11-1-2003

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

Ernst-Ulrich Petersmann

THEORIES OF JUSTICE, HUMAN RIGHTS, AND THE CONSTITUTION OF INTERNATIONAL MARKETS

*Prof. Dr. Ernst-Ulrich Petersmann**

I. INTRODUCTION

According to John Rawls, "[j]ustice is the first virtue of social institutions, as truth is of systems of thought."[1] This article argues that constitutional democracy and the universal recognition of human rights, as well as the need to legally constitute international markets for mutually beneficial cooperation among citizens across frontiers, offer a convincing framework for a modern, international theory of justice. This theory of justice 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 theories of human rights[2] often neglect to recognize that markets are inevitable consequences of the protection of human rights. In order to create the resources necessary for enjoying human rights and to coordinate autonomous conduct of free people, markets need to be legally constituted so as to limit market

* 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.

1. JOHN RAWLS, A THEORY OF JUSTICE 3 (rev. ed. 1999).

2. This contribution uses the terms *human rights* and *constitutional rights* interchangeably in view of the "human right to democratic governance," 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 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, 2000 O.J. (C 364) 1 [hereinafter EU CHARTER] and, in July 2003, adopted the DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, July 18, 2003, CONV 850/03 [hereinafter DRAFT TREATY] (whose Part II includes the EU CHARTER).

failures and provide collective public goods.[3] This article 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, *jus 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" (such as 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.

II. JUSTICE AS THE OBJECTIVE OF NATIONAL AND INTERNATIONAL LAW

The United Nations (U.N.) Charter,[4] the Treaty establishing the European Union (EU),[5] the Draft Treaty Establishing a Constitution for Europe,[6] 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 also suggests that *compliance* with international rules (i.e., rule of law) depends no less on the perceived legitimacy of the international rules[7] than on governments' cost/benefit analyses[8] and on the

3. 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 Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845, 845–51 (2002) [hereinafter *Rejoinder to Alston*].

4. *See* U.N. CHARTER art 1.

5. CONSOLIDATED VERSION OF THE TREATY ON THE EUROPEAN UNION, Dec. 24, 2002, 2002 O.J. (C 325) 5, http://europa.eu.int/eur-lex/en/treaties/dat/EU-Consol.pdf [hereinafter EU TREATY].

6. *See* DRAFT TREATY, *supra* note 2.

7. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24, 49 (1990) (defining legitimacy and identifying the following four major factors for assessing a rule's legitimacy: its determinacy, symbolic validation, coherence, and adherence).

8. *See* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979) (asserting 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.*").

"internalization"[9] 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).[10]

Since the time of the ancient Greek philosophers Plato and Aristotle, legal philosophy has tended 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.[11] Between the peace treaties of Westphalia in 1648 up to the end of the East/West divide in 1989, international legal theories focused on the sovereignty and consent of states and on the intergovernmental constitution of an international legal community.[12] The modern 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 peace in the world"[13] requires basing international law, public policy, and justice on "normative individualism," (i.e., that "all human beings are born free and equal in dignity and rights.")[14] Also, in

9. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–46 (1997) (arguing that voluntary obedience due to internalization is preferable to coercion).

10. *See, e.g.*, IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE (Judith Goldstein & Robert O. Keohane eds., 1993).

11. *See* CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 13–26, 191–99 (2d ed. 1963) (discussing 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 id.* at 17.).

12. *Cf.* ALFRED VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTS-GEMEINSCHAFT [THE CONSTITUTION OF THE INTERNATIONAL LAW COMMUNITY] (1926); HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 16 (1980) ("Any society, however unorganised it might be, must have one essential constitutional rule in the absence of which it would not be a community but simply a collection of individuals. This is the rule according to which law is created and developed.").

13. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), pmbl., U.N. Doc. A/810, at 71 (1948) [hereinafter *UDHR*]. This text has been subsequently incorporated into most U.N. human rights conventions.

14. *Id.*

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."[15]

The universal recognition, evidenced in national constitutions (such as in Article 1 of the German Basic Law), EU law (Article 1 of the Charter of Fundamental Rights of the European Union (EU Charter)), the Universal Declaration of Human Rights (UDHR) (i.e., Article 1), and in regional and worldwide human rights conventions, of inalienable human rights deriving from human dignity can be understood as requiring the interpretation of national and international law as a functional unity for promoting individual and democratic autonomy and diversity. In the modern, globally-integrated world, more than six 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, as all major U.N. human rights conventions and U.N. human rights declarations evince,[16] of human dignity as the moral source and ultimate objective

15. *Cf., e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977) ("'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction *as measured by aggregate consumer willingness to pay* for goods and services—is maximized."). For a criticism of Posner's theory of "justice as efficiency" and, more generally, of utilitarian theories of justice, see TOM CAMPBELL, JUSTICE 124–48 (2d ed. 2001); SERGE-CHRISTOPHE KOLM, MODERN THEORIES OF JUSTICE 403–72 (1996).

16. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Convention on the Elimination of all Forms of Racial Discrimination, U.N.G.A. Res. 2106 (XX), U.N. GAOR, 660 U.N.T.S. 195 (1996) (entered into force Jan. 4, 1969);

of inalienable human rights places theories of justice into a new constitutional context: Respect for, and protection of, human dignity (in the sense of moral autonomy, rational autonomy, personal and legal autonomy, equality, and responsibility of individuals) and inalienable human rights have become part of national and international constitutional law; as such, they 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 the democratic self-government that is necessary for personal self-development in dignity.

The legal implications of the universal recognition of human rights for theories of justice and for the interpretation of the U.N. Charter obligations so far have not been clarified.[17] In view of the existence of more than one 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,[18] there is strong evidence that many of the core

---

Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981), 1249 U.N.T.S. 13, *available at* http://www.un.org/womenwatch/daw/cedaw/index.html; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 112 (entered into force June 26, 1987); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37(a), U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) [hereinafter collectively Human Rights Conventions].

17. The International Court of Justice (ICJ) has long since recognized that U.N. member states also have human rights obligations under the U.N. Charter. *See, e.g.*, Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27). Yet, the expanding scope of these human rights obligations under the U.N. Charter remains to be clarified.

18. For example, in the 1989 U.N. Convention on the Rights of the Child, ratified by more than 190 states, the state 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." Convention on the Rights of the Child, *supra* note 16, pmbl. *See also* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 (2003); THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James

human rights listed in the UDHR have evolved into "constitutional obligations" of all U.N. member states and U.N. bodies under the U.N. Charter. This evolutionary change of U.N. law calls for new interpretations of some of the traditionally state-centered concepts of the U.N. Charter, such as focusing not only on state security and aggression against states in the interpretation of Chapter VII, but also on human security, democratic peace, and on the human rights obligations following from U.N. membership.[19] This article concludes that, contrary to the suggestion by John Rawls to base international justice on equal freedoms of peoples,[20] human rights offer a more appropriate constitutional basis for national as well as international justice.

III. 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, national and international human rights instruments also 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* likewise differ considerably depending on their underlying worldviews and moral and legal value premises.[21] For instance:

Crawford eds., 2000); UNITED NATIONS MANUAL ON HUMAN RIGHTS REPORTING, U.N. Doc. HR/PUB/91/1 (Rev. 1), U.N. Sales No. GV.E.97.0.16 (1997).

