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EU citizenship as a constitutional restraint on the EU's  
multilevel governance of public goods

Ernst-Ulrich Petersmann



European University Institute  
**Department of Law**

**EU CITIZENSHIP AS A CONSTITUTIONAL RESTRAINT ON THE  
EU'S MULTILEVEL GOVERNANCE OF PUBLIC GOODS**

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## **Abstract**

This contribution suggests a ‘republican interpretation’ of EU citizenship rights based on the following three propositions: First, the more globalization transforms national into transnational public goods (PGs), the more democratic and republican constitutionalism require designing and implementing transnational ‘PGs treaties’ as ‘democratic law’ empowering citizens to invoke and enforce precise and unconditional, multilevel market regulations and protection of PGs vis-à-vis multilevel governance institutions. Second, as EU law (e.g. Articles 2, 9-12 TEU) requires EU institutions and member states to protect constitutional, representative, participatory and deliberative democracy and limits all internal and external EU powers by fundamental rights and protection of PGs (res publica), EU citizens rightly challenge EU trade, investment and other treaties that privilege interest groups and undermine the ‘constitutional contract’ of citizens as codified in the EU Charter of Fundamental Rights (EUCFR). Third, just as common market and competition law inside and beyond the EU protects citizen-driven ‘network governance’ and rights-based ‘vigilance’ of EU citizens embedded into comprehensive protection of fundamental rights and a ‘social market economy’ (Article 3 TEU), EU institutions should respond to the legitimacy- and rule-of-law-crises in other areas of EU governance by ‘re-connecting’ EU law with EU citizens as ‘democratic principals’ of multilevel governance agents. ‘Anti-citizen clauses’ in EU free trade agreements (FTAs) with non-European countries (like Article 30.6 CETA) and discriminatory ‘arbitration privileges’ for foreign investors illustrate ‘authoritarian dis-connect’ of EU bureaucrats from EU citizens; they risk undermining rule of law, constitutional democracy, and the ‘social market economy’ inside the EU.

## **Keywords**

constitutionalism; EU citizenship; multilevel governance; public goods; republicanism.

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## EU fundamental rights as constitutional restraints on EU foreign policy powers\*

Since the 1950s, the numerous treaties on legal and economic integration in Europe acknowledged (e.g. in their Preambles) their goal of promoting also political integration for the benefit of citizens. What rights does European citizenship protect today? European integration law and human rights law have pioneered the structural changes from the ‘international law among sovereign states’ (e.g. 1648–1945) towards an ‘international law among peoples and citizens’ with universally recognized, ‘inalienable rights’ to individual and democratic self-determination. As human rights also protect individual and democratic diversity, the customary law requirement of interpreting treaties in conformity with the human rights obligations of the contracting parties tends to be construed differently in different treaty regimes and jurisdictions. The Lisbon Treaty prescribes - e.g. in Articles 2, 7, 9-12 TEU and in the EU Charter of Fundamental Rights (EUCFR) - constitutional, representative, participatory and deliberative ‘democratic principles’, procedures and institutions for constituting, limiting, regulating and justifying law and governance in the EU ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Article 2 TEU). As the interpretation of many of these general principles remains contested, it is important that - more than 30 years ago, in *Partie écologiste ‘Les Verts’ v European Parliament* - the European Court of Justice (CJEU) ‘emphasized ... that the European Economic Community 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’.<sup>1</sup> This ‘constitutional reading’ of the EC Treaty and of the limited powers of EC institutions built on preceding ‘constitutional interpretations’, notably regarding the legal primacy, direct effect and direct applicability of precise and unconditional EEC Treaty provisions and their conferral of ‘market freedoms’ and fundamental rights on citizens. The ‘constitutional jurisprudence’ initiated by the CJEU and supported by domestic jurisdictions used constitutionalism not only as a ‘judicial methodology’ for interpreting multilevel regulation of PGs (like the common market, rule of law) as a ‘principal-agent relationship’ between citizens and multilevel governance institutions with limited, delegated powers. The empowerment of ‘market citizens’ to invoke and enforce common market rules as conferring economic, social and other rights and remedies in multilevel jurisdictions (e.g. including also national courts as ‘functional Community courts’) was justified also by the ‘sociological task’ of constitutional rules and institutions to progressively transform the ‘law in the books’ into ‘law in action’. Successive treaty amendments, notably the Lisbon Treaty and its EUCFR, transformed this ‘judicial constitutionalization’ of European law into ‘democratic constitutionalism’, for instance by acknowledging that

‘the Union is founded on the indivisible universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice’.<sup>2</sup>

This ‘constitutional embedding’ beyond common market law constituted, limited, regulated and justified the EU as an association of Member States, peoples and EU citizens based on agreed principles of justice of a higher legal rank, as codified notably in the EUCFR, in fundamental rights as ‘general principles of the Union’s law’ (Article 6 TEU), in the EU’s ‘democratic principles’, EU citizenship rights (cf. Articles 20-25 TFEU), the protection of the ‘national identities’ of EU Member States and ‘the constitutional traditions common to the Member States’, including, *inter alia*, the constitutional principles of

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<sup>1</sup> EU:C:1986:1339, para. 23.

<sup>2</sup> Preamble EUCFR; similarly Article 2 TEU.

‘conferral’ of limited EU powers and their respect for legal ‘subsidiarity’ and ‘proportionality’ (cf. Articles 4, 6 TEU). This contribution argues that – as predicted in the Court’s claim that EU citizenship is ‘destined to be the fundamental status of nationals of member states’<sup>3</sup> – EU constitutional law justifies interpreting EU citizenship beyond the specifically protected rights (e.g. to reside, work, study and access public resources anywhere within the common market) as including also a basic ‘republican right’ to invoke and enforce EU rules protecting PGs for the benefit of citizens as constituent powers and ‘democratic principals’ of governance agents.

