struggles for individual rights "bottom up". By empowering and legally protecting individual citizens and economic actors against abuses of government powers, international economic law – like international human rights law – can serve "constitutional functions" for overcoming "constitutional failures" of national legal systems which, for centuries, discriminate against foreigners and against foreign goods, services and capital movements in a way reducing economic welfare and individual freedom at home and abroad.<sup>72</sup>

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<sup>71</sup> Cf. e.g. M. La Torre (ed.); *European Citizenship*, 1998. Such international "citizen rights" and "multi-level constitutionalism", with legal primacy over national law, go far beyond Kant's proposals for "cosmopolitan rights to hospitality" and an international confederation among republican states to defend "democratic peace".

<sup>72</sup> This was the central thesis of E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, 1991.

### 3. Individual Rights as Policy Instruments for Constituting Markets and Promoting Investments, Competition and Social Welfare

Between 1990 and 2001, 54 UN member countries suffered negative economic growth.<sup>73</sup> Most of these countries (e.g. in sub-Saharan Africa) had governments which did not protect human rights, rules-based market competition and democratic governance effectively.<sup>74</sup> The modern economic insight - that human rights make individuals not only better “democratic citizens” but also “better economic actors”<sup>75</sup> - is important not only for empowering and protecting mutually beneficial economic cooperation among individuals at national levels. Respect for human rights, rule of law and constitutional safeguards (such as parliamentary and judicial control) offer also legal and constitutional remedies against abuses of the limited powers delegated to international organizations, in which human rights are often less effectively protected than inside constitutional democracies. In the European Union, the progressive evolution from a sectoral “coal and steel community” toward a customs union, common market, monetary union and political union with a “common foreign and security policy” was democratically acceptable for national parliaments, citizens and national constitutional courts (e.g. in Germany) only because of the simultaneous transformation of the EC Treaty into a “treaty constitution” committed to the protection of human rights, democratic peace, “citizenship of the Union”, social justice and judicial review of the rule of law inside the EC.<sup>76</sup>

Legal doctrine has long neglected that human rights constitute not only moral and legal rights (e.g. of a defensive, procedural, participatory or redistributive nature), corresponding obligations of governments at national and international levels, and objective principles of justice necessary for protecting “democratic peace” and for limiting abuses of power also by non-state actors (e.g. freedom of association in labor markets).<sup>77</sup> The decentralized information-, incentive-, coordination-, enforcement- and legitimacy-functions of human rights for rendering economic and political competition more effective - and for solving social problems confronting all societies, such as promoting welfare-increasing division of labor, social justice and the overall consistency of legal systems in a

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<sup>73</sup> Cf. Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty, UNDP 2003.

<sup>74</sup> Cf. Human Security Now: Protecting and Empowering People (above note 15).

<sup>75</sup> See: Human Development Report 2000: Human Rights and Human Development, UNDP 2000, p. iii.

<sup>76</sup> Neither in the EC nor in most federal states (including the USA), the constitutional doctrine of limited delegation of powers has prevented ever-expanding and increasingly vague delegations to the higher (federal) level. Judicial protection of human rights and of open markets may offer more effective constitutional safeguards of individual liberties and deregulation than the constitutional doctrines of limited delegation of powers and of subsidiarity..

<sup>77</sup> On these diverse functions of human rights see the literature cited above in note 41.

manner respecting and protecting individual self-development, responsibility and human dignity - are often not adequately understood by economists and lawyers.<sup>78</sup> While economists often focus on outcomes rather than on the rules shaping the outcomes, human rights "fundamentalists" often focus one-sidedly on civil and political rights constituting "political markets" (e.g. democracy) without according similar importance to economic and social rights constituting "economic markets".<sup>79</sup> If unnecessary human poverty, the dependence of personal self-development in dignity on economic resources and on professional freedom, and the need for constitutional limitations of abuses of economic power are recognized as inter-related human rights problems, then human rights can be perceived as *instruments* for empowering individuals and protecting their human dignity in economic markets no less than in political markets. This "instrumental function" of constitutional rights is particularly evident in EC law which realized its Treaty objective of an "internal market ... without internal frontiers" (Article 14 EC Treaty) to a large extent by relying on the "vigilance of individuals concerned to protect their rights"<sup>80</sup> and by empowering individuals to enforce, through national courts and the EC Court of Justice, intergovernmental EC Treaty rules as "fundamental freedoms" of "market citizens" protecting free movements of goods, services, persons, capital and related payments as individual rights.<sup>81</sup>

(a) Human rights as instruments for reducing the problem of limited knowledge

Human rights (e.g. to freedom of information and freedom of the press) entitle individuals to act on the basis of their own personal knowledge and to acquire and take into account the personal knowledge of others. They also protect spontaneous information mechanisms (such as market prices) which enable individuals to take into account knowledge dispersed among billions of human beings even though individuals remain "rationally ignorant" of most of this dispersed knowledge. Such decentralized information and ordering of the actions of diverse persons with limited knowledge reduces the need for centralized government regulation (e.g. laws imposing the majorities' preferences on minorities) which might unnecessarily limit individual freedom and disrupt decentralized ordering (notwithstanding the inevitable need for some centralized

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<sup>78</sup> On the instrumental function of human rights for dealing with the problems of limited knowledge, conflicting interests and abuses of power see e.g.: R.E.Barnett, *The Structure of Liberty. Justice and the Rule of Law*, 2000.