19. *See Report of the Commission on Human Security to the United Nations Secretary-General, Human Security Now* (May 1, 2003), *at* http://www.humansecurity-chs.org/finalreport/FinalReport.pdf [hereinafter *Human Security Now*] (emphasizing that respecting human rights and promoting democratic principles are central to protection of security of peoples).

20. JOHN RAWLS, THE LAW OF PEOPLES 80–81, 113–19 (1999).

21. For overviews of the diverse theories of justice, with extensive references to the vast literature, see CAMPBELL, *supra* note 15; KOLM, *supra* note 15; 1 BRIAN BARRY, A TREATISE ON SOCIAL JUSTICE: THEORIES OF JUSTICE (1989); JUSTICE (Thomas Morawetz ed., 1991); AXEL TSCHENTSCHER, PROZEDURALE THEORIEN DER GERECHTIGKEIT

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 Immanuel Kant, must be treated as ends in themselves and never merely as means for securing benefit to some other person. While Anglo-American libertarians (such as John Locke and Robert Nozick) conceive human rights (i.e., to life, liberty, and property) and legitimate government powers narrowly, modern European constitutional theories seek to protect human liberty and personal self-development broadly as maximum equal freedoms subject to democratic legislation that protects other human rights in a non-discriminatory, necessary, and proportionate manner.[22]

- John Rawls's conception of "justice as fairness" and "procedural justice" proceeds from a rational constitutional choice among individuals behind a "veil of ignorance" in order to define the basic rights and liberties of free and equal citizens in a constitutional democracy.[23] According to Rawls's "welfare liberalism," rational citizens would give priority to maximum equal liberty as the "first principle of justice," but would also recognize the "principle of fair equality of opportunity" and a "difference principle" within a system of equal basic rights.[24] The

---

[PROCEDURAL THEORIES OF JUSTICE] (2000), *available at* http://www.oefre.unibe.ch/law/gerechtigkeiteinleitung.pdf (last visited Oct. 4, 2003).

22. *See Rejoinder to Alston*, *supra* note 3.

23. *See* RAWLS, *supra* note 1, at 73, 118–23.

24. Even though "[e]ach 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's concept of maximum equal liberty is narrower than Kant's moral categorical imperative. *Id.* at 220. Equal liberties must be protected before "[s]ocial and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." *Id.* at 72. This "difference principle" is rationally chosen by individuals in order to limit social and economic inequalities (which inevitably result, for example, from the unequal distribution of human capacities) and to provide a "social minimum" of resources for the least well-

latter "secondary principles of social justice" are rationally necessary for defining "the appropriate distribution of the benefits and burdens of social cooperation"[25] so as to secure a socially just distribution of welfare essential for the moral and rational self-development of every person.

- 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 because only human conduct but, arguably, not market-mechanisms (such as prices) can be "unjust."[26]

- Communitarian theories of justice regard all values as embedded in a particular social culture and emphasize "deliberative democracy" and other democratic procedures (rather than 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."[27]

- Meritorian theories of justice combine notions of equality, desert, and "corrective justice" (e.g., punishment and compensation for injuries) in order to give "'to each according to his or her due.'"[28] Justice requires treating

---

off group through what Rawls calls the "transfer branch" of government. *See id.* at 244.

25. *Id.* at 4.

26. *See* 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 31 (1976); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–294 (1974) (arguing 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 GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY (1985); VIKTOR J. VANBERG, THE CONSTITUTION OF MARKETS: ESSAYS IN POLITICAL ECONOMY (2001).

27. CAMPBELL, *supra* note 15, at 4.

28. *Id.* at 24.

individuals as rational agents responsible for their actions and, therefore, rewarding or punishing their conduct.

The modern universal recognition of human rights 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-governance, and 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.[29] 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.[30] The legal definition of justice in terms of equal human rights is becoming ever more precise, and the legal justification for inequalities in the distribution of benefits and burdens is becoming ever more demanding. Even though democratic legislation defining, balancing, and implementing human rights and constitutional rights may differ legitimately 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,"[31] 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, the major unresolved problems of international justice relate to the *international* legal definition and constitutional and judicial protection of non-discriminatory

29. *See* HANS KÜNG, A GLOBAL ETHIC FOR GLOBAL POLITICS AND ECONOMICS (1998); A GLOBAL ETHIC AND GLOBAL RESPONSIBILITIES: TWO DECLARATIONS (Hans Küng & Helmut Schmidt eds., 1998); The Global Ethic Foundation, World Religions, Universal Peace, Global Ethic (2002), *at* http://www.weltethos.org/dat_eng/pdf_eng/we-ab_e.pdf (last visited Oct. 4, 2003).

30. *See* CAMPBELL, *supra* note 15, at 53–54 (discussing "justice as human rights"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (analyzing fundamental rights as legal and judicial "trumps").

31. RAWLS, *supra* note 1, at 6.

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.)

IV. 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; and (3) principles and rules for a just constitutional order protecting general citizen interests against government failures.

A. Maximum Equal Freedoms as the First Principle of Justice

In accordance with Aristotle's *Nicomachean Ethics*[32] (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 that justice be legally constituted by protection of equal basic rights. For example, the liberal claim that "[m]en are born and remain free and equal in rights" (found in Article 1 of the French Declaration of the Rights of Man and of the Citizen), is universally recognized in numerous U.N. human rights instruments.[33] If the modern universal recognition of inalienable core human rights is recognized as a new constitutional contract fundamentally changing the traditionally state-centered structures and contents of public international law, maximum equal freedoms as a first principle of justice no longer depends on "contractarian" or "non-contractarian"

32. *Cf.* FRIEDRICH, *supra* note 11, at 19–26.

33. "All human beings are born free and equal in dignity and rights." *UDHR*, *supra* note 13, art. 1.

thought experiments (e.g., on "natural rights"),[34] but has become a matter of positive national and international law.

The French Declaration defines liberty in terms of maximum equal freedom: "[l]iberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."[35] This constitutional guarantee of equal individual freedom subject to democratic legislation is recognized in most constitutional democracies and in international human rights law. It is protected either in terms of individual rights to maximum equal freedom (as in Article 2:1 of the German Basic Law), or in terms of an objective constitutional requirement, often unwritten (as in the constitutional law of the U.S. and some other Anglo-Saxon countries), of a legislative basis for restrictions of freedom and other human rights (as in Article 29 of the UDHR).[36] Respect for maximum equal "liberties-to-be" is of existential importance for personal self-development in dignity and, as explained in Kant's moral theory of the "categorical imperative,"[37]

---

34. *See, e.g.*, RAWLS, *supra* note 1, at 28. The two original positions used by John Rawls for modeling negotiations on a national constitutional contract among parties representing citizens, and negotiations on an international constitutional contract among parties representing "liberal" or "decent peoples," are contractarian theories which, similar to some non-contractarian theories, emphasize the need for higher-level "constitutional rules" limiting post-constitutional "lower-level law." Unlike this article, Rawls does not rely on existing national and international constitutional law as a normative basis, however imperfect, for a theory of justice. *See id.* at 102–68; RAWLS, *supra* note 20, at 89–120.

35. THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (1789) art. 4, *available at* http://www.constitution.org/fr/fr_drm.htm (last visited Sept. 16, 2003).

36. *See, e.g.*, Fred L. Morrison & Robert E. Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States*, *in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 91 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 7 (1977).