The more ‘globalization’ transforms *national* into *transnational* PGs (like human rights, rule of law, democratic governance of mutually beneficial monetary, trading, environmental and security systems) which no state can protect unilaterally without international law and multilevel governance institutions, the more important becomes transforming *national constitutionalism* into *multilevel constitutionalism* constituting, limiting, regulating and justifying multilevel governance of transnational PGs for the benefit of citizens and their constitutional rights. The progressive transformations of democratic and republican constitutionalism can be sub-divided into the following four phases:<sup>4</sup>

- The emancipatory ‘constitutionalism 1.0’ constituted the basic legal order of nation states (e.g. in the 18<sup>th</sup> and 19<sup>th</sup> centuries) – yet often without effective ‘constitutionalization’ of abuses of public and private powers (like gender and racial discrimination, feudal market regulations).
- Multilevel ‘human rights constitutionalism 2.0’ (e.g. as reflected in the post-war Constitutions of many EU Member States) protected civil and political rights more effectively by embedding constitutional democracies into regional and UN human rights law and related accountability mechanisms.
- The treaties establishing the EU and the European Economic Area (EEA) created complementary, regional systems of multilevel, legal and judicial protection of transnational PGs for the benefit of citizens cooperating inside and beyond the EU’s ‘competitive social market economy’ (Article 3 TEU). The democratic, republican and cosmopolitan principles underlying this ‘multilevel constitutionalism 3.0’ call for ‘inclusion principles’ transcending state-centered boundaries.
- EU law prescribes (e.g. in Article 3, 21 TEU) ‘protection of its citizens’, ‘strict observance of international law’, ‘consistency’ of the EU’s internal and external market regulations, and ‘cosmopolitan constitutionalism’ (e.g. based on the EUCFR) also for the external EU regulations and agreements. Yet, in spite of this ‘cosmopolitan foreign policy mandate’ and some successful EU initiatives for ‘constitutionalizing’ multilevel governance of PGs beyond Europe (‘constitutionalism 4.0’), most EU agreements with non-European countries and UN/WTO governance of transnational PGs remain ‘dis-connected’ from citizens and from effective democratic and judicial accountability.<sup>5</sup> What rights to ‘democratic inclusion’ and to ‘effective remedies’ (Article 47 EUCFR) do EU citizens have under EU law?

The EU’s internal ‘constitutionalism 3.0’ cannot be imposed on third states with different constitutional traditions, as illustrated by the EEA Agreement and the EU’s trade agreements with other European countries like Switzerland and Turkey. Yet, European courts and civil society increasingly challenge intergovernmental treaty provisions that do not adequately protect fundamental rights of EU citizens (like Article 8 EUCFR concerning personal data protection, Article 47 EUCFR on equal access to legal

<sup>3</sup> *Grzelczyk* (Case C-184/99), EU:C:2001:I-06193, para. 25.

<sup>4</sup> Cf. E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law* (Oxford: Hart 2016).

<sup>5</sup> Cf. E.U.Petersmann, Democratic Legitimacy of the CETA and TTIP Agreements? in: T. Rensmann (ed), *Mega-Regional Trade Agreements and the Future of International Trade and Investment Law* (Heidelberg: Springer 2017) 37-59; J.Habermas, *The Divided West* (Cambridge: Polity Press 2007).

and judicial remedies).<sup>6</sup> The more citizens used the 'common market freedoms' for actively exercising their free movement rights beyond their initially *economic rationale* (e.g. migrant workers moving their families and demanding access to social assistance systems in host states), the more national and European courts protected also related fundamental rights (e.g. individual interests in non-discriminatory treatment).<sup>7</sup> The protection of EU citizenship rights since 1993 - and of 'an area of freedom, security and justice' since 1999 - strengthened the interpretation of 'market freedoms' as fundamental rights by protecting broader, constitutional values of EU citizens beyond their instrumental, economic functions.<sup>8</sup> This contribution argues that EU citizenship is no longer only about every citizen's 'right to participate in the democratic life of the Union' (Article 10 TEU) by exercising the specific rights protected in Articles 20 to 25 TFEU (such as 'the right to move and reside freely within the territory of the Member States'). Just as free movement rights must be interpreted with due regard to citizenship rights and other fundamental rights, for instance as empowering EU citizens to emancipate from the nation state and to challenge questions of justice and democracy in transnational contexts<sup>9</sup>, so must other EU 'PGs regulations' be construed in conformity with the EUCFR as protecting equal individual rights, such as the freedom to choose an occupation (Article 15), 'freedom to conduct a business in accordance with Union law' (Article 16), related property rights (Article 17) and effective remedies (Article 47 EUCFR). EU citizen rights have become part of a broader 'constitutional contract' approved by parliaments and codified in the EUCFR. EU citizenship should not be narrowly perceived as 'primarily about free movement' emancipating the individual from national 'communities of fate'<sup>10</sup> (i.e. protecting individual conceptions of a 'good life', which immobile citizens may resist as illustrated by the Brexit referendum of June 2016). From the perspective of the 'constituent power' of EU citizens for 'public justice' in the EU, the republicanism underlying EU law calls for a broader, constitutional interpretation of EU citizenship as the primary responsibility of citizens for, and their right to participate in multilevel governance of European PGs like the fundamental rights and rule-of-law principles codified in the EUCFR. EU power derives its legitimacy from protecting equal rights of citizens and other PGs; in order to remain non-dominating, it must empower citizens to participate in EU governance, remain accountable to EU citizens as democratic principals of all governance agents, promote decentralized enforcement of EU law, and win the hearts and minds of citizens (e.g. so as to overcome

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<sup>6</sup> A recent illustration is the CJEU judgment of 6 October 2015 invalidating the EU – USA 'safe harbour agreement' on transfers of data, in view of their inadequate legal and judicial protection in the USA against disproportionate mass surveillance by the US National Security Agency.