<sup>79</sup> See my criticism (above note 3) of the authoritarian premises of P.Alston's treatment of economic markets as a "blackbox" where economic rights are not constitutionally protected and individuals are treated as mere objects of discretionary, welfare-reducing governmental policies.

<sup>80</sup> EC Court of Justice, Case 26/62, *van Gend en Loos*, ECJ Reports 1963, 10.

<sup>81</sup> For references to the pertinent jurisprudence of the ECJ see above note 31.

ordering e.g. in governmental and non-governmental organizations, companies and families). Freedom of opinion and of commercial speech, for instance, are of constitutive importance for the "marketing" of goods and services and have given rise to a vast jurisprudence of national and international courts protecting and limiting the respective freedoms of producers (e.g. the right to advertise their products) and consumers (e.g. the right to criticize the consumer risks of dangerous products).<sup>82</sup>

(b) Human rights as incentives for mutually beneficial division of labor

Economic transactions are based on the exercise of liberty rights (e.g. to sell and buy) and the transfer of property rights (e.g. in traded goods). Human rights (e.g. property rights, freedom of contract) set incentives for savings, investments and mutually beneficial division of labor among self-interested actors (e.g. by requiring compensation in case of non-fulfillment of contracts or of governmental takings of property rights). They protect individual rights to acquire, buy and sell goods and services that are necessary for personal self-development but whose supply remains scarce in relation to consumer demand. Equal human rights force people to take into account the interests of others (e.g. by requiring consent to rights transfers) and to settle disputes peacefully based on respect for the rule of law. The WTO rules on trade-related intellectual property rights (= TRIPS), for instance, are justified by the holders of patent rights and of other intellectual property rights by the "incentive functions" and "compensation functions" of such temporary monopoly rights for making private investments and recuperating the high investment costs of pharmaceutical products. The WTO's Doha Declaration of November 2001 on the TRIPS Agreement and Public Health<sup>83</sup>, and the follow-up WTO decision of 30 August 2003 on implementation of paragraph 6 of that Doha Declaration<sup>84</sup>, "re-balanced" the legitimate scope of certain patent rights through legal changes that will make it easier for poor countries to import cheaper generic medicines made under compulsory licensing if they are unable to manufacture the medicines themselves.

(c) Human rights as conflict-prevention mechanisms

Human rights can help to transform the Hobbesian "war of everybody against everybody else" into peaceful cooperation based on equal legal rights and access

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<sup>82</sup> The interesting question why human rights courts often protect freedom of commercial speech more comprehensively than trade courts, cannot be pursued here. See e.g. the judgement of the European Court of Human Rights of 25 August 1998 in *Hertel v. Switzerland* (published in ECHR Reports 1998 – VI) which concluded that restrictions on freedom of speech imposed under the Swiss Unfair Competition Law, and upheld by Swiss courts, were in violation of Article 10 of the European Convention on Human Rights.

<sup>83</sup> WTO document WT/MIN(01)/DEC/2.

<sup>84</sup> WTO document WT/L/540.

to courts. In the economy no less than in the polity, the inevitable conflicts of interests (e.g. between producer interests in high sales prices and consumer interests in low prices) can be reconciled best on the basis of equal liberty rights (e.g. freedom of contract) and other human rights (e.g. to judicial protection). Human rights enable decentralized solutions also for the “value problem” that human views about “truth” may differ, and value judgments about “the good” and “the beautiful” are not necessarily true.<sup>85</sup> By protecting (e.g. through freedom of religion, freedom of opinion and freedom of the press) diversity of individual values, and by preventing majorities from imposing their value preferences on minorities, human rights promote peaceful coexistence, tolerance and scientific progress. For instance, the EC Court of Justice, in a recent judgment of June 2003, held that - even though the failure of Austria to ban a political demonstration blocking freedom of transit on an important motorway amounted to a restriction of free movement of goods in the EC (Article 28 EC Treaty) - the fundamental rights to freedom of expression and freedom of assembly, as protected by the Austrian Constitution and the European Convention on Human Rights, could justify the restriction of the freedom of movement of goods in the EC.<sup>86</sup> Effective protection of human rights gives inevitably rise to information markets, economic markets, political markets and also "legal markets" as decentralized means for evaluating scarce resources (e.g. private and public goods and services) in a manner respecting individual freedom and responsibility, promoting dialogues about values, and allocating and distributing resources in accordance with consumer demand.

