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Reasonableness and Law

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self-governance which, under conditions of global interdependence, depends ever more on judicial protection of rule of law and citizen rights across national frontiers.

According to John Rawls, "justice is the first virtue of social institutions, as truth is of systems of thought" (Rawls 1973, 3). In his *Theory of Justice*, Rawls used the idea of reasonableness for designing fair procedures that help reasonable citizens (as autonomous moral agents) to agree on basic equal freedoms and other principles of justice. In his later book on *Political Liberalism*, Rawls reframed his theory of justice as fairness by emphasizing the importance of the public use of reason for maintaining a stable, liberal society confronted with the problem of reasonable disagreement about individual conceptions for a good life and a just society. Reasonableness requires not only constitutional and legislative guarantees of basic equal rights (e.g., freedoms to participate as equals in public discourse) as legal and institutional preconditions for public debate defining the conditions for a stable consensus on the principles of justice; according to Rawls, also independent judicial protection of equal basic rights is of constitutional importance for the "overlapping, constitutional consensus" necessary for a stable and just society among free, equal and rational citizens who tend to be deeply divided by conflicting moral, religious and philosophical doctrines: "in a constitutional regime with judicial review, public reason is the reason of its supreme court" (Rawls 1993, 231ff.).[1] Yet, in his theory of international law, Rawls assigned only a limited role to human rights, constitutional democracy and independent judicial protection in view of Rawls' focus on freedom and equality of peoples (rather than individuals) which, according to Rawls, require toleration and respect of non-liberal societies (see Rawls 1999).

This paper argues that the universal recognition of human rights and the increasing number of international courts settling transnational disputes "in conformity with principles of justice" and human rights, as required by the customary methods of treaty interpretation (as codified in the VCLT), entail that judicial and democratic reasoning rightly challenges power-oriented "intergovernmental reasoning" and the state-centred *opinio juris sive necessitatis* that dominated the Westphalian system of "international law among states" (Sections 1, 2, 3). In Europe, three different ways of judicial transformation of intergovernmental treaties into objective constitutional orders—i.e., the judicial "constitutionalization" of the intergovernmental European Community (EC) Treaty and of the European Convention on Human Rights (ECHR), and to a lesser extent also of the European Economic Area (EEA) Agreement—succeeded because their multilevel judicial protection of constitutional citizen rights vis-à-vis transnational abuses of governance powers was accepted by citizens, national courts and parliaments as legitimate (Section 4). Sections 5 and 6 argue that the European "*Solange* method" of judicial cooperation "as long as" other courts respect constitutional principles of justice should be supported by citizens, judges, civil society and their democratic representatives also in judicial cooperation

[1] Rawls (1993, 48ff.) explains the Kantian distinction between the reasonable (aiming at just terms of social cooperation by basing individual actions on universalizable principles) and the rational egoism of individuals (pursuing their individual ends without moral sensibility for the consequences of their actions on other's well-being).

with worldwide courts and dispute settlement bodies. Section 7 concludes that "public reasonableness" is a precondition for maintaining an "overlapping consensus" on rule of law not only inside constitutional democracies but also in the international division of labor and mutually beneficial cooperation among citizens across national frontiers. Just as "public reason" among the 480 million EC citizens is no longer dominated alone by the reasoning of their 27 national governments, so does the economic integration law beyond Europe require "cosmopolitan public reasoning" complementing the inter-state structures of international law. In a world dominated by power politics and by reasonable "constitutional pluralism," it is easier for international judges to meet their obligation to settle disputes "in conformity with principles of justice" if courts cooperate and base their "judicial discourses" on impartial "constitutional justice," notably judicial protection of universal human rights.