37. See ALLEN W. WOOD, KANT'S ETHICAL THOUGHT (1999), for more 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.'" *Id.* at 17.), 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

as well as in John Rawls's theory of justice,[38] it also constitutes the first principle of justice. "Liberties-to-be" must be distinguished from *instrumental freedoms* ("liberties-to-have," produce, acquire, sell, or consume), which may have a price rather than "dignity" (in Kant's terms). Yet, economic liberties (such as free choice of one's profession) and property rights also have an inalienable core in view of their existential necessity for personal self-development. As respect for human dignity requires that human beings be treated 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.[39] Hence, whereas some Anglo-American constitutional theories 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),[40] European Community (EC) law rightly recognizes individual producers, investors, traders, consumers, and other "EU citizens" as legal subjects of European integration law inside the EC.

Thus, maximum equal freedoms are no longer only a matter of moral judgment and of rational constitutional choice, but also are

---

time as an end, never merely as a means.'" *Id.* at 18.), and for respecting individual autonomy ("'the idea of the will of every rational being as a will giving universal law.'" *Id.*), and on Kant's theory of the antagonistic human nature promoting market competition and national and international constitutional guarantees of equal freedoms. 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.* ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 217 (1993); PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 264 (2000).

38. *See, e.g.*, RAWLS, *supra* note 1, at 47–101.

39. According to the German Constitutional Court, the "maxim 'man must always be an end 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." Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3 GLOBAL JURIST FRONTIERS 1, 75 (2003) (quoting BVerfGE 45, 187 at 227–28).

40. *See, e.g.*, CAMPBELL, *supra* note 15, at 56–59.

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."[41] These "basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."[42] Maximum equal freedoms are recognized as individual rights and objective constitutional principles in Article 2: "[e]very 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."[43] According to the EU Treaty (Article 6) and the EU Charter, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity,"[44] each of which serve as the legal basis for specific dignity rights (chapter I), liberty rights (chapter II), equality rights (chapter III), solidarity rights (chapter IV), citizens' rights (chapter V), and access to justice guarantees (chapter VI of the EU Charter).

B. Freedoms of Trade and Basic Social Rights as Secondary Principles 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 economy with free competition"[45] and "freedom to conduct a business in accordance with Community law and national laws,"[46] 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

41. Art. 1, para. 2 GG.
42. *Id.* para. 3.
43. *Id.* art. 2, para. 1.
44. EU CHARTER, *supra* note 2, pmbl.
45. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) arts. 4, 98, 105 [hereinafter EC TREATY].
46. EU CHARTER, *supra* note 2, art. 16.

goods, persons, services and capital is ensured."[47] Just as human dignity is indivisible, the indivisibility of all human rights is recognized in EU law as well as in international law.[48] The market freedoms guaranteed by the EC Treaty can be understood as specific manifestations of "freedoms of trade,"[49] deriving ultimately from an indivisible, basic "right to liberty."[50] The progressive extension of international legal and judicial guarantees for mutually beneficial economic cooperation among citizens across frontiers is the central objective of World Trade Organization (WTO) law and of the already more than 250 free trade areas, customs unions, and other economic integration agreements concluded by WTO Members.

In constitutional democracies and also in EC law, "process freedoms"[51] are supplemented by numerous rules and government

47. EC TREATY, *supra* note 45, art. 14.

48. *See* EU CHARTER, *supra* note 2, pmbl.; *Vienna Declaration and Programme of Action*, U.N. GAOR, World Conf. on Hum. Rts. ¶ 5, U.N. Doc. A/Conf. 157/23 (1993) [hereinafter *Vienna Declaration*] ("All human rights are universal, indivisible and interdependent and interrelated."). *See also* Ernst-Ulrich Petersmann, *On 'Indivisibility' of Human Rights*, 14 EUR. J. INT'L L. 381 (2003).

49. *See, e.g.*, Case 240/83, Procureur de la République v. Association de défense des brûleurs d'huiles usagées, 1985 E.C.R. 531, 548 ("[T]he 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."). Moreover, the freedom of movement of workers and other persons, access to employment, and the right of establishment have been described by the EC Court as "fundamental freedoms" or rights. *See* Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37, [1996] CEC (CCH) 175, 193 (1995); Case 222/86, Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens & Ors., 1987 E.C.R. 4097, ¶ 14, [1989] 1 CEC (CCH) 131, 145 (1987) (free access to employment is "a fundamental right which the Treaty confers individually on each worker in the Community."). The E.C.J. 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.

50. EU CHARTER, *supra* note 2, art. 6. *See, e.g.*, art. 2, para. 1 GG (granting the individual right to general freedom of action and free development of a person's personality, which has been recognized by the courts to protect individual rights, such as importing and exporting 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 ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 223–59 (Julian Rivers trans., 2002).

51. *Cf.* KOLM, *supra* note 15, at 13.

interventions aimed at correcting market failures and supplying public goods, such as: "a system ensuring that competition in the internal market is not distorted,"[52] "[e]nvironmental protection . . . with a view to promoting sustainable development,"[53] "fundamental social rights,"[54] and health and consumer protection.[55] The EC's wasteful and discriminatory agricultural policy illustrates that the EC's redistributive policies do not focus on the principle of "maximizing the minimum" of the most deprived people, a concept which various theories of justice postulate as a secondary principle of justice.[56] European constitutional law recognizes, at both national and EU levels, a variety of solidarity obligations to promote satisfaction of basic needs.[57]

While the core of *existential equal liberties* is recognized as inalienable, *instrumental market freedoms* are much more subject to legal regulation that balances diverse human rights and private and public interests.[58] Where respect for, and protection of, human dignity are recognized as constitutional obligations of governments, respect for the core of economic liberty rights and protection of social human rights to satisfy basic needs ("distributive justice") can be interpreted as legal consequences of an indivisible obligation to protect individual self-development in dignity.[59]

---

52. EC TREATY, *supra* note 45, art. 3(1)(g).
53. *Id.* art. 6.
54. *Id.* art. 136.
55. *Id.* arts. 152, 153.
56. *See, e.g.*, RAWLS, *supra* note 1, at 52–73.
57. *Cf., e.g.*, EU CHARTER, *supra* note 2, arts. 27–36.
58. *Cf.* Ernst-Ulrich Petersmann, *Human Rights and Liberalisation of Markets: The Social Responsibility of International Organisations to Make Market Competition and Social Rights Mutually Consistent, in* THE STATE AND NEW SOCIAL RESPONSIBILITIES IN A GLOBALISING WORLD (2003).
59. *Cf.* COUNCIL OF EUROPE, THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (1998). 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 a mere object within the state." *Ullrich*, *supra* note 39 (quoting BVerfGE 45, 187 at 227–28). *See also* RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 20–46 (Christian Starck ed., 1987) (discussing the

C. 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 of the 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).[60] The democratic balancing process, in its implementation of legislation and institutions, may differ legitimately 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 the 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.[61] As emphasized by the European Court of Human Rights, human rights treaties are now part of an objective "constitutional order," based no longer exclusively on states, but also on individuals as legal subjects.[62]

Human rights, and the reciprocal obligations of governments, do not end at national borders. U.N. human rights law recognizes that "[e]veryone is entitled to a social and international order in which the

---

judicial protection by the German Constitutional Court of maximum equal freedoms in terms of economic liberty rights).