(d) Human rights as countervailing powers and decentralized remedies against "market failures"

Human rights historically emerged through “bottom-up struggles” in order to empower citizens to limit abuses of public and private powers through “inalienable constitutional rules” of a higher legal rank. Whereas first-generation “civil” and “political” human rights aim at regulating “political markets” by protecting general citizen interests (e.g. in individual and democratic self-governance and judicial protection) against abuses of political power, second-generation “economic and social human rights” focus on regulating “economic markets” and promoting “social welfare”. The history of “human rights revolutions” demonstrates that human rights (e.g. to self-defence *vis-à-vis* illegal abuses of power) offer "checks and balances" enabling citizens (e.g. women) and

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<sup>85</sup> On Immanuel Kant’s distinction between truth (analyzed in Kant’s *Critique of Pure Reason*), value judgments (analyzed in Kant’s *Critique of Practical Reason*), and esthetic judgments (analyzed in Kant’s *Critique of the Human Ability to Judge*), and on decentralized methods (i.e. markets and democracy) and centralized methods (e.g. dictatorship) to overcome conflicts about value judgments, see e.g. Fikentscher, *Freiheit als Aufgabe*, 1997, at 50-51.

<sup>86</sup> EC Court of Justice, case C-112/00, *Schmidberger Internationale Transporte*, in: *Common Market Law Reports* 2003, at 1043.

minorities to defend their equal rights against abuses of powers and to limit the constitutional task of governments to the “common public interest” defined in terms of equal human rights. By defining core human rights as “inalienable” and requiring respect for the equal human rights of all others, human rights require substantive and procedural justifications of governmental restrictions and promote democratic accountability. It is no coincidence that the “general exceptions” (e.g. in GATT Article XX) and other “public interest clauses” in WTO law as well as in regional integration agreements (e.g. Article 30 EC Treaty) permit governmental restrictions of freedom of trade subject to legal requirements of non-discrimination and necessity that are similar to the non-discrimination, necessity and proportionality requirements in human rights law for governmental restrictions of other individual freedoms.

Human rights - by offering additional safeguards against “market failures” such as “external effects”, “asymmetries in information” and “social injustice” (resulting e.g. from selfish utility-maximization by individual economic actors) – complement the objectives of “social market economies”. EC competition rules and other EC common market rules offer many examples of intergovernmental rules empowering individuals to seek judicial protection against abuses of private economic power (such as cartel agreements and monopolization) as well as of public power (e.g. public monopolies and trade-distorting subsidies).

(e) Human rights as decentralized dispute settlement and enforcement mechanisms

The decentralized empowerment of investors, producers, traders, consumers and other individuals - through assignment of liberty rights, property rights and other individual rights (e.g. of access to scarce resources, markets and courts) - can transform short-term conflicts of interests into mutually beneficial cooperation and promote a decentralized “self-enforcing constitution”. Human rights (e.g. of individual access to courts) and corresponding obligations (e.g. for compensation for violations of individual rights) set incentives for decentralized enforcement of rules by self-interested, vigilant citizens and for spontaneous, private initiatives to “internalize” harmful “market externalities” (e.g. by invoking property rights and human rights to a clean environment *vis-à-vis* harmful pollution).<sup>87</sup> The private enforcement and judicial protection of the EC Treaty's guarantees of non-discrimination (e.g. “equal pay for male and female workers for equal work” pursuant to Article 141 EC), and of free movements of goods, services, persons and capital across frontiers as “fundamental individual rights”, illustrates that a

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<sup>87</sup> On the recognition of the importance of human rights for rendering environmental law and environmental protection more effective see: A.Boyle/M.Anderson, *Human Rights Approaches to Environmental Protection*, 1998; F.Francioni (ed), *Environment, Human Rights and International Trade*, 2001; M.Déjant-Pons/M.Pallemaerts (eds), *Human Rights and the Environment*, Council of Europe 2002.

rights-based approach can be successfully applied to economic integration not only inside constitutional democracies but also across frontiers.<sup>88</sup> Likewise, the EU citizen rights to direct election of the European Parliament and to direct access to the European Court of Justice apply to the EU's "political market" constitutional principles that are recognized also at the national level in all EU member states (e.g. human rights to democratic participation in the exercise of government powers, rights of individual access to courts). Human rights require legislative, administrative and judicial protection specifying and balancing human rights, and thereby promote a living "human rights culture" and continuous adjustment of law and "justice" to changing situations. Access to justice and judicial review are perceived positively - also at the international level e.g. in the Dispute Settlement Understanding (DSU) of the WTO - as indispensable elements of rights-based legal systems in order to provide "security and predictability to the multilateral trading system", "preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law" (Article 3:2 DSU).

(f) Human rights as sources of democratic legitimacy

The human rights to "periodic and genuine elections ...by universal and equal suffrage" (Article 21 UDHR), and to democratic participation in the exercise of government powers (Article 25 UN Covenant on Civil and Political Rights), promote transparent governance based on "the will of the people" (Article 21 UDHR) and on "deliberative democracy"<sup>89</sup> legitimating the exercise of political power at national and international levels. By defining principles of justice which constitutionally limit and guide all government activities, human rights inform and educate people on how they can realize individual and democratic self-government and mutually beneficial cooperation across frontiers while avoiding conflicts with the independent actions of others. The UN Resolutions on the "right to development", for instance, rightly define development in terms of fulfillment of basic needs and of human rights.<sup>90</sup>

4. Human Rights and the Economic Theory of Optimal Interventions: Subsidiarity of Social Rights?

The economic theory of optimal intervention teaches that governments should correct "market failures" through "optimal" interventions directly at the source of the problem (e.g. competition rules prohibiting cartels and other abuses of economic power) without reducing the social gains from non-discriminatory

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<sup>88</sup> See above note 33.