<sup>7</sup> Cf. E. Recchi/A. Favell (eds), *Pioneers of European Integration. Citizenship and Mobility in the EU*, Cheltenham : Elgar 2009. An illustration is the *Angonese Case C-281/98*: 'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 Defrenne v Sabena [1976] ECR 455, para 31). Such consideration must, a fortiori, be applicable to Article 48 of the Treaty, which ... is designed to ensure that there is no discrimination on the labour market' (EU:C:2000 I-4139).

<sup>8</sup> Cf. A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Oxford: Bloomsbury 2016). On national and EU citizenship rights as constitutional rights to participate in the constitution and exercise of public authority, to respect corresponding duties of citizens, and benefit from related civil rights (e.g. distinguishing citizens from foreigners), see: M. La Torre (ed), *European Citizenship. An Institutional Challenge* (The Hague: Kluwer, 1998).

<sup>9</sup> On free movement as emancipation making EU citizenship distinctive from, and genuinely supplementary to, national citizenship, see : F. de Witte/R. Bauböck/J. Shaw (eds), *Freedom of movement under attack : Is it worth defending as the core of EU citizenship?* EUI Working Papers RSCAS 2016/69.

<sup>10</sup> Cf. F. de Witte, Kick off contribution - Freedom of movement under attack: Is it worth defending as the core of EU citizenship? (note 9), 1-4 (suggesting that 'the added value that EU citizenship can offer primarily lies in its connection to free movement'). On the primary responsibility of EU member states and the limited powers of the EU and EU courts for protecting 'social justice' inside national polities see D. Thym, The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens, *CML Rev* 52 (2015), 17-50. Thym's call for 'a vision of social justice for the Union as a whole' does, however, not justify neglecting neither the 'subsidiarity' and 'limited conferral of power' principles of EU law (e.g. limiting access to the social welfare systems in host states) nor the fact that social welfare creation and income redistribution depend on national cultures (e.g. for protecting legal security, competition, productivity and social peace, limiting rent-seeking and tax-evasion).

the low turnout in elections for the European Parliament, counter populist claims of ‘taking back control’).

National parliamentarians tend to focus on local constituencies and party politics; they cannot effectively control the modern reality of thousands of intergovernmental treaties on protecting PGs. Hence, the Lisbon Treaty supplements the principles of representative and parliamentary democracy by multilevel requirements of constitutional, deliberative and participatory democracy, thereby limiting EU powers through multilevel participation and democratic discourses legitimizing and controlling rule-making.<sup>11</sup> Also in its external relations, the EU must aim at ‘protection of its citizens’, ‘strict observance of international law’ (Article 3 TEU), and ‘consistency’ between internal and external EU market regulations (Article 21 TEU). Most ‘peoples of Europe’ prioritize their ‘national identities’, for instance in view of their diverse democratic and cultural preferences and solidarity traditions. Even if the EU does not aim at a single ‘European *demos*’, the EU’s constitutional, participatory and deliberative ‘democratic principles’ require protection of EU citizens as ‘constituent powers’, ‘democratic principals’ of multilevel governance agents, and ‘republican agents of justice’ in all areas of EU governance of transnational PGs. The EU’s democratic and republican constitutionalism justifies legal presumptions of interpreting internal and external ‘PGs regulations’ of the EU as empowering EU citizens (e.g. including foreign investors, workers and their families inside the EU) as morally and legally autonomous actors entitled to, and responsible for, collective protection of PGs in the EU’s ‘emerging polity’.<sup>12</sup> Multilevel protection of fundamental rights (e.g. protecting the two moral powers of individuals to choose their conceptions of a ‘good life’ and ‘social justice’), of citizen participation in EU law-making, and of ‘constitutional patriotism’ (J. Habermas) supporting and enforcing EU constitutional law can be seen as the republican core of EU citizenship; they are preconditions for ‘constitutional democracy’ in multilevel governance of PGs in a globally integrating world challenging the historically contingent boundaries of ‘democratic self-government’.

### **The ‘dis-connect’ of EU ‘intergovernmentalism’ from citizens undermines legitimacy and rule-of-law in the EU**

The EU’s protection of ‘market freedoms’, fundamental rights and of a ‘highly competitive social market economy’ had been strongly influenced by German traditions of ‘*ordo*-liberalism’, i.e. the conception of markets as legal constructs whose proper functioning requires systemic limitations of ‘market failures’ (e.g. through competition, environmental and social legislation) as well as of ‘governance failures’ (e.g. through constitutional protection of civil, political, economic and social rights). The German Basic Law of 1949 had been designed so as to exclude a repetition of the ‘constitutional failures’ of the 1919 Weimar Republic, such as ‘emergency regulations’ violating fundamental rights, distorting the economy (e.g. through governmental price, interest and wage regulations), and ushering in dictatorship, war and genocide.<sup>13</sup> The German negotiators of the EEC Treaty (like W. Hallstein, Müller-Armack) insisted on embedding the common market into the liberal customs union rules of the General Agreement on Tariffs and Trade (GATT 1947), strong competition rules, ‘social market economy’ rules and constitutional restraints aimed at institutionalizing ‘*ordo*-liberal public reason’ (e.g. through independence of national and European competition authorities) and

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<sup>11</sup> On struggles for recognition in constitutional democracies and democratic discourse justifications of law through participatory and deliberative democracy see: J. Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge: MIT Press 1998).