60. *See* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (discussing the emerging "human right to democratic governance"); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (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 PAUL K. HUTH & TODD L. ALLEE, THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY (2003).

61. For examples of these various "individual" and "objective" functions of human rights, see ALEXY, *supra* note 50; RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW, *supra* note 59.

62. *Cf.* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 27 (1995).

rights and freedoms . . . can be fully realized."[63] 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"), U.N. human rights instruments also rightly emphasize that "[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."[64] The widespread poverty and human rights violations outside the thirty 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 realized effectively in many U.N. 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 U.N. member states are not effectively protected and enforced in many states.

V. THE EC AND WTO AGREEMENTS AS "INTERNATIONAL ECONOMIC CONSTITUTIONS"

Parts I to IV concluded that in modern international law, as well 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 inevitably gives 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."

---

63. *UDHR*, *supra* note 13, art. 28. *See also Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., 97th plen. mtg., Annex, U.N. Doc. A/RES/41/128 (1986).

64. *Vienna Declaration*, *supra* note 48, ¶ 8. These interrelationships are explained in Ernst-Ulrich Petersmann, *Constitutional Economics, Human Rights and the Future of the WTO*, 58 AUSSENWIRTSCHAFT: SWISS REV. OF INT'L ECON. REL. 49 (2003).

A. 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: "[a]ny society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."[65] The Court of Justice of the European Communities (E.C.J.) emphasizes that the EC is "a Community based on the rule of law, inasmuch 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."[66] 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; these guarantees have also 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:

- an "economic constitution" for "an open market economy with free competition";[67] and
- a "political constitution" guaranteeing human rights, democratic governance, and an "area of freedom, security and justice"[68] in the EU.

The EU Charter, and its incorporation into the draft treaty establishing a constitution for Europe, confirm the E.C.J.'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

65. THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, *supra* note 35, art. 16.

66. Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1339, 1365.

67. EC TREATY, *supra* note 45, art. 4.

68. EU TREATY, *supra* note 5, art. 2. *See also id.* arts. 6, 7, 49 (regarding human rights and democracy, breaches by member states, and admissions of states into the union).

which the Member States have collaborated or to which they are signatories.[69]

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.

B. 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 also, in the case of the U.N. Charter, over other conflicting treaty rules,[70] and the separation and mutual "checks and balances" among the legislative, executive, and judicial organs of international organizations (sometimes with compulsory international jurisdiction, such as in the WTO and the Law of the Sea Convention) have promoted the emergence of "international constitutional law" on the worldwide level.[71] This progressive "constitutionalization" is not limited to international treaty law but, as illustrated by the universal recognition of *jus cogens*,[72] of *erga omnes* obligations,[73] 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 U.N. Charter and the constitutions of the International Labor Organizations (ILO), the World Health Organization (WHO) and the

---

69. Gráinne de Búrca, *Fundamental Rights and Citizenship*, *in* TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 11, 15 (Bruno de Witte ed., 2003), *at* http://europa.eu.int/futurum/documents/other/oth020403_en.pdf.

70. *See* U.N. CHARTER art. 103.

71. *See, e.g.*, Christian Walter, *Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT'L L. 170 (2001); Ernst-Ulrich Petersmann, *Constitutionalism, International Law and "We the Peoples of the United Nations"*, *in* TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER 291 (Hans-Joachim Cremer et al., 2001).

72. *E.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention].

73. *E.g.*, Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

U.N. Education, Scientific and Cultural Organization (UNESCO), explicitly refer to human rights.[74] Yet, the general international law requirement to construe international treaties in conformity with general international law rules applicable among the parties concerned[75] requires that construction of the law of international organizations be 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.[76]

---

74. *See, e.g.*, U.N. CHARTER pmbl.; Constitution of the International Labour Organisation, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378; Constitution of the United Nations Educational, Scientific, and Cultural Organization, Nov. 16, 1945, 4 U.N.T.S. 275; Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.

75. *See* Vienna Convention, *supra* note 72, art. 31 (according to the WTO Appellate Body, article 31 reflects customary rules of international treaty interpretation).

76. International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Sess., 37 I.L.M. 1233, 1237–38 (1998).

The 1994 Agreement establishing the WTO[77] includes all four 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 provision of this Agreement shall prevail to the extent of the conflict;"[78] (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;[79] and (4) the compulsory jurisdiction of WTO dispute 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. Similar to the German Constitutional Court,[80] the E.C.J.,

77. Marrakesh Agreement Establishing World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

78. *Id.* art. XVI.

79. 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. *See* WTO Panel Report on United States–Sections 301–310 of the Trade Act of 1974, Dec. 22, 1999, WT/DS152/R,¶ 7.73, *available at* http://www.worldlii.org/int/cases/WTOP/1999/6.html.

80. *See, e.g.*, *Rechtsschutz gegen Maßnahmen des Europäischen Patentamts*, 37 NEUE JURISTISCHE WOCHENSCHRIFT 2705, 2705–06 (2001) (discussing the recent decision of the Federal Constitutional Court in a complaint by a German citizen against the European Patent Office in Munich 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).

and the European Court of Human Rights,[81] WTO dispute settlement bodies increasingly apply 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 are they referred to, thusfar, in the legal findings of WTO dispute settlement bodies.[82]

VI. THE HUMAN-RIGHTS APPROACH TO WTO LAW ADVOCATED BY THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS

Neither the U.N. Charter nor the law of U.N. 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, U.N. law has manifestly failed to realize, in the majority of its 191 U.N. 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."[83] Recent U.N. resolutions recognize the interrelationships between human rights, consumer-driven competition, and citizen-driven democracies.[84] Nevertheless, the numerous non-democratic U.N. member governments make it politically difficult for the U.N. and U.N. Specialized Agencies to follow the approach of regional organizations in Europe and North America which explicitly condition market integration on respect for human rights and constitutional democracy. Some U.N. bodies (like the International Monetary Fund (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

81. For references to the relevant case law, see Walter, *supra* note 71; ERNST-ULRICH PETERSMANN, TIME FOR INTEGRATING HUMAN RIGHTS INTO THE LAW OF WORLDWIDE ORGANIZATIONS 24–25 (Jean Monnet Program, Working Paper No. 7/01, 2001).

82. *See* Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 J. WORLD TRADE 241, 243, 246 (2003).

83. U.N. CHARTER art. 55.

84. *See, e.g.*, *Vienna Declaration*, *supra* note 48.

constitutional restraints. Government discretion to define the "public interest" in a manner discriminating among domestic citizens and reducing consumer welfare prevails in most U.N. member states, including: (1) *foreign policy discretion* to apply discriminatory and welfare-reducing border restrictions; (2) *parliamentary discretion* to redistribute income among domestic citizens through discriminatory regulation of the domestic economy in favor of powerful producer interests; and (3) *judicial discretion* to interpret and apply domestic law without regard to the international legal obligations of states or the EC.

U.N. human rights bodies often include non-democratic governments and neglect the functional interrelationships between human rights, consumer-welfare, and democracy.[85] For example, a 2001 report for the U.N. Commission on Human Rights discredited the WTO as "a veritable nightmare" for developing countries and women[86] 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 U.N. High Commissioner for Human Rights recently published three more differentiated reports analyzing human rights dimensions of the WTO Agreements on Trade-Related Intellectual Property Rights (TRIPS),[87] the Agreement on Agriculture (AOA)[88]

85. *See* Petersmann, *supra* note 82. In 2002, Libya, a country known for its disregard of human rights, presided over the U.N. Commission on Human Rights.