<sup>89</sup> See e.g.: H.H.Koh/R.C.Slye, *Deliberative Democracy and Human Rights*, 1999.

<sup>90</sup> See above note 66.

competition and without preventing citizens to engage in mutually beneficial trade across frontiers.<sup>91</sup> The definition of specific civil, political, economic, social and cultural human rights and constitutional rights - in national and international constitutions and human rights instruments - as individual remedies for specific human rights problems can be seen as an application of the basic insights of economic theories about separation and decentralized regulation of policy instruments taking into account locally different policy preferences and regulatory problems. In both economic as well as in political markets, individual rights offer decentralized "first best policy instruments" empowering citizens to protect themselves – through legal, judicial and political remedies - against “government failures” as well as “market failures”. The identification of the "optimal level" and "optimal target" of governments interventions and of legal rules remains, however, often controversial. Article 295 of the EC Treaty, for instance, leaves the regulation of property rights to the national legal system of each member state where individual property rights may be better tailored to the particular traditions and preferences of citizens. The focus of EC competition law and policies on protection of “economic freedom” of competitors in the marketplace differs fundamentally from the focus of some national competition laws (e.g. in the US) on protection of competition as a process<sup>92</sup> and illustrates how the legal design of competition rules and of individual rights to "freedom of competition"<sup>93</sup> in national and international competition laws may legitimately differ depending on the underlying value premises.

The move from sovereign nation states to internationally integrated “market states” has not prevented modern welfare states from retaining primary responsibility for social and health security on their respective territory. Democratic preferences and "opportunity costs" for social welfare policies ("distributive justice"), and the role of trade unions, collective bargaining, and unemployment continue to differ from country to county, even inside the EC. National social and health services in EC member states have, however, become subject to single market principles such as freedom to provide services, free

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<sup>91</sup> For a survey of this economic theory of optimal intervention, with references to the economics literature, see Petersmann (note 72), 57-58.

<sup>92</sup> US competition lawyers criticize this European notion of “restriction of economic freedom” on several grounds such as: “(1) its failure to generate precise operable legal rules (i.e. its failure to provide an analytical framework); (2) its distance from and tension with (micro)economics, which does provide an analytical framework; (3) its tendency to favour traders/competitors over consumers and consumer welfare (efficiency); and (4) its capture of totally innocuous contract provisions having no anti-competitive effects in an economic sense” (B.Hawk, System Failure: Vertical Restraints and EC Competition Law, in: Common Market Law Review 1995, 973, at 977-978). For an explanation of the EC position see e.g.: P.Marsden, The Divide on Verticals, in: S.J.Evenett/A.Lehmann/B.Steil (2000), at 117-136. On the different US position see: E.Fox, "We Protect Competition, You Protect Competitors", in: World competition 2003, 149-166.

<sup>93</sup> On "freedom of competition" in EC law see also above note 33.



movement of workers and non-discriminatory treatment (e.g. of migrant workers). Whereas EC Council Regulation 1408/71 of June 1971 limited the application of social security schemes to employed persons and their families moving within the EC, the individual rights to intra-European social security have been progressively expanded from "market citizens" to "EU citizens" and to third country nationals inside the EC.<sup>94</sup> The EC Court of Justice has confirmed the applicability of EC competition rules to certain social and labor policies, such as state monopolies for employment placement services and pension funds set up in collective agreements.<sup>95</sup> Yet, collective agreements among "social partners" appear to be immune from EC competition law.<sup>96</sup> So far, not only European labor law and its participatory institutions but also the broader EC social policies fail to secure the labor market flexibility necessary for achieving full employment without inflationary wage policies and without abuses of social security systems.

The EC Court of Justice rightly emphasizes that economic freedoms "are not absolute but must be viewed in relation to their social function".<sup>97</sup> Yet, the social objectives of the EC Treaty - such as the EC citizen rights to reside, live and work in all EC member states, and the EC guarantees of freedom of association, collective bargaining, the right to strike, and of other workers' rights and social rights - should remain consistent with the economic EC Treaty objectives of e.g. "non-inflationary growth" (Article 2 EC), "price stability" (Article 4 EC) and "an open market economy with free competition, favouring an efficient allocation of resources" (Article 105) in order to avoid inflationary wage policies and reduce incentives for "moral hazard" in labor markets and social policies.<sup>98</sup> So far, social rights, and the corresponding obligations of governments and "social partners", are not yet adequately designed to achieve full employment in the EC. "Regulatory competition" among diverse national labor and social laws, within the limits of common core labor standards guaranteed by EC law, may correspond better to the diversity of preferences, resources and "social opportunities" of citizens in EC member states than premature EC harmonization of national labor and social laws. Even though recognition of social rights at EC level may help to progressively build a broader European consensus on the right balance between wealth creation and distributive justice, the implementation of social rights at national levels may legitimately differ.