1 Public Reasonableness as Requirement of UN Human Rights Law and European Law

UN human rights law proceeds from the Kantian premise that—as emphasized in the Preambles to the 1966 UN Covenants on civil, political, economic, social and cultural rights—human rights "derive from the inherent dignity of the human person" and are based on "recognition 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." The Preambles make clear that human rights precede "the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms," a general obligation universally recognized in UN human rights covenants. Already the Universal Declaration on Human Rights (UDHR) had recognized that "human rights should be protected by the rule of law" (Preamble); yet, they exist as inherent birthrights of every human being independent from their legal recognition in UN human rights instruments. The today universal recognition by all states—in hundreds of UN, regional and national human rights instruments and national constitutions—of inalienable human rights has objectively changed the legal status of individuals as legal subjects of international law: Inalienable human rights now exist *erga omnes* and require respect, legal protection and fulfillment of inalienable human rights by all governments. Due to their progressive transformation into international *ius cogens*, the fragmented, treaty-based UN human rights guarantees gradually evolve into a UN human rights constitution limiting the powers also of international organizations (see Petersmann 2006a). As in European human rights law, international human rights serve only as a "second line of constitutional entrenchment" respecting the right of self-determination of peoples and the constitutional foundation of modern international law in the universal recognition of an inalienable core of human rights.

All six major UN human rights covenants acknowledge in their Preambles the close interrelationship between "the inherent dignity and [. . .] the equal and inalienable rights of all members of the human family." The universal recognition of human dignity as the constitutive principle for human rights suggests that a

common understanding cannot be found by interpreting human dignity in the light of theological concepts of "person" (e.g., the creation of man in God's image). The explicit link made in Article 1 of the UDHR between "All human beings are born free and equal in dignity and rights" (first sentence), and "They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (second sentence), confirms that "reason and conscience" must be regarded as the defining elements of humanity and dignity (see Dicke 2002, 111, 117). The appeal to moral conduct "in a spirit of brotherhood" further indicates that "reason and conscience" are referred to not only as anthropological facts, but as sources for moral reasoning enabling mankind to secure universal equal rights as the legal "foundation of freedom, justice and peace in the world" (Preamble UDHR) and of enjoyment by everybody of "an existence worthy of human dignity" (Article 23 UDHR).

Human dignity is also recognized as constitutive principle in Article 1 of the EU Charter of Fundamental Rights proclaimed by the European Parliament, the EU Commission and the EU Council in December 2000[2] and incorporated into the 2004 Treaty establishing a Constitution for Europe as well as into the 2007 Reform Treaty of the European Union. Some national constitutional systems (e.g., in Germany, India, Israel, South Africa) and regional constitutional systems (like EC law as protected by the EC courts, the ECHR as protected by the European Court of Human Rights) explicitly recognize human dignity as a constitutional value underlying human rights (e.g., the ECHR) or as a human right (e.g., as protected in EC law by the EC Court of Justice). Yet, political and legal conceptions of human rights continue to differ reasonably depending on how human dignity is being conceptualized. For instance, whereas the EC Court and the EU Charter of Fundamental Rights protect "market freedoms" guaranteed in the EC Treaty as conferring "fundamental rights" to individuals, Anglo-Saxon human rights lawyers from common law countries without constitutional guarantees of comprehensive liberty rights often disregard constitutional traditions of protecting liberty rights also in the economy and claim that market freedoms are not directly rooted in human dignity, but are fundamentally different from human rights and "fundamental freedoms" protected by UN human rights law.[3] Regardless of whether human dignity is recognized as the most fundamental human right from which all other rights are following (as e.g., in German and Israeli constitutional law), or whether human dignity is viewed only as a constitutional principle: Both legal traditions recognize respect for the moral and rational autonomy of individuals as the normative source of inalienable human rights requiring democratic self-government based on "public reasoning" (as protected by freedom of opinion, freedom of the press, freedom of religion, rights to democratic governance) and entailing obligations by governments to respect, protect and promote human rights "in a spirit of brotherhood" (Article 1 UDHR) and in the context of "an effective political democracy" (Preamble ECHR).