<sup>12</sup> On national and EU citizenship rights, ‘market rights’, human rights and other ‘cosmopolitan rights’ as constitutional foundations, limitation, regulation and justification of multilevel governance of PGs in the 21st century see Petersmann (note 4).

<sup>13</sup> The failures of liberalism, democracy and of economic planning during the inter-war period and the resulting financial, economic and democratic crises impeding the enforceability of the social rights guarantees in the Weimar Constitution are described in F.A. Hayek, *The Road to Serfdom* (London: Routledge 1944).

preventing a return to laissez-faire liberalism, socialist planning, and 'democratic failures'. The Maastricht Treaty's Economic and Monetary Union – with its EMU commitments to budgetary, price and monetary stability – was expected to complete the *ordo*-liberal project of limiting regulatory discretion - and related interest group politics and 'rent-seeking' – through constitutional and legislative rules, independent institutions (like national and European central banks) and multilevel legal and judicial protection of fundamental rights. The Lisbon Treaty continued this 'surveillance paradigm' respecting the fiscal and economic policy powers of EU member states and strengthening the role of EMU and Euro institutions as 'discipline enforcers', without adopting the alternative 'fiscal federalism proposals' for more comprehensive EU resources to address structural inequalities and prevent 'asymmetric shocks' (e.g. by EU stabilization and financial assistance tools).<sup>14</sup> This incomplete and inflexible 'constitutional approach' prioritizing coordination (e.g. rather than harmonization of fiscal, economic, social and unemployment policies) underestimated, however, that – similar to the financial, economic, monetary and constitutional crises during the Weimar Republic – the financial, sovereign debt, economic and social crises, since 2008, prompted increasing rule violations in many EU member states due to their diverse political traditions (e.g. in defending rule of law against rent-seeking interest group pressures from uncompetitive producers, failing banks and socially disadvantaged citizens).

Do the frequent departures from rule of law inside the EU (e.g. non-compliance with the budget and debt disciplines in Article 126 TFEU) impede effective 'constitutionalization' of economic, financial and monetary politics inside and beyond the EU? Just as theories of justice (e.g. justifying rules on the basis of Kantian 'moral imperatives' and 'constitutional conventions' among free and reasonable citizens) had not prevented 'unpolitical Germans' to support 'constitutional failures' undermining the Weimar Constitution (like executive 'emergency politics' undermining 'Weimar liberalism', as justified by Hitler's legal advocate Carl Schmitt), so is the European '*ordo*-liberal constitution' progressively transformed by financial, economic, social, migration, security and rule-of-law crises, the emergence of 'illiberal politics' (e.g. in Hungary, Poland) and opportunistic 'populism' (e.g. in the UK's 'Brexit referendum'). As acknowledged by J. Rawls in his later studies on political liberalism, public political cultures are often not homogenous and may give rise to political conflicts caused by 'unreasonable and irrational, and even mad, comprehensive doctrines' that risk undermining law and justice in societies.<sup>15</sup>

The global financial crisis of 2008 ushered in increasing disregard by EU Member States for the budget and debt disciplines of Article 126 TFEU. The 'bail out'- and related 'credit facility'-prohibitions in Articles 123-125 TFEU did not prevent the EU and its Member States to respond positively to requests for - so far - ten 'sovereign debt programs' disbursing around 500 billion euros since 2008 in favour of euro area states (Greece, Ireland, Portugal, Cyprus) as well as balance of payments loan assistance under Article 143 TFEU for other EU Member States (Hungary, Latvia, Romania).<sup>16</sup> The fact that only Greece remains in a sovereign debt program illustrates not only the success of most of these programs; it also seems to confirm the 'deeper underlying problem' that – in weak political systems where politicians fail to defend the rule of law (e.g. the budget and debt disciplines of Article 126 TFEU) – 'the public debt is high because the government is willing to pay for the losses of small, well-organised groups' rather than to defend 'the collective interests of taxpayers'.<sup>17</sup> The numerous legal and judicial challenges of EU, intergovernmental and national 'emergency measures', of their 'austerity conditions' (e.g. imposing cuts of wages, pensions, social security assistance and bank depositor rights in over-indebted countries) and alleged, related human rights violations reveal that – notwithstanding important

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<sup>14</sup> Cf. A.Hinarejos, *The Euro-Area Crisis in Constitutional Perspective* (Oxford University Press 2015); M.Adams/F.Fabbrini/P.Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford: Hart 2014).

<sup>15</sup> J.Rawls, *Political Liberalism* (New York : Columbia University Press 1993) xvi-xvii. See also : E.Kennedy, *Constitutional Failure. Carl Schmitt in Weimar* (Durham : Duke University Press 2004).

<sup>16</sup> This does not include the very substantial financial sector assistance granted to Spain under the European Stability Mechanism (ESM) and the European Central Bank (ECB)'s indirect financial assistance measures.