Also beyond Europe, global market integration is increasingly accompanied by global recognition of "inalienable" and "indivisible" human rights (e.g. in UN law), social rights (e.g. in ILO law), intellectual property rights (e.g. in the law of

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<sup>94</sup> See M.Bell, *Anti-Discrimination Law and the EU*, 2002.

<sup>95</sup> Cf. the references to the jurisprudence of the ECJ in Bell (note 94), at 11.

<sup>96</sup> Cf. EC Court of Justice, Case C-67/96 (Albany), ECR 1999 I-5751.

<sup>97</sup> Case C-44/94, *The Queen vs. Minister of Agriculture*, ECR 1995 I-3115, at para. 28.

<sup>98</sup> Cf. S.Deakin, *Labour Law as Market Regulation: The Economic Foundations of European Social Policy*, in: P.Davies *et alii* (eds.), *European Community Labour Law: Principles and Perspectives*, 1996.

the World Property Organization and the WTO's Agreement on Trade-Related Intellectual Property Rights) and investor rights (e.g. in the almost 2'000 bilateral investment treaties). Due to the producer-driven politics of intergovernmental negotiations, investor rights (e.g. on intellectual property) tend to be more effectively protected and enforced than social rights that are of particular importance for migrant workers and their families, for the poor, vulnerable and disadvantaged in society, and for the “losers” in international competition. The respective interpretation and interrelationships (e.g. of non-discrimination requirements in human rights law, trade law and economic law) raise numerous questions that need further clarification.

#### VIII. HUMAN RIGHTS REQUIRE A “SOCIAL MARKET ECONOMY”: DIVERSITY OF APPROACHES RECONCILING HUMAN RIGHTS AND MARKET COMPETITION

Modern national constitutions (e.g. Article 1 of the German Basic Law) and EU law proceed from the value premise that “human dignity is inviolable. It must be respected and protected” (Article 1 of the EU Charter of Fundamental Rights). Human rights entail social responsibilities of governments for enabling each citizen to live a life in dignity, freedom and responsibility. In addition to constituting individual rights and corresponding government obligations, human rights also require governments to promote “principles of justice”, such as “solidarity” (cf. Chapter IV of the EU Charter of fundamental Rights), equal opportunities and promotion of welfare-increasing competition without undermining human rights so that also the “losers in the market game” retain effective access to the goods and services necessary for the enjoyment of human rights. In Europe, and increasingly also in the WTO's "Development Round" of worldwide trade negotiations, international market integration has proven politically unsustainable without complementary social rights and solidarity obligations for a “social market economy”, as now explicitly called for in the Draft Treaty Establishing a Constitution for Europe (e.g. Article 3) of June 2003.<sup>99</sup>

The approaches of regional and worldwide organizations – such as the EU, the NAFTA, the IMF, the World Bank, the WTO and ILO – to the promotion and protection of human rights and market competition continue to differ considerably. Four different, and in part complementary, approaches can be distinguished:

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<sup>99</sup> Draft Treaty Establishing a Constitution for Europe, EC 2003, at 10.

A. Benevolent Government Approaches: Inadequacies of the EU Commission's *White Paper on Governance in Europe*

*Benevolent government approaches* are characterized by government discretion to define the “public interest” in a manner discriminating among domestic citizens (e.g. discretion to redistribute income among domestic citizens through discriminatory border restrictions and discriminatory regulation of the domestic economy in favor of powerful producer interests). Several worldwide and regional organizations commit themselves to “good governance principles” without clarifying their relationships to human rights.<sup>100</sup> The recent Commission White Paper on “European Governance”<sup>101</sup> likewise recommends “good governance principles” (such as openness, participation, accountability, effectiveness, coherence) and objective constitutional principles (such as the “Community method”) for “connecting Europe with its citizens” and protecting the “general interest” through legislative and policy proposals by the European Commission, rule-making by the European Council and by the European Parliament, and judicial protection of rule of law by national and EC courts. Yet, the Commission proposals for administrative and constitutional reforms are not clearly linked to EU citizen rights, general consumer welfare and “social justice”. As long as so many EU policies are designed to serve protectionist producer interests (e.g. of agricultural and textiles industries) rather than general citizen interests, there are good reasons for popular distrust in “benevolent government approaches” that do not effectively limit discriminatory abuses of government powers.

Contrary to the White Paper, “governance” in the EU should not only be defined in a formal manner as “rules, processes and behavior that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.”<sup>102</sup> Nor should “civil society” be reduced to its organized components.<sup>103</sup> The EU Treaty (e.g. Article 6) and the EU Charter of Fundamental Rights rightly proceed from “normative individualism” as constitutional premise of EU law. Individual self-governance (“human dignity”), public confidence and democratic participation in EU governance depend more on EU protection of equal individual rights than on paternalistic “good governance” principles that do not effectively constrain interest group politics in the EU. Arguably, the greater the distance between citizens and representative governance at the international level (e.g. the EU Parliament and EU Council), the greater the need for complementing “representative democracy” through direct citizen rights defining the “public

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<sup>100</sup> Cf. e.g.: Governance and Human Rights, World Bank 1995; Participatory Development and Good Governance, OECD 1995.