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[2] The text of this Charter is published in the Official Journal of the EC, C 364/1–22 of 18 December 2000. It remains contested whether Article 1 recognizes a fundamental right to human dignity or merely an objective constitutional principle.

[3] On this controversy see e.g., Petersmann (2002, 2005).

2 Citizen-Oriented Reasonableness as a Requirement of Constitutional Justice in International Law

A second source of reasonableness as a constitutional principle of international law derives from the customary law requirement of protecting "constitutional justice" as a general principle of international law. Denial of justice is one of the oldest principles of state responsibility in international law. Under the customary international law rules for the protection of aliens, the international minimum standard with respect to the duties of states to provide decent justice to foreigners focused on procedural due process of law and the duty of states "to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected" (Paulsson 2006, 7, 36); state responsibility for denial of justice depended on proof of a systemic failure in the national administration of justice, either by a miscarriage of justice by the judiciary or by non-judicial authorities (e.g., if they prevented the judiciary from administering justice in a fair manner). The universal recognition—in regional and worldwide human rights conventions as well as in national laws—of human rights of access "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" for the "determination of civil rights and obligations or of any criminal charge" has reinforced the intergovernmental prohibition of a denial of justice by individual rights of access to justice.[4] The progressive extension—by an ever larger number of other international treaties, notably in the field of international economic and environmental law—of individual rights of access to courts and to effective legal remedies increasingly confronts judges with a "constitutional dilemma":

- On the one side, foreigners and their home states increasingly invoke specific treaty obligations (e.g., relating to human rights of access to justice, labor rights, intellectual property rights, investor rights, trading rights, fishing rights and other freedoms of the sea) rather than general international law rules on denial of justice in case of unfair treatment of foreigners.
- On the other side, most intergovernmental treaties on the protection of human rights and other individual rights do not offer effective individual legal and judicial remedies[5]; hence, national and international judges are increasingly

[4] Cf. Article 6 European Convention on Human Rights and similar guarantees in other regional human rights conventions (e.g., Article 8 American Convention on Human Rights), UN human rights conventions (e.g., Article 14 International Covenant on Civil and Political Rights) and other UN human rights instruments (e.g., Article 10 Universal Declaration of Human Rights), which have given rise to a comprehensive case-law clarifying the rights of access to courts and related guarantees of due process of law (e.g., justice delayed may be justice denied, see Shelton 2005, 113ff.; Francioni 2007).

[5] See Dugard (2000, par. 25): "To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right to individual petition to the monitoring bodies of these conventions,

> confronted with legal claims that intergovernmental treaty rules on the protection of individual rights (e.g., in UN human rights conventions, WIPO conventions on intellectual property rights, ILO conventions on labor and social rights, WTO rules and regional trade agreements on individual freedoms of trade, investment treaties protecting investor rights) should be legally protected by judges as constituting *individual rights* and legal remedies.

The UN Charter (Article 1) and the Vienna Convention on the Law of Treaties recall the general obligation under international law "that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law," including "universal respect for, and observance of, human rights and fundamental freedoms for all (VCLT, Preamble). The functional interrelationships between law, judges and justice are reflected in legal language from antiquity (e.g., in the common core of the Latin terms *jus, judex, justitia*) up to modern times (cf. the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). Like the Roman god *Janus*, justice and judges face two different perspectives: Their "conservative function" is to apply the existing law and protect the existing system of rights so as "to render to each person what is his [right]." Yet, laws tend to be incomplete and subject to change. Impartial justice may require "reformative interpretations" of legal rules in response to changing social conceptions of justice. This is particularly true following the universal recognition—by all 192 UN member states—of inalienable human rights, which call for citizen-oriented interpretations of the power-oriented structures of international law. Former UN Secretary-General Kofi Annan, in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, criticized the power-oriented UN system as "unjust, discriminatory and irresponsible" in view of its failures to effectively respond to the three global challenges to the United Nations: "to ensure that globalization would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot." According to Kofi Annan, these three challenges—"an unjust world economy, world disorder and widespread contempt for human rights and the rule of law"—entail divisions that "threaten the very notion of an international community, upon which the UN stands."[6] Under which conditions may national and international judges respond to this "constitutional dilemma" by interpreting "principles of justice and international law" from citizen-oriented, human rights perspectives rather than from the state-centered perspectives of governments, whose representatives all too often pursue self-interests in limiting their personal accountability by treating citizens as mere objects of international law and of discretionary foreign policies?