<sup>17</sup> D.Gros, *The Italian Banking Saga : Symptom of a deeper underlying problem?* in : *CEPS Thinking ahead for Europe*, 7 July 2017 (<http://www.ceps.eu/publications>).

legal clarifications by the CJEU (notably in the *Pringle*, *Gauweiler* and *Ledra* cases) on the scope of the monetary policy powers of the EU and of the ECB – civil society, parliaments and governments disagree on the legal limits and design of the EMU (e.g. debt relief measures as requested by the International Monetary Fund, scope of ‘austerity restrictions’ imposed by loan agreements on fundamental rights, creation of a ‘new European Social Pillar’ proposed by President Juncker, transformation of the EMU into a ‘transfer Community’ as requested by some over-indebted Mediterranean countries as compensation for their ‘weak legal and political systems’).<sup>18</sup> The more ‘governance failures’ (e.g. in the EMU and related banking supervision) led to redistribution of taxpayers’ money (e.g. more than 4,5 trillion euros used to rescue banks in the EU by 2012), the more citizens question the legitimacy of redistributive policies aimed at compensating ‘market failures’ and ‘regulatory failures’ through inter-governmental agreements and EU institutions (e.g. the ECB’s use of monetary powers to purchase unlimited amounts of securities reducing the interest rates on private bank investments and turning the ECB effectively into a lender of last resort). The continued use of public tax income for bailing-out private banks (e.g. in Italy 2017), the suspension of the ‘Dublin’- and ‘Schengen-rules’ in response to uncontrolled migration flows, recent terrorist attacks and security threats, and the ‘Brexit referendum’ of June 2016 transformed the economic crises into a broader identity crisis of EU citizens, including both citizens using their rights under the EUCFR (e.g. to move abroad) and those staying in their state of origin (e.g. claiming rights of access to EU documents, rights of communication with EU institutions, launching ‘citizen initiatives’ pursuant to Article 11 TEU).<sup>19</sup> The widespread civil society protests against the Canada-EU Comprehensive Economic and Trade Agreement (CETA), the EU-USA Transatlantic Trade and Investment Partnership (TTIP) negotiations, and against other, non-inclusive EU policies (e.g. vis-à-vis illegal migrants) reveal increasing distrust of EU citizens vis-à-vis alleged abuses of EU powers and intergovernmental arrangements (e.g. creating the ESM as an intergovernmental organization with a budget of 700 billion euros for bailing-out indebted member states and troubled banks).

The perceived ‘democracy deficits’ of the secretive, intergovernmental CETA negotiations from 2009 to 2014, and of the ‘anti-citizen clauses’ and ‘arbitration privileges’ in the final CETA text signed in November 2016, illustrate this widespread ‘euro-skepticism’ and erosion of the EU’s *ordo-liberal* ‘social market economy’:

- EU law requires taking ‘decisions as openly as possible and as closely as possible to the citizen’ (Articles 1, 10 TEU). But the EU negotiates free trade agreements (FTAs) in non-transparent ways far away from citizens. In the EU’s 2014 ‘public consultation’ on transatlantic investment rules, the criticism by EU citizens illustrated how ‘inclusive, deliberative democracy’ may require re-negotiation of intergovernmental treaty drafts so as to better protect ‘public interests’ (for instance, in transparent and inclusive investment adjudication). Even though EU trade policies have recently become more transparent, EU citizens continue to complain that CETA risks undermining fundamental rights of citizens, like rights to protection of personal data (Article 8 EUCFR), the ‘freedom to conduct a business in accordance with Union law’ (Article 16), the rights to property protection (Article 17), to effective remedies (Article 47) and to respect for the constitutional principles of transparency, non-discrimination, necessity and proportionality of EU limitations of fundamental rights (Article 52 EUCFR).

<sup>18</sup> For analyses of the relevant case-law see: T. Beukers/B. De Witte/C. Kilpatrick (eds) *Constitutional Change Through Euro-Crisis Law* (Cambridge University Press 2017). In *Pringle*, the CJEU construed the bail-out prohibition in Article 125 TFEU as ‘not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State’ (Case C-370/12, EU:C:2012:756, para.130). In the *Dano* judgment of 11 November 2014, the CJEU allowed EU member states to exclude economically inactive EU citizens from certain national social benefits if freedom of movement was used only in order to obtain another member state’s social assistance (C-333/13, EU:C:2014:2358), thereby allaying fears of ‘welfare tourism’.

<sup>19</sup> Cf. V.Hatzopoulos, From Economic Crisis to Identity Crisis: The Spoliation of EU and National Citizenships, *College of Europe Research Paper in Law* 01/2017.

- The Union 'is founded on respect for human rights' and requires 'protection of its citizens' and of their rights also in external relations (Articles 2, 3 TEU). Yet, in contrast to FTAs among European countries, Article 30.6 CETA precludes citizens from invoking CETA provisions in domestic legal systems, thereby impeding effective remedies against harmful CETA regulations. Can market regulations be 'democratic' if citizens are barred from invoking them and from exercising the 'right to an effective remedy' of 'everyone' (Article 47 EUCFR) against harmful FTA market regulations? The lack of discussions in national and European Parliaments of this exclusion of rights of citizens in FTAs concluded by the EU since 2006 reveals failures by the EU to meet its legal duty (e.g. pursuant to Article 52 EUCFR) to justify how such 'anti-citizen clauses' could be necessary for 'protection of citizens' (Article 3 TEU).
- As 'the Union is founded on the rule of law' (Article 2), Articles 3, 21 TEU prescribe 'strict observance of international law' and 'consistency' of internal and external market regulations for EU external relations, without conferring EU powers to violate international treaties approved by parliaments for the benefit of EU citizens. Preventing citizens from invoking FTAs in domestic courts and offering foreign investors arbitration privileges (cf. Articles 8.18, 30.6 CETA) risk distorting and undermining citizen-driven rule-of-law based on equal access to justice, as illustrated by 20 years of discriminatory EU import restrictions on bananas (1992-2012) in violation of some 15 GATT/WTO dispute settlement rulings, redistributing billions of euros to rent-seeking interest groups as in a 'banana republic'.<sup>20</sup>
- The EU principles of constitutional, representative, participatory and deliberative democracy (Articles 9-12 TEU) protect rights of 'every citizen to participate in the democratic life of the Union'. Yet, the fundamental rights of 'everyone' protected by the EUCFR – such as 'freedom to conduct a business in accordance with Union law' (Article 16), property rights (Article 17), access to justice (Article 47) and to 'necessity' and 'proportionality' of restrictions (Article 52) – are neither mentioned nor protected in transatlantic FTAs.
- EU law requires to 'ensure consistency' of internal and external market regulations as well as among the 'different areas of external action' (Article 21 TEU). EU common market law became effective due to its citizen-driven, decentralized enforcement. FTAs with other European countries (like EFTA countries and Turkey) can be invoked and enforced by citizens in domestic courts. 'Disempowerment' and discrimination of EU citizens in transatlantic relations runs counter to the EU's promise of 'transformative transatlantic FTAs' that can limit the long-standing market failures and governance failures in transatlantic markets, which gave rise to numerous transatlantic disputes over the past decades.<sup>21</sup>