<sup>101</sup> European Governance: A White Paper, COM (2001) 428, 25 July 2001.

<sup>102</sup> White Paper (note 101), at 7.

<sup>103</sup> Cf. White Paper, at 13-14.

interest” in a justiciable manner by empowering citizens to defend their equal rights vis-à-vis majority politics.<sup>104</sup> Not only the EC’s internal market integration, but also its policy integration and EC leadership for global integration should be more clearly based on legal and judicial protection of fundamental rights and general consumer welfare.

#### B. Ordo-Liberal Market Integration Approaches: An Insufficient Basis for Social Policy

Economic policies often do not define whether they are aimed at maximizing "consumer welfare" (e.g. by prohibiting restrictive business practices), "producer welfare" (e.g. by allowing private price fixing) or "total national welfare" (e.g. by promoting export cartels enhancing domestic producers' surplus at the expense of foreign consumers). The "European School" of "*ordo-liberalism*"<sup>105</sup> emphasizes the need for "an open market economy with free competition" (Articles 4,98,105 EC Treaty), based on a non-discriminatory "system ensuring that competition in the internal market is not distorted" (Articles 3g, 81 *et seq* EC Treaty), as the most efficient way of promoting producer productivity, innovation and job-creation in order to meet consumer demand for goods and services. While all citizens are consumers, their respective producer interests often conflict with each other and must be reconciled through non-discriminatory competition rules. In order to maximize general consumer welfare (as measured by price, quality, quantity and diversity of goods and services), competition and economic policies must be legally constrained and empower citizens to protect themselves against abuses of power (like private monopolization, cartel agreements or arbitrary redistribution of income through government policies).

The European *ordo-liberal* tradition recognizes that, in order to realize a "social market economy", the market-driven distribution of income must be supplemented by additional social rules and policies. Yet, neither the EC Treaty of 1957 nor *ordo-liberal* theory offered a coherent blueprint for the development of social policies. During the early years, the EC left social policies largely to national discretion and developed common social rules at the EC level mainly in order to promote market integration (e.g. by extending free movement of persons to family members) and prevent unfair competition (e.g. by securing non-discriminatory minimum standards for social security and employment

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<sup>104</sup> On this "inverse relationship" between human rights and parliamentary democracy at national and international levels see E.U.Petersmann, From State Sovereignty towards Sovereignty of Citizens in the International Relations Law of the EU?, in: N.Walker (ed.), *Sovereignty in Transition*, 2003.

<sup>105</sup> On the "European school" of "*ordo-liberalism*" and a "social market economy" see e.g. D.Hildebrand, *The Role of Economic Analysis in the EC Competition Rules. The European School*, 2<sup>nd</sup> ed. 2002, 1-5. On the influence of this school on EC competition law see D.Gerber, *Law and Competition in Twentieth Century Europe*, 1998, chapter IX.

regulation). For instance, the EC Treaty guarantees for “equal pay for male and female workers for equal work” (Article 141) had been originally motivated by French concerns at avoiding competitive distortions.<sup>106</sup> The *ordo*-liberal competition approach was not applied to labor markets and offered no coherent concept for national and EC social policies.

### C. Human Rights Approaches: Recognition of Social Rights as Integral Parts of “Social Market Economies”

While human rights are not mentioned in the law of many worldwide economic organizations (such as the IMF, the World Bank, the WTO) and regional organizations (such as NAFTA), they have proven to be indispensable for promoting democratic legitimacy and social responsibility in European integration. Also social rights are explicitly protected in the EC Treaty. According to Article 136, the

“Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.”

In contrast to the earlier distinction of a “market correction function” of national social policies and a “market-building function” of EC social policies<sup>107</sup>, the newly introduced “open method of coordination” has led to an increasing integration of employment, labor, social, economic and human rights policies in the EU aimed at promoting full employment and human dignity as overriding paradigms.<sup>108</sup> Emphasis on corporate social responsibility and on more precise obligations of the social partners is another characteristic of the recent evolution of social policies in the EU.<sup>109</sup>

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<sup>106</sup> Cf. Bell (above note 94).

<sup>107</sup> Cf. e.g. the contribution by Streeck to: Liebfried/Pierson (eds), *European Social Policy: Between Fragmentation and Implementation*, 1995.

<sup>108</sup> Cf. E.Szysczak, *The New Paradigm for Social Policy: A Virtuous Circle?* In: *Common Market Law Review* 38 (2001), 1125-1170.

<sup>109</sup> Cf. e.g. Balme/Chabanet/Wright (eds.), *Collective Action in Europe*, 2002.