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have obtained or will obtain satisfactory remedies from these conventions." On the dual meaning of remedies (e.g., in terms of access to justice and substantive redress) see Shelton 2005, 7ff., n. 9.

[6] The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

3 International Courts as Guardians of Public Reason in Modern International Law

The functions of judges are defined not only in the legal instruments establishing courts. Since legal antiquity, judges also invoke inherent powers deriving from the constitutional context of the respective legal systems (such as constitutional safeguards of the independence of courts in the Magna Charta and in the US Constitution), often in response to claims to impartial, judicial protection of "justice." Article III, Section 2 of the US Constitution provides, for example, that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made [. . .] under their Authority" (etc). Based on this Anglo-Saxon distinction between statute law and equity limiting the permissible content of governmental regulations, courts and judge-made law have assumed a crucial role in the development of "equity law" and "constitutional justice" in many countries (see Allan 2001). Also in international law, international courts invoke inherent powers to protect procedural fairness and principles of reciprocal, corrective and distributive justice, for example by using principles of equity for the delimitation of conflicting claims to maritime waters and to the underlying seabed (see the examples given by Franck 1997, Chapters 3, 10). Since the democratic constitutions of the 18th century, almost all UN member states have adopted national constitutions and international agreements that have progressively expanded the power of judges in most states as well as in international relations (see Guarnieri and Pederzoli 2002). The constitutional separation of powers provides for ever more comprehensive legal safeguards of the impartiality, integrity, institutional and personal independence of judges (see Sajo 2004).

Alexander Hamilton, in the "Federalist Papers," described the judiciary as "the least dangerous branch of government" in view of the fact that courts dispose neither of "the power of the sword" nor of "the power of the purse" (Hamilton 1961). In modern, multilevel governance systems based on hundreds of functionally limited, intergovernmental treaty regimes, courts remain the most impartial and independent "*forum* of principle" and "exemplar of public reason."[7] For example, fair and public judicial procedures and "*amicus curiae* briefs" may not only enable all parties involved to present and challenge all relevant arguments; they may also require more comprehensive and principled justification of judicial decisions compared with political and administrative decisions. As all laws and all international treaties use vague terms and incomplete rules, the judicial function goes inevitably beyond being merely "*la bouche qui prononce les mots de la loi*" (Montesquieu 1950, 217). By choosing among alternative interpretations of rules, "filling gaps" in the name of justice and by protecting the general principles underlying the hundreds of specialized treaty regimes, judicial decisions interpret, progressively develop and complement legislative rules and intergovernmental treaties in order to settle disputes "in conformity with principles of justice." The multilevel judicial protection

[7] On supreme courts as "exemplar of public reasons" see Rawls (1993, 231ff.)

of constitutional citizen rights in Europe (see Section 4 below) illustrates that the independence and impartiality of national and international judges makes them the most effective guardians of the "constitutional essentials" and "overlapping consensus" (see Rawls 1993) underlying national and international human rights law as the constitutional foundation of democratic self-government. Both positivist-legal theories as well as moral-prescriptive theories of adjudication justify such judicial clarification and progressive development of indeterminate legal rules (e.g., general human rights guarantees) on the ground that independent courts are the most principled guardians of constitutional rights and of "deliberative, constitutionally limited democracy," of which the public reasoning of courts is an important part.[8] For example, the judicial protection of equal treatment for children of different colour by the US Supreme Court in the celebrated case of *Brown v. Board of Education* in 1954—notwithstanding earlier denials by the law-maker and by other courts of such a judicial reading of the US Constitution's safeguards of "equal protection of the laws" (Fourteenth Amendment)—was democratically supported by the other branches of government and is today celebrated by civil society as a crucial contribution to protecting more effectively the goals of the US Constitutions (including its Preamble objective "to establish justice and secure the blessings of liberty") and human rights.