The EU Commission negotiated a first CETA draft text 2009-2014 with very little involvement by the European Parliament, national parliaments and civil society in Europe. As the on-line publication of this lengthy text (with some 1600 pages) on the EU Commission's website in September 2014 gave rise to parliamentary and civil society challenges (notably of the CETA investor-state arbitration rules), parts of the text were re-negotiated in early 2016 ushering in the on-line publication of a revised treaty text in February 2016.<sup>22</sup> On 30 October 2016, the agreement was signed by the EU and Canada as a 'mixed agreement' (i.e. involving Canada, the EU and all 28 EU member states) after the Belgian region of Wallonia had finally given up its opposition to authorizing the federal Belgian government to sign the deal. This consent by the regional government of Wallonia had been conditional, *inter alia*, on the formal

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<sup>20</sup> Cf. E.U. Petersmann, Why Do the EU and its Court of Justice Fail to Protect the 'Strict Observance of International Law' (Article 3 TEU) in the World Trading System and in other Areas of Multilevel Governance of International Public Goods? in: *European Yearbook of International Economic Law – Liber Amicorum for Horst G. Krenzler* (2015), 145-189.

<sup>21</sup> Cf. E.U. Petersmann/M. Pollack (eds), *Transatlantic Economic Disputes. The WTO, the EU and the USA* (Oxford University Press 2003).

<sup>22</sup> The treaty text and all following information on the EU's FTA negotiations and related decisions are available on the website of the European Commission, Directorate-General for Trade: <http://trade.ec.europa.eu/doclib/press>.

adoption of a legally binding 'Joint Interpretative Declaration on the CETA between Canada and the EU and its Member States' as well as on a commitment by the Belgian federal government to request the CJEU for a legal Opinion (pursuant to Article 218(11) TFEU) on the compatibility of CETA's 'investment court system' (ICS) with EU law.<sup>23</sup> In a 'Namur Declaration' of 5 December 2016, a large number of academics and politicians justified the civil society challenges of the CETA by, *inter alia*, the need 'to ensure that European economic and trade agreement negotiations respect the civil society's legitimate demands for transparency and the democratic parliamentary control procedures' and 'guarantee public interests in the dispute resolution mechanism'.<sup>24</sup> In a competing Declaration of 25 January 2017 on 'Trading Together - For strong and democratically legitimized EU international agreements'<sup>25</sup>, an even larger number of academics warned of the dangers of making EU Agreements covering principally issues falling within the EU's exclusive competence 'artificially mixed', thereby 'allowing a particular local interest to veto the interests of all other EU citizens even in areas where EU Member States have decided to act collectively'. Both Declarations criticized, *inter alia*, that '(a)ll private stakeholders (not just foreign investors) should have access to effective surveillance mechanisms regarding the compliance of the signatories with their obligations under these international trade agreements'; and 'national and regional parliaments should engage more with the positions taken by their governments in the EU institutions'. Following the approval of CETA by the European Parliament on 15 February 2017, parts of CETA will be 'provisionally applied' by Canada and the EU in view of the fact that the approval of CETA by all national parliaments - and CETA's legal entry into force - risk requiring many additional years. Yet, the provisional application is limited to areas of exclusive EU competences and does not include CETA's ICS, whose legal consistency with EU constitutional law remains contested and – according to Opinion 2/15 by the CJEU of 16 May 2017 – requires approval by national governments and parliaments.<sup>26</sup>

## EU democracy requires re-connecting multilevel market regulations to the rights of citizens

Inside EU Member States, democratic traditions differ enormously, for instance in countries prioritizing 'parliamentary sovereignty' (e.g. in the UK) and illiberal national traditions (as currently practiced in Hungary and Poland) over judicial protection of constitutional rights of citizens (e.g. as protected under the German Basic Law of 1949). By respecting constitutional pluralism (e.g. regarding social rights), diverse 'national identities' (cf. Article 4 TEU), and acquisition and loss of citizenship as a national competence (e.g. regulating the 'genuine link' to the country in diverse ways), EU law recognizes democratic self-government as an intrinsic value (rather than a merely instrumental value for realizing justice and human rights). Yet, it prescribes 'democratic principles' constituting, limiting, regulating and justifying all levels of EU governance through multilevel rights and deliberations:

- 'constitutional democracy' principles as protected in the EUCFR, the 'general principles of the Union's law' (e.g. 'as they result from the common constitutional traditions of the Member States', cf. Article 6 TEU), as well as through multilevel judicial remedies;
- 'representative democracy' principles as protected by national and European parliaments and other democratically elected institutions (cf. Article 10 TEU);

<sup>23</sup> Cf. G. Van der Loo, CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future, CEPS Commentary of 31 October 2016, available at [www.ceps.eu](http://www.ceps.eu).