At the worldwide level, the International Labor Organization and various UN human rights bodies likewise emphasize the need for taking into account the human rights obligations of all UN member states in all policy areas, including monetary policies in the IMF, development policies in the World Bank Group, and trade policies in the WTO context. Human rights entail legal obligations not only for national governments but also for the collective exercise of government powers in regional and worldwide organizations. For instance, UN human rights bodies rightly emphasize that the human rights to food, health, education, development, property, rights to the enjoyment of the benefits of scientific progress and intellectual property rights may be relevant for interpreting WTO rules on protection of intellectual property rights, trade in goods and services (e.g. regarding availability, accessibility and acceptability of educational and health services, food and medicines).<sup>110</sup>

#### D. Social Citizenship Models: The EU Charter of Fundamental Rights

The EC Treaty and the EU Charter of Fundamental Rights<sup>111</sup> protect additional rights and duties of the “citizens of the Union”, such as “the right to move and reside freely within the territory of the Member States” (Article 18 EC). The EU Charter's chapter IV on “solidarity” recognizes comprehensive social rights and corresponding government responsibilities, thereby complementing the economic market access rights by rights to participation in labor markets and to social security. The comprehensive EC powers to “combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (Article 13 EC Treaty) have led to EC Directives on racial equality<sup>112</sup> and on equal treatment in employment and occupation<sup>113</sup>, reflecting a further move towards an anti-discrimination law that is based more on protection of fundamental rights than on an economic market integration rationale.

### IX. CONCLUSION: NEED FOR PROVIDING THE 'GLOBAL JUSTICE MOVEMENT' WITH A MORE COHERENT THEORY OF JUSTICE

The two "European Conventions" which successfully elaborated the EU Charter of Fundamental Rights of 2001 as well as the Draft Treaty Establishing a Constitution for Europe of 2003<sup>114</sup>, and the increasing "global justice campaigns" by non-governmental organizations (NGOs) which influence international rule-making (e.g. on the International Criminal Court, environmental agreements,

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<sup>110</sup> See above chapter V and notes 57-60.

<sup>111</sup> See above note 2.

<sup>112</sup> Council Directive (EC) 2000/43 of 29 June 2000, OJ L 180/22.

<sup>113</sup> Council Directive (EC) 2000/78 of 27 November 2000, OJ L 303/16.

<sup>114</sup> See above notes 2 and 99.

WTO negotiations) ever more actively, illustrate the emergence of a new international "civil society" and of more democratic, new forms of international rule-making and international public discussions ("deliberative democracy") focusing not only on inter-governmental representatives and negotiations, but also on more active participation by members of parliaments and other representatives of "civil society". The central aim of the WTO "Development Round" to help less-developed countries to benefit more from the global division of labor, and the increasing calls for adapting the state-centered UN system to the needs of the 21<sup>st</sup> century by e.g. enforcing the human rights obligations of UN law more effectively vis-à-vis the many "failed" and non-democratic UN member states, are further illustrations of the increasing recognition that global market integration must be supplemented by a new UN security system focusing on "human security" and democratic "peace by satisfaction"<sup>115</sup>, and by a more comprehensive global integration aimed at eradicating unnecessary poverty and securing "social justice."

European integration is characterized by "multi-level", national and international guarantees of freedom, non-discrimination, rule of law, democratic peace and other civil, political, economic and social human rights and additional constitutional rules that can be invoked and enforced by citizens in national and international courts. Also at the worldwide level, WTO rules and human rights entail complementary obligations of governments and intergovernmental organizations to respect and promote freedom, non-discriminatory competition and individual self-development in dignity across frontiers. In addition to liberty rights, property rights and other human rights promoting the efficient use of scarce resources through decentralized market mechanisms, social human rights have proven essential for dealing with the social adjustment problems (e.g. unemployment) of market competition in a manner respecting and promoting individual self-development and responsibility in dignity.

The "instrumental", economic and social functions of human rights for creating and distributing scarce resources needed for enjoying human rights are of particular importance vis-à-vis less developed WTO member countries and the Eastern European "transition countries" that have decided to open and adjust their formerly protected economies so as to benefit more from international division of labor. Human rights and market integration law pursue complementary objectives (e.g. freedom and equal opportunities of individuals) on the basis of complementary principles (e.g. "necessity" and "proportionality" of governmental restrictions of individual freedom) that must be construed in a mutually consistent manner. The international government obligations to protect human rights and non-discriminatory competition across frontiers complement and extend the corresponding obligations in domestic legal systems; they thereby

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<sup>115</sup> On the distinction between "peace by satisfaction" and "Peace by power" see Rawls (note 16), at 47.

reinforce national “bottom-up struggles” by international “top-down pressures” to abolish welfare-reducing market access restrictions and protect human rights more effectively. The “constitutional functions” of international guarantees of freedom, non-discriminatory competition and social security are particularly visible with regard to international movements of persons where e.g. the market freedoms and non-discrimination requirements of EC law have been supplemented by transnational citizen rights and social security rights for migrant persons.

The dynamic evolution of regional and global integration law illustrates that "justice" remains a never-ending regulatory task and "cannot be related to any *one* value, be it equality or any other, but only to the complex value system of a man, a community, or mankind."<sup>116</sup> The universal recognition of human rights requires a citizen-oriented "constitutionalization" of the traditionally state-centered international legal system. European integration law and international human rights law already go far beyond the "cosmopolitan rights" postulated by Immanuel Kant.<sup>117</sup> Yet, it seems obvious that the current international economic and legal order is not sufficiently "just" in order to be durable. The great achievement of postwar national and international constitutionalism has been to channel the all too often violent "struggles for law" into peaceful, incremental changes and reforms of the postwar international legal system.