86. *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 52d Sess., Provisional Agenda Item 4, ¶ 15, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000) [hereinafter *Globalization and Its Impact*]. 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.

87. *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, U.N. ESCOR, 52d Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/13 (2001).

88. *Globalization and Its Impact*, *supra* note 86.

and the General Agreement on Trade in Services (GATS).[89] The reports call for a "human rights approach to trade" which:

> (a) Sets the promotion and protection of human rights among the objectives of trade liberalization [not exceptions];
>
> (b) Examines the effects 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;
>
> (c) 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 for the implementation of human rights;
>
> (d) Seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
>
> (e) Requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
>
> (f) Promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[90]

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 U.N. human rights conventions.[91] 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

89. *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*, U.N. ESCOR, 54th Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2002/9 (2002).

90. *Id.* at 2.

91. *See* Human Rights Conventions, *supra* note 16.

limitations of "market failures" (e.g., in case of essential services, anti-competitive price increases or output restrictions), as well as of "government failures" for the protection and fulfillment of human rights, is acknowledged and discussed. The reports rightly underline that references in numerous WTO provisions to *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 U.N. High Commissioner suggests recognizing 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.[92]

VII. NEED FOR CLARIFYING THE HUMAN RIGHTS OBLIGATIONS OF INTERNATIONAL ORGANIZATIONS

In Europe, human rights are 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 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 of the EC.[93] The European Court of Human Rights has likewise held:

> Where States establish international organisations, 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

92. *See Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*, *supra* note 89, at 2.

93. In *Internationale Handelsgesellschaft mbH*, the E.C.J. held that respect for human rights forms an integral part of the general principles of Community law: "[T]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community." Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 16 E.C.R. 1125, 1135 (1970).

> States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[94]

The U.N. Charter includes explicit human rights obligations for U.N. member states,[95] which, in case of conflict, assert legal primacy over other international treaties.[96] The U.N. institutions (e.g., the ICJ) have, however, failed so far to specify the exact scope of the expanding human rights obligations of all U.N. member states and U.N. organs under the U.N. Charter. The laws of many U.N. specialized agencies (such as the IMF and the World Bank) and of other worldwide organizations (such as the WTO) do 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. Additionally, all U.N. members have recognized, for instance, in various U.N. resolutions like the UDHR, 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."[97] Hence, the U.N. resolutions on the "right to development" define development in terms of fulfillment of basic needs and human rights.[98] If, as universally recognized in Principle 1 of the "Rio Declaration" of the U.N. Conference on Environment and Development, "[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,"[99] such rights

94. T.I. v. United Kingdom, App. No. 43844/98 2000-III Eur. H.R. Rep. at 15, *available at* http://ehcr.coe.int/eng. In *Matthews v. United Kingdom*, 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 among EC member states on the election of the European Parliament: "[T]here 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." Matthews v. United Kingdom, App. No. 24833/94, 28 Eur. H.R. Rep. 361, 362 (1999).

95. U.N. CHARTER arts. 55, 56.

96. *Id.* art. 103.

97. *UDHR*, *supra* note 13, art. 28.

98. *See, e.g.*, *Declaration on the Right to Development*, *supra* note 63.

99. *Rio Declaration on Environment and Development, United Nations Conference on Environment and Development*, U.N. GAOR, 47th Sess., Annex I, princ. 1, U.N. Doc. A/CONF.151/26 (vol. I) (1992).

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 U.N. Convention on the Rights of the Child,[100] only 137 have accepted the U.N. Covenant on Economic, Social and Cultural Human Rights.[101] The U.N. Convention on the Human Rights of Migrant Workers and their Families has been ratified so far by only twenty-two U.N. member states.[102] Following the example of the 1998 ILO Declaration on Fundamental Principles and Rights at Work,[103] 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 U.N. and the ICJ should likewise clarify the extent to which U.N. member states and international organizations are obligated today (under the U.N. Charter and under general international law) to respect and protect civil, political, economic, and social human rights even if they have not ratified the relevant U.N. human rights conventions concerned.

VIII. 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 also protects the "market forces" of individual demand and supply of scarce goods, services, and job

100. Convention on the Rights of the Child, *supra* note 16.

101. International Covenant on Economic, Social and Cultural Rights, *supra* note 16.

102. *See* Office of the High Commissioner for Human Rights, *Status of Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *at* http://www.unhchr.ch/html/menu3/b/migrants.htm (last visited Oct. 4, 2003).

103. International Labour Organisation, ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Sess., Geneva, June 19, 1998, 37 I.L.M. 1233, *available at* http://www.ilo.org/public/english/standards/decl/declaration/text (last visited Oct. 4, 2003).

opportunities necessary for the enjoyment of human rights, and inevitably gives 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 (such as protecting the freedom to have and use resources exclusively), transaction rights (such as 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.

A. "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 for the exchange of social services and political ideas (e.g., the *agora* in classical Athens during the 5th 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.[104]

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 of freedom of trade in the Middle Ages, 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 United States Constitution in 1791.[105] The particular focus of liberty rights (e.g., freedom of religion, freedom of association, freedom to demonstrate, and freedom of trade) often was shaped by historical events (such as the schism of the Christian church from the 16th century onwards) and by political struggles against 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 21st century.

The common core of markets and of human rights rests on "normative individualism" (i.e., respect for personal autonomy, individual diversity, and the dependence of values on individual preferences and consent).[106] The Kantian moral "categorical imperative"[107] of maximizing equal liberties across frontiers justifies

104. *See* World Bank, Globalization, Growth and Poverty: Building an Inclusive World Economy (2002), *available at* http://econ.worldbank.org/prr/globalization/text-2857.

105. *See, e.g.*, U.S. CONST. amends. I-X; THE MAGNA CARTA OF 1215, *available at* http://www.constitution.org/eng/magnacar.htm (last visited Sept. 16, 2003); FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, *supra* note 35.

106. *See* BRENNAN & BUCHANAN, *supra* note 26, at 21–25 (discussing individuals as sources of value in economics); JOHN B. DAVIS, THE THEORY OF THE INDIVIDUAL IN ECONOMICS: IDENTITY AND VALUE (2003).

107. *See supra* text accompanying note 37.

both the human rights objective of empowering and protecting individuals through equal constitutional rights and 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 and citizen sovereignty) based on voluntary cooperation in economic and political markets reflecting social dialogues about values. According to Kant's legal philosophy, the antagonistic natures 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.[108]

B. 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 that 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 inevitably gives 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-maximizing 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

108. On the Kantian theory of national and international constitutionalism, see Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 7–11 (1998).

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 also, increasingly, to the recognition of international competition rules (such as in EC, North Atlantic Free Trade Agreement (NAFTA), and WTO law) and international constitutional rules (e.g., in U.N. human rights law and EU law) aimed at protecting non-discriminatory conditions of international trade, competition, and a cosmopolitan, international "civil society" (based on human rights and, in the EU, also on non-discriminatory EU citizen rights).[109]

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, 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, 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 upon* constitutional reforms "top down" (like freedom of trade inside the EC); these reforms are often politically impossible to realize through *unilateral* national reforms

109. *See generally* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 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".