In its Advisory Opinion on Namibia, the International Court of Justice (ICJ) emphasized that—also in international law—legal institutions ought not to be viewed statically and must interpret international law in the light of the legal principles prevailing at the moment legal issues arise concerning them: "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[9] International human rights courts like the European Court of Human Rights (ECtHR), just as economic courts like the EC Court, have often emphasized that effective protection of human rights and of non-discriminatory conditions of competition may require "dynamic interpretations" of international rules with due regard to changed circumstances (such as new risks to human health, competition and the environment). As in domestic legal systems, intergovernmental and judicial rule-making are interrelated also in international relations: As all international treaties remain incomplete and build on general principles of law, the judicial interpretation, clarification and application of international law rules, like judicial decisions on particular disputes, inevitably influence the dynamic evolution and clarification of the "opinio juris" voiced by governments, judges, parliaments, citizens and non-governmental organizations with regard to the progressive development of international rules. The universal recognition, by all 192 UN member states, of "inalienable" human rights deriving from respect for human dignity, and the ever more specific legal obligations to protect human rights entail that citizens (as the "democratic owners" of international law and institutions) and

[8] For a justification of judicial review as being essential for protecting and promoting deliberative democracy see Zurn 2007.

[9] ICJ Reports, 1971, at p. 31, par. 53.

judges (as the most independent and impartial guardians of "principles of justice" underlying international law) can assert no less democratic legitimacy for defining and protecting human rights than governments that often dislike empowering citizens in international relations and prefer treating citizens as mere objects of international law in most UN institutions. From the perspective of citizens and "deliberative democracies," active judicial protection of constitutional citizen rights (including human rights) is essential for "constitutionalizing," "democraticizing" and transforming international law into a constitutional order, as it is emerging for the more than 800 million European citizens benefiting from human rights and fundamental freedoms protected by the ECtHR, and especially for the 480 million EC citizens who have been granted by EC law and by European courts constitutional freedoms and social rights across the EC that national governments had never protected before. The inalienable *jus cogens* and *erga omnes* core of human rights, and the judicial obligation to settle disputes "in conformity with principles of justice and international law," are of constitutional importance for protecting "constitutional justice" in international law in the 21st century.

4 Constitutional Pluralism: Three Different Kinds of Multilevel Judicial Protection of Citizen Rights in Europe

An ever larger number of empirical political science analyses of the global rise of judicial power, and of "judicial activism" by supreme courts and international courts in Europe, confirm the political impact of judicial interpretations on the development of national and European law and policies.[10] This Section 4 argues that the "multilevel judicial governance" in Europe—notably between the EC Court of Justice and its Court of First Instance, the EC courts and national courts, the European Free Trade Area (EFTA) Court and national courts, and the ECtHR and national courts—was successful due to the fact that this judicial cooperation was justified as multilevel protection of constitutional citizen rights and, mainly for this reason, was supported as reasonable and "just" by judges, citizens and parliaments. Sections 5 and 6 explain why the European "*solange*-method" of judicial cooperation "as long