<sup>24</sup> For the *Déclaration de Namur* see: [www.declarationdenamur.eu](http://www.declarationdenamur.eu).

<sup>25</sup> For the Declaration on 'Trading Together' see: [www.trading-together-declaration.org](http://www.trading-together-declaration.org).

<sup>26</sup> See Opinion 2/15 of the CJEU, para. 292: 'Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent'.



- ‘*participatory democracy*’ principles as protected by EU citizen rights ‘to participate in the democratic life of the Union’ (Article 10:3 TEU) and to invoke and enforce precise, unconditional EU law provisions as ‘democratic principals’ of EU governance agents; and
- ‘*deliberative democracy*’ principles, for instance based on ‘political parties at European level ... expressing the will of citizens of the Union’ (Article 10:4 TEU), and duties of EU institutions to ‘give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’ (Article 11:1 TEU) and ‘maintain an open, transparent and regular dialogue with representative associations and civil society’ (Article 11:2 TEU) based on EU ‘decisions ... taken as openly and as closely as possible to the citizens’ (Article 10:3 TEU).

*Sections I and II* argued that all EU law – including multilevel market regulations in EU FTAs with transatlantic democracies – must comply with these ‘four levels’ of democratic governance of, for and by the peoples in order to become ‘democratic law’ deserving support by EU citizens and domestic institutions. The civil society opposition against transatlantic FTAs was justified by the secretive, intergovernmental negotiations and the related failures of national and European parliaments to hold EU governance institutions accountable to ‘place the individual at the heart of EU activities’ by protecting fundamental rights of EU citizens also in the negotiations and texts of transatlantic FTAs. This *section III* argues that also the investor-state provisions in the EU’s FTAs with Singapore (2015) and Canada (2016) unnecessarily limit rights and remedies under the EUCFR; in relations among constitutional democracies, investor-state arbitration should be replaced by equal access to domestic legal and judicial remedies, as it is now considered for the EU-Japan FTA.<sup>27</sup>

Since the entry into force of the Lisbon Treaty in 2009, the EU’s common commercial policy powers (Article 207 TFEU) also include powers to conclude international investment agreements. So far, the EU included investment protection chapters into its FTAs with Singapore (2015), Vietnam (2016), and Canada (2016). The draft chapter in the EU-Japan FTA, by contrast, no longer mentions ‘fair and equitable treatment’ and protections against expropriation; instead, it focuses on non-discriminatory market access, national treatment and limited most-favored-nation treatment obligations subject to public policy exceptions (e.g. similar to GATT Article XX). This lack of treaty provisions on investor-state arbitration is a response to the CJEU’s legal findings in Opinion 2/2015 that – notwithstanding the Court’s confirmation of the comprehensive trade and investment policy powers of the EU and its rejection of the more narrow interpretations suggested by Advocate-General Sharpston (e.g. that air and maritime transport services, certain intellectual property and investment provisions, as well as some treaty provisions on labor and environmental standards fall under ‘shared competences’ of the EU and its member states) – removal of investor-state disputes from the jurisdiction of the courts of the Member States ‘cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States’ consent.’<sup>28</sup>

The EU Commission’s ‘transparency initiative’ of 2014 triggered civil society criticism of the draft CETA rules on investor-state arbitration as well as a resolution by the European Parliament calling for reforms of investor-state arbitration rules. In response, the EU Commission proposed new FTA rules for an ICS and additional treaty clarifications of the sovereign ‘rights to regulate investments’ and protect PGs. Both the EU-Vietnam and the EU-Canada FTAs provide for a novel two-tier system of settling investment disputes through a ‘Tribunal of First Instance’ and an ‘Appeal Tribunal’ as parts of a new permanent investment court. The arbitration procedures have become more ‘court-like’ (e.g. improved procedures for appointments of judges for a six-year term; random composition of the divisions of three judges deciding a dispute; provisions protecting judicial impartiality; option of appellate review confirming, reversing or modifying the ‘provisional award’ of first instance; incorporation of the

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<sup>27</sup> An incomplete draft text was approved by the EU and Japan on 6 July 2017 and is published on the EU Commission website (note 22).

<sup>28</sup> See note 26 above.

UNCITRAL Transparency Rules). Yet, the awards rendered under the new ICS will remain enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or following the enforcement provisions (Article 54(1)) in the World Bank Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID).<sup>29</sup>

### ***Failure of the ‘investment court system’ to protect fundamental rights of citizens***

According to CETA Article 8.31 on ‘Applicable law and interpretation’,

- ‘1. When rendering its decision, the Tribunal ... shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
- ‘2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.
- ‘3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may ... recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.’