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, have discriminated against foreigners and against foreign goods, services, and capital movements in a way that reduces economic welfare and individual freedom at home and abroad.[110]

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

Between 1990 and 2001, fifty-four U.N. member countries suffered negative economic growth.[111] Most of these countries (such as those in sub-Saharan Africa) had governments which did not effectively protect human rights, rules-based market competition, and democratic governance.[112] The modern economic insight that human rights make individuals not only better democratic citizens, but also "better economic actors,"[113] is important 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) also offers 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

110. This was the central thesis of ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

111. *Human Development Report 2003 Millennium Development Goals: A Compact Among Nations to End Human Poverty*, U.N. Development Programme, at 2 (2003), U.N. Doc. DP(058)/H8/2003, *available at* http://www.undp.org/hdr2003/pdf/hdr03_complete.pdf.

112. *See Human Security Now*, *supra* note 19.

113. Mark Malloch Brown, *Foreword* to *Human Development Report 2000 Human Rights and Human Development—for Freedom and Solidarity*, U.N. Development Programme, at iii (2000), U.N. Doc. DP(058)/H81/ARM/2000, *available at* http://www.undp.org/hdr2000/english/book/ch0.pdf.

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 (such as 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.[114]

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), but also 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).[115] 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 the welfare-increasing division of labor, social justice, and the overall consistency of legal systems in a manner respecting and protecting individual self-development, responsibility, and human dignity) are often not adequately understood by economists and lawyers.[116] 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"

114. Neither in the EC nor in most federal states (including the U.S.) has the constitutional doctrine of limited delegation of powers prevented ever-expanding and increasingly vague delegations to the higher (federal) level. Judicial protection of human rights and 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.

115. On these diverse functions of human rights, see ALEXY, *supra* note 50; RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW, *supra* note 59.

116. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998) (discussing the instrumental function of human rights for dealing with the problems of limited knowledge, conflicting interests, and abuses of power).

(e.g., democracy) without according similar importance to economic and social rights constituting "economic markets."[117]

If unnecessary human poverty, the dependence of personal self-development in dignity on economic resources and professional freedom, and the need for constitutional limitations of abuses of economic power are recognized as interrelated human rights problems, then human rights law can be perceived as an *instrument* for empowering individuals and protecting their human dignity no less in economic markets 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"[118] to a large extent by relying on the "vigilance of individuals concerned to protect their rights"[119] 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.[120]

1. Human rights as instruments for reducing the problem of limited knowledge

Human rights (for example, 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

---

117. *See Rejoinder to Alston*, *supra* note 3, at 845–51 (criticizing the authoritarian premises of 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).

118. EC TREATY, *supra* note 45, art. 14.

119. Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 13.

120. *See* discussion *supra* text accompanying note 49 (referencing pertinent jurisprudence of the E.C.J.).

limited knowledge reduces the need for centralized government regulation (such as laws imposing the majority's preferences on minorities), which might unnecessarily limit individual freedom and disrupt decentralized ordering, notwithstanding the inevitable need for some centralized ordering, as 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 (i.e., the right to advertise their products) and consumers (i.e., the right to criticize the consumer risks of dangerous products).[121]

2. Human rights as incentives for mutually beneficial division of labor

Economic transactions are based on the exercise of liberty rights (such as selling and buying) and the transfer of property rights (such as trading 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 (for example, 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 (i.e., 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.

121. The interesting question of why human rights courts often protect freedom of commercial speech more comprehensively than trade courts do cannot be pursued here. *See, e.g.*, Hertel v. Switzerland, 1998-VI Eur. Ct. H.R. 2299, 2343 (concluding 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).

The WTO's *Doha Declaration on the TRIPS Agreement and Public Health*,[122] and the follow-up WTO decision on implementation of paragraph six of that *Doha Declaration*,[123] "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.

3. Human rights as conflict-prevention mechanisms

Human rights can help transform the Hobbesian "war of everybody against everybody else" into peaceful cooperation based on equal legal rights and access 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 best be reconciled on the basis of equal liberty rights (e.g., freedom of contract) and other human rights (e.g., to judicial protection). Human rights also enable decentralized solutions for the "value problem" that human views about "truth" may differ, and value judgments about "the good" and "the beautiful" are not necessarily true.[124] By protecting diversity of individual values (e.g., through freedom of religion, freedom of opinion, and freedom of the press), and by preventing majorities from imposing their value preferences on minorities, human rights promote peaceful coexistence, tolerance, and scientific progress. For instance, in a recent judgment, the EC Court of Justice held that even though Austria's failure to ban a political demonstration blocking freedom of transit on an important motorway amounted to a restriction of free

122. *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001), *at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf.

123. *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Aug. 30, 2003), *at* http://www.wto.org/
english/tratop_e/trips_e/implem_para6_e.htm.

124. 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 (e.g., markets and democracies) and centralized methods (e.g., dictatorships) to overcome conflicts about value judgments, see WOLFGANG FIKENTSCHER, FREIHEIT ALS AUFGABE [FREEDOM AS A TASK] 50–51 (1997).

movement of goods in the EC (a violation of Article 28 of the 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.[125]

Effective protection of human rights inevitably gives rise to information markets, economic markets, political markets, and also "legal markets" as decentralized means for evaluating scarce resources (such as 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.

4. 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-defense vis-à-vis illegal abuses of power) offer "checks and balances" enabling citizens (such as women and 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 by 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.*,

125. Case C-112/00, Schmidberger, Internationale Transporte und Planzüge v. Republic Österreich, [2003] 2 C.M.L.R. 34, 1043 (2003), http://europa.eu.int/eur-lex/en/dat/2003/c_184/c_18420030802en000100002.pdf.

in GATT Article XX) and other "public interest clauses" in WTO law as well as in regional integration agreements (such as Article 30 of the 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.

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), human rights 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 (such as public monopolies and trade-distorting subsidies).

5. 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 interest into mutually beneficial cooperation and promote a decentralized "self-enforcing constitution." Human rights (such as individual access to courts) and corresponding obligations (such as 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).[126] The private enforcement and judicial protection of the EC Treaty's

126. *See* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan Boyle & Michael Anderson eds., 1998) (recognizing the importance of human rights for rendering environmental law and environmental protection more effective); ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE (Francesco Francioni ed., 2001); MAGUELONNE DÉJEANT-PONS & MARC PALLEMAERTS, HUMAN RIGHTS AND THE ENVIRONMENT (2002).

guarantees of non-discrimination (e.g., "equal pay for male and female workers for equal work" pursuant to Article 141 of the EC Treaty), and of free movements of goods, services, persons, and capital across frontiers as "fundamental individual rights" illustrates that a rights-based approach can be successfully applied to economic integration not only inside constitutional democracies but also across frontiers.[127] Likewise, the EU citizen rights to a direct election of the European Parliament and to direct access to the European Court of Justice apply constitutional principles to the EU's "political market" that are also recognized 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 (including at the international level, such as 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 customary rules of interpretation of public international law."[128]

6. Human rights as sources of democratic legitimacy

The human rights to "periodic and genuine elections . . . by universal and equal suffrage"[129] and to democratic participation in the exercise of government powers[130] promote transparent governance based on "the will of the people"[131] and on "deliberative

127. *See supra* text accompanying note 49.

128. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. III para. 2, 33 I.L.M. 1125 (1994).

129. *UDHR*, *supra* note 13, art. 21.

130. *See* International Covenant on Civil and Political Rights, *supra* note 16, art. 25.