[10] Stone Sweet describes how much third-party dispute resolution and judicial rule-making have become privileged mechanisms of adapting national and intergovernmental rule-systems to the needs of citizens and their constitutional rights (see Stone Sweet 2000). In his book on *The Judicial Construction of Europe,* Stone Sweet (2004) analyzes the judicial "constructing of a supra-national constitution" (Chapter 2) as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities. The former EC Court judge P. Pescatore confirmed that—when deciding the case *van Gend & Loos*—the judges had a certain idea of Europe, and that these judicial ideas—"and not arguments based on legal technicalities of the matter"—had been decisive (Pescatore 1983, 157). On the criticism of such "judicial law-making" see Mähner (2005) who criticizes the inadequate democratic legitimacy of the ECJ's expansive case-law limiting national sovereignty in unforeseen ways (e.g., by judicial recognition of fundamental rights as general principles of Community law). From the point of view of "deliberative democracy," however, the ECJ's case-law has been approved by EC member states, parliaments and citizens.

as" other courts respect constitutional principles of justice, should be supported by citizens, judges, civil society and their democratic representatives as the most reasonable basis for judicial cooperation, judicial dialogues and "judicial competition" also in international relations beyond Europe. Section 7 concludes that—in a world dominated by power politics and by reasonable "constitutional pluralism"—it is easier for international judges to meet their obligation to settle disputes "in conformity with principles of justice" if courts cooperate and base their "judicial discourses" on "public reason" and judicial protection of the constitutional principles underlying human rights law.

Judicial protection of human rights deriving from respect for human dignity as "foundation of freedom, justice and peace," and multilevel judicial protection of equal liberty rights in the European economy no less than in the polity, were the driving forces in the progressive transformation of the intergovernmental EC treaties and the ECHR into constitutional instruments protecting citizen rights and community interests (such as the EC's common market and multilevel democracy) across national frontiers by three different kinds of "multilevel judicial governance" and of "multilevel constitutionalism":

- The multilevel judicial governance in the EC among national courts and European courts remains characterized by the supranational structures of EC law and the fact that the fundamental freedoms of EC law and related social guarantees go far beyond the national laws of EC member states (below 1).
- The multilevel judicial governance of national courts and the ECtHR in the field of human rights differs fundamentally from the multilevel judicial governance in European economic law: Both the ECtHR and the ECHR assert only subsidiary constitutional functions vis-à-vis national human rights guarantees and respect diverse democratic traditions in the 47 countries that have ratified the ECHR (below 2).
- The multilevel judicial governance among national courts and the EFTA Court has extended the EC's common market law to the three EFTA members (Iceland, Liechtenstein and Norway) of the European Economic Area (EEA) through intergovernmental modes of cooperation rather than by using the EC's constitutional principles of legal primacy, direct effect and direct applicability of the EC's common market law. This different kind of multilevel judicial cooperation (e.g., based on voluntary compliance with legally non-binding preliminary opinions by the EFTA Court) confirms the legitimacy of constitutional pluralism: citizens in third countries can effectively benefit from the legal "market freedoms" and social benefits of European integration law without full membership in the EC (below 3).

4.1 Multilevel Judicial Protection of EC Law has Extended the Constitutional Rights of EC Citizens

A citizen-driven common market with free movement of goods, services, persons, capital and payments inside the EC can work effectively only to the extent that

the common European market and competition rules are applied and protected in coherent ways in national courts in all 27 EC member states. As the declared objective of an "ever-closer union between the peoples of Europe" (Preamble to the EC Treaty) was to be brought about by economic and legal integration requiring additional law-making, administrative decisions and common policies by the European institutions, the EC Treaty differs from other international treaties by its innovative judicial safeguards for the protection of rule of law—not only in intergovernmental relations among EC member states, but also in the citizen-driven common market as well as in the common policies of the European Communities. Whereas most international jurisdictions (like the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal, WTO dispute settlement bodies) remain characterized by intergovernmental procedures, the EC Treaty provides unique legal remedies not only for member states, but also for EC citizens and EC institutions as guardians of EC law and of its "constitutional functions" for correcting "governance failures" at national and European levels:

- The citizen-driven cooperation among national courts and the EC Court in the context of preliminary rulings procedures (Article 234 EC) has uniquely empowered national and European judges to cooperate, at the request of EC citizens, in the multilevel judicial protection of citizen rights protected by EC law.
- The empowerment of the European Commission to initiate infringement proceedings (Article 226 EC) rendered the ECJ's function as an intergovernmental court much more effective than it would have been possible under purely inter-state infringement proceedings (Article 227 EC).
- The Court's "constitutional functions" (e.g., in case of actions by member states or EC institutions for annulment of EC regulations), as well as its functions as an "administrative court" (e.g., protecting private rights and rule of law in response to direct actions by natural or legal persons for annulment of EC acts, failure to act, or actions for damages), offered unique legal remedies for maintaining and developing the constitutional coherence of EC law.
- The EC Court's teleological reasoning based on communitarian needs (e.g., in terms of protection of EC citizen rights, consumer welfare, and of undistorted competition in the common market) justified constitutional interpretations of "fundamental freedoms" of EC citizens that would hardly have been acceptable in purely intergovernmental treaty regimes.

  The diverse forms of judicial dialogues (e.g., on the interpretation and protection of fundamental rights), judicial contestation (e.g., of the scope of EC competences) and judicial cooperation (e.g., in preliminary ruling procedures) emphasized the need for respecting common constitutional principles deriving from the EC member states' obligations under their national constitutions, under the ECHR (as interpreted by the ECtHR) as well as under the EC's constitutional law. This judicial respect for "constitutional pluralism" promoted judicial comity among national courts, the ECJ and the ECtHR in their complementary, multilevel protection of constitutional rights, with due respect for the diversity of national constitutional and judicial traditions. Arguably, it was this multilevel

judicial protection of common constitutional principles underlying European law and national constitutions which enabled the EC Court, and also the ECtHR, to progressively transcend the intergovernmental structures of European law by focusing on the judicial protection of individual rights in constitutional democracies and in common markets rather than on state interests in intergovernmental relations.

4.2 Multilevel Judicial Enforcement of the ECHR: Subsidiary "Constitutional Functions" of the ECtHR

The European Convention on Human Rights (ECHR), like most other international human rights conventions, sets out minimum standards for the treatment of individuals that respect the diversity of democratic constitutional traditions of defining individual rights in democratic communities. The 14 Protocols to the ECHR and the European Social Charter (as revised in 1998) also reflect the constitutional experiences in some European countries (like France and Germany) with protecting economic and social rights as integral parts of their constitutional and economic laws. For example, in order to avoid a repetition of the systemic political abuses of economic regulation prior to 1945,[11] the ECHR also includes guarantees of property rights and rights of companies. The jurisdiction of the ECtHR for the collective enforcement of the ECHR—based on complaints not only by member states but also by private persons—prompted the Court to interpret the ECHR as a constitutional charter of Europe[12] protecting human rights across Europe as an objective "constitutional order."[13] The multilevel judicial interpretation and protection of fundamental rights, as well as of their governmental restriction "in the interests of morals, public order or national security in a democratic society" (Article 6), are of a constitutional nature. But ECtHR judges rightly emphasize the subsidiary functions of the ECHR and of its Court:

> these issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the breaches that escape the rigorous scrutiny of the national constitutional bodies. (Wildhaber 2002, 161)

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[11] For example, the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany's 1919 Constitution for the "Weimar Republic" had led to ever more restrictive government interventions into labour markets, capital markets, interest rates, as well as to expropriations "in the general interest" which—during the Nazi dictatorship from 1933 to 1945—led to systemic political abuses of these regulatory powers.

[12] See Ireland v. United Kingdom (1979), 2 *European Human Rights Reports* 25.

[13] See the judgment of the ECtHR in *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, par. 75, referring to the status of human rights in Europe. Unlike the ECJ, the ECtHR has no jurisdiction for judicial review of acts of the international organization (the Council of Europe) of which the Court forms part.