International guarantees (e.g. in WTO law) for transnational movements of goods, services and capital go far beyond autonomous domestic laws and serve “constitutional functions” by protecting citizens against welfare-reducing restrictions and discriminations by their own governments.<sup>118</sup> The ever increasing number of national constitutional democracies and the emerging international constitutional law in worldwide and regional organizations offer a framework for progressively integrating the different conceptions of social justice, human rights, democratic rule-making and economic order. The universal recognition of human rights requires to base "international justice" - contrary to the views of J.Rawls - not only on freedom and equality of *peoples*<sup>119</sup>, but also on equal human rights<sup>120</sup>

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<sup>116</sup> Friedrich (note 8), at 199.

<sup>117</sup> Cf. I.Kant, *Idea for a Universal History with Cosmopolitan Intent* (1784) and *Eternal Peace* (1795), reproduced e.g. in C.J.Friedrich (ed.), *The Philosophy of Kant*, 1993, chapters V and XII. Kant did not envisage cosmopolitan citizenship as a basis for universal, legally and judicially enforceable human rights and constitutional law-making, but was preoccupied with a cosmopolitan right to "hospitality", i.e. the ability of people to travel anywhere and be treated in a civilized manner; cf. the "third definitive article of the eternal peace" formulated by Kant in his "Eternal Peace" in the following manner: "The Cosmopolitan or World Law shall be limited to conditions of universal hospitality."

<sup>118</sup> Cf. E.U.Petersmann (note 72).

<sup>119</sup> In his book on *The Law of Peoples* (above note 16), Rawls rejects the constitutional values of maximum equal freedoms of individuals - which he uses for his Theory of Justice in a constitutional democracy (note 1 above) - as a basis for a theory of "international justice" on the ground that these Western human rights values show insufficient tolerance and respect for



and multi-level constitutionalism.<sup>121</sup> International justice and national justice depend both on respect for human rights empowering and protecting citizens not only inside constitutional democracies, but also in countries with non-democratic governments. As explained already by Kant, human rights can be effective only in a framework of national and international constitutionalism. Today, human rights also require democratic forms of governance at national and international levels.<sup>122</sup> Given the ubiquity of “market imperfections” (e.g. cartels, involuntary unemployment) and the uneven distribution of resources (including individual capabilities), “social justice” also requires social rights guaranteeing effective access to the resources necessary for individual self-development in dignity. The constitutional and legislative definition, and the administrative and judicial protection, of economic and social rights may, however, legitimately differ from country to country and from international organization to organization.-

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non-liberal, but "decent peoples". Instead, the parties rationally choosing the "principles of international justice" behind a "veil of uncertainty" in the "original international position" (i.e. fictional deliberations and negotiations on concluding an international constitutional contract) are conceived as representatives of liberal or "decent" people (i.e. excluding peoples that are not "well-ordered") who would rationally agree on a "law of peoples" based on eight principles that are, in essence, already part of modern international law. This distinction between liberal, decent and other non-liberal peoples does not appear in Rawls' theory of justice for constitutional democracies (note 1) which argues on exclusively individualist grounds. The universally recognized "popular sovereignty" and self-determination of peoples and the mainly domestic causes of injustice, poverty and international inequalities entail that, according to Rawls, people are responsible for their own development and have only limited duties to assist other people living under unfavorable conditions.

<sup>120</sup> This position is shared, e.g., by T.W.Pogge, *Realizing Rawls*, 1989; F.R.Teson, *A Philosophy of International Law*, 1998, chapter 4. Rawls fails to explain convincingly why the international value of tolerance vis-à-vis non-liberal peoples requires "peoples-based" rather than "individuals-based" rules of international justice, and how such tolerance can justify the limitations of human rights in non-liberal peoples. Even from a state-centered (rather than cosmopolitan or people-centered) conception of public international law, John Rawls' narrow interpretation of human rights and of "the international political world as we see it" (Rawls, note 16 above, at 83) appears inconsistent with the progressive expansion, since the 1993 Vienna Declaration on Human Rights, of the "inalienable core" of human rights universally recognized in national, regional and worldwide legal instruments as constitutional limits of tolerance vis-à-vis non-liberal governments.

<sup>121</sup> On the "constitutional functions" of international guarantees of freedom, non-discrimination and "justice", and of rule-making and adjudication in international organizations, cf. Petersmann, above notes 47, 70 and 72. Specifically on "multi-level constitutionalism" in EU law see: I.Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, in: *Common Market Law Review* 1999, 703-750; E.U.Petersmann, *The Foreign Policy Constitution of the EU: A Kantian Perspective*, in: U.Immenga *et alii* (eds), *Festschrift für E.J.Mestmäcker*, 1996, 433-447.

<sup>122</sup> See above note 40 and S.Marks, *The Riddle of all Constitutions*, 2000.