131. *UDHR*, *supra* note 13, art. 21.

democracy"[132] 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 U.N. Resolutions on the right to development, for instance, rightly define development in terms of fulfillment of basic needs and of human rights.[133]

D. 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 (such as by competition rules prohibiting cartels and other abuses of economic power) without reducing the social gains from non-discriminatory competition and without preventing citizens from engaging in mutually beneficial trade across frontiers.[134] The definition of specific civil, political, economic, social, and cultural human rights and constitutional rights, in national and international constitutions as well as in 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 that take 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 government interventions and of legal rules remains, however, often controversial. Article 295 of the EC Treaty, for instance, leaves the

132. *See, e.g.*, DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS (Harold Hongju Koh & Ronald C. Slye eds., 1999).

133. *See Declaration on the Right to Development*, *supra* note 63.

134. *See generally* PETERSMANN, *supra* note 110, at 57–58 (surveying this economic theory of optimal intervention, with references to economics literature).

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.[135] 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 (for example, in the U.S.) on protection of competition as a process.[136] This divergent focus illustrates how the legal design of competition rules and of individual rights to "freedom of competition"[137] in national and international competition laws may differ legitimately 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 country, even inside the EC. National social and health services in EC member states, however, are subject to single market principles such as freedom to provide services, free movement of workers, and non-

135. EC TREATY, *supra* note 45, art. 295.

136. U.S. competition lawyers criticize this European notion of "restriction on economic freedom" on several grounds such as: "(1) its failure to generate precise operable legal rules (i.e. 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." Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON MKT. L. REV. 973, 978 (1995). For an explanatory example of the EC position, see Philip Marsden, *The Divide on Verticals*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 117 (Simon J. Evenett et al. eds., 2000). For a different U.S. position, see Eleanor M. Fox, *"We Protect Competition, You Protect Competitors"*, 26 WORLD COMPETITION L. & ECON. REV. 149 (2003).

137. On "freedom of competition" in EC law, see Case 240/83, Procureur de la République v. Association de défense des brûleurs d'huiles usagées, 1985 E.C.R. 531; Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] CEC (CCH) 175, 193 (1995); Case 222/86, Union Nationale des Entraîneurs et Cadres Techniques Professionnales du Football v. Heylens, 1987 E.C.R. 4097, [1989] 1 CEC (CCH) 131 (1987).

discriminatory treatment (e.g., of migrant workers). Whereas EC Council Regulation 1408/71 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.[138] 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.[139] Yet, collective agreements among "social partners" appear to be immune from EC competition law.[140] Thus 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."[141] 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, for example, "non-inflationary growth,"[142] "price stability,"[143] and "an open market economy with free competition, favouring an efficient allocation of resources"[144] in order to avoid inflationary wage policies and reduce incentives for "moral hazard" in labor markets and social policies.[145] So far, social rights and the corresponding obligations of governments and "social partners" are

138. *See* MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION (2002).

139. *See id.* at 11 (referencing the jurisprudence of the E.C.J.).

140. *Cf.* Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751.

141. Case C-44/94, The Queen v. Minister of Agric., Fisheries and Food, ex parte Nat'l Fed. of Fishermen's Org. and Others, 1995 E.C.R. I-3115, I-3152.

142. EC TREATY, *supra* note 45, art. 2.

143. *Id.* art. 4, para. 1.

144. *Id.* art. 105, para. 1.

145. *Cf.* Simon Deakin, *Labour Law as Market Regulation: The Economic Foundations of European Social Policy*, *in* EUROPEAN COMMUNITY LABOUR LAW: PRINCIPLES AND PERSPECTIVES 63 (Paul Davies et al. eds., 1996).

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 the 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 U.N. law), social rights (e.g., in ILO law), intellectual property rights (e.g., in the law of the World Property Organization and the WTO's TRIPS Agreement), and investor rights (e.g., in the almost 2000 bilateral investment treaties). Due to the producer-driven politics of intergovernmental negotiations, investor rights (such as 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.

IX. HUMAN RIGHTS REQUIRE A "SOCIAL MARKET ECONOMY": DIVERSITY OF APPROACHES RECONCILING HUMAN RIGHTS AND MARKET COMPETITION

Modern national constitutions (such as Article 1 of the German Basic Law) and EU law proceed from the value premise that: "[h]uman dignity is inviolable. It must be respected and protected."[146] Human rights entail social responsibilities of governments to enable each citizen to live a life of dignity, freedom, and responsibility. In addition to constituting individual rights and corresponding governmental obligations, human rights also require

146. EU CHARTER, *supra* note 2, art. 1.

governments to promote "principles of justice," such as "solidarity,"[147] equal opportunities, and promotion of welfare-increasing competition without undermining human rights so that the "losers" in the market game also 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.[148]

The approaches of regional and worldwide organizations (such as the EU, 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.

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.[149] The recent Commission White Paper on "European Governance"[150] likewise recommends "good governance principles"

147. *See id.* ch. IV.

148. DRAFT TREATY, *supra* note 2, art. 3.

149. *Cf., e.g.*, WORLD BANK GOVERNANCE AND HUMAN RIGHTS (George Black & Patricia Armstrong eds., 1995); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FINAL REPORT OF THE AD HOC WORKING GROUP ON PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE (1995), *available at* http://www.oecd.org/publications/0,2743,en_2649_201185_1_1_1_1_1,00.html (last visited Sept. 21, 2003).

150. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER, COM(01)428 final at 3, *available at*

(such as "openness, participation, accountability, effectiveness . . . coherence"[151]) and objective constitutional principles (such as the "Community method") for "connect[ing] 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.[152] 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 be defined in a formal manner as only "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."[153] Nor should "civil society" be reduced to its organized components.[154] The EU Treaty 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 (such as the EU Parliament and EU Council), the greater the need for complementing "representative democracy" through direct citizen rights defining the "public interest" in a justiciable manner by empowering citizens to

---

http://www.europa.eu.int/comm/governance/white_paper/en.pdf (last visited Sept. 21, 2003).

151. *Id.* at 8 n.1.

152. *Id.*

153. *Id.*

154. *Id.* at 14–15.

defend their equal rights vis-à-vis majority politics.[155] 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" (such as by prohibiting restrictive business practices), "producer welfare" (such as by allowing private price fixing) or "total national welfare" (such as by promoting export cartels enhancing domestic producers' surplus at the expense of foreign consumers). The "European School" of "*ordo*-liberalism"[156] emphasizes the need for "an open market economy with free competition"[157] based on a non-discriminatory "system ensuring that competition in the internal market is not distorted,"[158] as the most efficient way of promoting producer productivity, innovation, and job creation to meet consumer demand for goods and services. While all citizens are consumers, their respective producer interests often conflict 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 to empower citizens to protect themselves against abuses of power (such as private monopolization, cartel agreements, or arbitrary redistribution of income through government policies).

---

155. On this "inverse relationship" between human rights and parliamentary democracy at national and international levels, see Ernst-Ulrich Petersmann, *From State Sovereignty to the Sovereignty of Citizens in the International Relations Law of the EU?*, *in* SOVEREIGNTY IN TRANSITION 145 (Neil Walker ed., forthcoming Nov. 2003).

156. *See, e.g.*, DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 334–91 (1998) (discussing the influence of the "European school" of "*ordo*-liberalism" on EC competition law); DORIS HILDEBRAND, THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES 1–5 (2d ed. 2002) (discussing the "European school" of "*ordo*-liberalism" and a "social market economy").

157. EC TREATY, *supra* note 45, arts. 4, 98, 105.

158. *Id.* art. 3(g).

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 to prevent unfair competition (e.g., by securing non-discriminatory minimum standards for social security and employment regulation). For instance, the EC Treaty's guarantee of "equal pay for male and female workers for equal work"[159] originally was motivated by French concerns at avoiding competitive distortions.[160] 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, or 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

159. *Id.* art. 141.
160. *Cf.* BELL, *supra* note 138, at 8.

> labour, 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.[161]

In contrast to the earlier distinction of a "market correction function" of national social policies and a "market-building function" of EC social policies,[162] the newly introduced "open method of co-ordination" 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.[163] Emphasis on corporate social responsibility and on more precise obligations of social partners is another characteristic of the recent evolution of social policies in the EU.[164]

At the worldwide level, the ILO and various U.N. human rights bodies likewise emphasize the need for taking into account the human rights obligations of all U.N. 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 demand legal obligations not only for national governments, but also for the collective exercise of government powers in regional and worldwide organizations. For instance, U.N. human rights bodies rightly emphasize that human rights to food, health, education, development, property, the enjoyment of the benefits of scientific progress, and intellectual property may be relevant for interpreting WTO rules on protection of intellectual property rights and trade in goods and services (e.g., regarding

---

161. EC TREATY, *supra* note 45, art. 136.

162. *Cf., e.g.*, Wolfgang Streeck, *From Market Making to State Building? Reflections on the Political Economy of European Social Policy*, *in* EUROPEAN SOCIAL POLICY: BETWEEN FRAGMENTATION AND INTEGRATION 389 (Stephan Liebfried & Paul Pierson eds., 1995).

163. *See* Erika Szyszczak, *The New Paradigm for Social Policy: A Virtuous Circle?*, 38 COMMON MKT. L. REV. 1125, 1125 (2001).

164. *See generally* L'ACTION COLLECTIVE EN EUROPE [COLLECTIVE ACTION IN EUROPE] (Richard Balme et al. eds., 2002).

availability, accessibility, and acceptability of educational and health services, food, and medicines).[165]

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

The EC Treaty and the EU Charter of Fundamental Rights 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."[166] The EU Charter's chapter IV on "solidarity" recognizes comprehensive social rights and corresponding government responsibilities, thereby complementing the economic market access rights with 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"[167] have led to EC directives on racial equality[168] and equal treatment in employment and occupation,[169] which reflect a further move towards an anti-discrimination law that is based more on the protection of fundamental rights than on an economic market integration rationale.

X. 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 as well as the Draft Treaty Establishing a Constitution for Europe,[170] and the increasing "global justice campaigns" by non-governmental organizations (NGOs) which influence international rule-making ever more actively (e.g., on the International Criminal Court, environmental agreements, WTO negotiations), illustrate the emergence of a new international "civil society." Additionally, these conventions and campaigns establish the emergence of new, more democratic forms of international rule-making and international public discussions ("deliberative democracy") that focus not only on intergovernmental

165. *See supra* Part VI and notes 85–88.
166. EC TREATY, *supra* note 45, art. 18.
167. *Id.* art. 13.
168. Council Directive 2000/43, 2000 O.J. (L 180) 22.
169. Council Directive 2000/78, 2000 O.J. (L 303) 16.
170. *See* sources cited *supra* note 2.

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 benefit more from the global division of labor, and the increasing calls for adapting the state-centered U.N. system to the needs of the twenty-first century (by, for example, enforcing the human rights obligations of U.N. law more effectively vis-à-vis the many "failed" and non-democratic U.N. member states) are further illustrations of the increasing recognition that global market integration must be supplemented by a new U.N. security system focusing on "human security" and democratic "peace by satisfaction,"[171] as well as by a more comprehensive global integration geared toward 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, as well as by additional constitutional rules that can be invoked and enforced by citizens in national and international courts. Moreover, at the worldwide level, WTO rules and human rights entail complementary obligations of governments and intergovernmental organizations to respect and to 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 the 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

171. *See* RAWLS, *supra* note 20, at 47 (distinguishing between "peace by satisfaction" and "peace by power").

of labor. Human rights and market integration law pursue complementary objectives (such as freedom and equal opportunities of individuals) on the basis of complementary principles (such as 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, thereby reinforcing national "bottom-up struggles" by international "top-down pressures" to abolish welfare-reducing market access restrictions and to 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, for example, 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."[172] 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 extend far beyond the "cosmopolitan rights" postulated by Immanuel Kant.[173] Yet, it seems obvious that the current international economic and legal order is not sufficiently "just" to be durable. The great achievement of post-war national and international constitutionalism has been to

---

172. FRIEDRICH, *supra* note 11, at 199.

173. *Cf.* IMMANUEL KANT, *Eternal Peace*, *in* THE PHILOSOPHY OF KANT 430, 446 (Carl J. Friedrich ed., 1949) ("The Cosmopolitan or World Law shall be limited to conditions of universal hospitality."); IMMANUEL KANT, *Idea for a Universal History with Cosmopolitan Intent*, *in* THE PHILOSOPHY OF KANT 116 (Carl J. Friedrich ed., 1949). 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.

channel the all too often violent "struggles for law" into peaceful, incremental changes and reforms of the post-war international legal system.

International guarantees (e.g., in WTO law) for transnational movement of goods, services, and capital extend far beyond autonomous domestic laws and serve "constitutional functions" by protecting citizens against welfare-reducing restrictions and discrimination by their own governments.[174] 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 basing "international justice"—contrary to the views of John Rawls—not only on freedom and equality of *peoples*,[175] but also on equal human rights[176] and multi-level constitutionalism.[177]

---

174. *See generally* PETERSMANN, *supra* note 110.

175. In his book, *The Law of Peoples*, Rawls rejects the constitutional values of maximum equal freedoms of individuals, which he uses for his *theory of justice* in a constitutional democracy as a basis for a theory of "international justice" on the ground that these Western human rights values show insufficient tolerance and respect for non-liberal, but "decent peoples." RAWLS, *supra* note 20; RAWLS, *supra* note 1. 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 non-liberal peoples does not appear in Rawls's *A Theory of Justice* for constitutional democracies, which argues on exclusively individualist grounds. *See* RAWLS, *supra* note 1. 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.

176. *See, e.g.*, THOMAS W. POGGE, REALIZING RAWLS (1989); FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 105–126 (1998).

177. On the "constitutional functions" of international guarantees of freedom, non-discrimination, and "justice," and of rule-making and adjudication in international organizations, see Petersmann, *supra* note 71; Petersmann, *supra* note 108. *See also* PETERSMANN, *supra* note 110. Specifically on "multilevel constitutionalism" in EU law, see generally Ingolf

Both international justice and national justice depend 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 require democratic forms of governance at national and international levels.[178] 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, differ legitimately from country to country and from international organization to organization.

Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMMON MKT. L. REV. 703 (1999); Ernst-Ulrich Petersmann, *The Foreign Policy Constitution of the European Union: A Kantian Perspective*, *in* FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER 433 (Ulrich Immenga et al. eds., 1996).

178. *See supra* note 60 and accompanying text; *see generally* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS (2002).