Hence, if Canadian investors challenge national or EU regulations under CETA arbitration procedures and EU citizens intervene in such arbitration procedures as *amici curiae*, the fundamental rights of ‘everybody’ under the EUCFR – for instance, the economic liberties and property rights protected under Articles 15-17, the equality and solidarity rights protected under Articles 20-38, or the judicial remedies and proportionality principles protected in Articles 47, 52 EUCFR – are excluded from the applicable law, even though an ‘award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case’ (Article 8.41(1) CETA). Such an intergovernmental limitation of the legal and judicial accountability of multilevel governance actors vis-à-vis citizens is neither consistent with the ‘right to an effective remedy and to a fair trial’ (Article 47 EUCFR), according to which ‘(e)veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal’; nor can remedies in national courts and in the CJEU remain ‘effective’ if investors and citizens adversely affected by violations of CETA obligations are barred from invoking CETA rules as ‘integral parts’ of EU law. In economic cooperation among constitutional democracies involving private investments and fundamental rights, the independence and impartiality of adjudication inside the EU should not be unduly limited by ‘executive prerogatives’ like the power of the CETA Joint Committee to change the applicable law and likely outcome of judicial proceedings through an agreed ‘interpretation’, as it happened in NAFTA investment arbitration pursuant to NAFTA Chapter 11.<sup>30</sup> Offering arbitration privileges to foreign investors in the EU and excluding effective remedies of other European investors is hardly consistent with the fundamental ‘right of everyone to an effective remedy’ (Article 47 EUCFR) and with the EU prohibition of ‘any

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<sup>29</sup> As Article 25 ICSID Convention limits the jurisdiction of ICSID to investment disputes between a ‘Contracting State and a national of another Contracting State’ and the EU is not a party of the ICSID Convention, the FTA rules for an ICS provide for additional obligations to accept investment final awards involving the EU as legally binding.

<sup>30</sup> Cf. *Mondev International Ltd. v USA*, ICSID Case No. ARB (AF)/99/2, Award of 11 October 2002 (examining the impact of a restrictive treaty ‘interpretation’ by a NAFTA Committee of 31 July 2001 on the pending arbitration procedures).

discrimination on grounds of nationality' (Article 18 TFEU). Articles 3 and 21 TEU explicitly require 'protection of its citizens' by the EU in external market regulations. As Articles 207 and 208 TFEU on the EU trade and development policies are limited by the EU requirements of 'consistency between the different areas of its external action and between these and its other policies' (Article 21:3 TEU), 'market failures' and related 'governance failures' should be regulated in transatlantic markets in ways consistent with the common market, competition and social regulations inside the European Economic Area (EEA) between the EU and EFTA countries. The civil society opposition against the proposed investment rules reflects justified distrust by citizens vis-à-vis intergovernmental investment rules that unnecessarily limit the legal and judicial accountability of multilevel governance institutions. Three examples illustrate this:

- Transnational rule of law and market integration inside Europe were promoted through citizen-driven, decentralized enforcement of common market rules and FTAs. Also in transatlantic FTAs, non-discriminatory access of all affected citizens to domestic judicial remedies offers more effective enforcement mechanisms than transnational investor-state arbitration and related 'negative discrimination' of domestic citizens, which limit 'participatory democracy', rule of law and fundamental rights in violation of Articles 52, 54 EUCFR. The EU negotiators offered no justification of why exclusion and 'negative discrimination' of EU citizens in international investment arbitration may be necessary and preferable over non-discriminatory access of all citizens and investors to domestic and EU courts, which are more independent and more constitutionally constrained and can offer more impartial and effective remedies.
- In Opinions 1/2009 (European Patent Court) and 2/2013 (European Convention on Human Rights), the CJEU emphasized the constitutional prohibition of unnecessarily limiting the EU guarantees of interpreting and protecting fundamental rights within the particular structures and restraints of EU law. A 2016 opinion by the German Association of Judges inferred from this jurisprudence as well as from EU and German constitutional law that the CETA limitations of the jurisdiction of national and EU courts for investor-state disputes are neither necessary nor consistent with EU law in view of the alternative of more effective, and more comprehensive legal and judicial remedies in European courts.<sup>31</sup> The legal admissibility of 'negative discrimination' of EU investors inside the EU is likewise contested in a pending CJEU dispute.<sup>32</sup>
- The broad definition of the 'applicable law' in Article 42 of the ICSID Convention illustrates that investor-state arbitration involves all three dimensions of international investment law: national laws, investor-state contracts, and international law rules applicable in the relations among the home and host states involved.<sup>33</sup> The EU proposals for new FTA investment rules 're-fragment' these complex interactions among the interdependent 'three levels of investment regulation' and related adjudication; they risk harming investors and the rule of law, for instance if EU investors cannot invoke FTA guarantees in domestic courts and fundamental rights cannot be invoked in investment courts (cf. Article 8.18 CETA). Rather than complying with their EU mandate for citizen-oriented reforms of trade and investment agreements, EU institutions emulate power-oriented foreign trade policies by excluding rights and remedies of citizens under FTAs so as to limit their own legal, democratic and judicial accountabilities vis-à-vis citizens.

As the Belgian federal government has committed itself – in exchange for the consent by the regional government of Wallonia to the conclusion of the Canada-EU CETA in October 2016 - to requesting an opinion by the CJEU on whether CETA's investment arbitration rules are consistent with EU law, it remains to be seen whether this judicial review pursuant to Article 218(11) TFEU will necessitate amendments of the CETA rules on judicial remedies. Even though the CETA investment tribunal has

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<sup>31</sup> Cf. Richterbund Stellungnahme 04/16 (<http://www.drj.de/cms/index.php?id=952>).

<sup>32</sup> Cf. the request of 3 March 2015 (I ZB 2/15) by the German *Bundesgerichtshof* for a preliminary ruling by the CJEU on whether investor-state arbitration inside the EU is consistent with EU law (e.g. Arts 18, 267, 344 TEU).

<sup>33</sup> Cf. J.W. Salacuse, *The Three Laws of International Investment. National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013).

no power to apply EU law, its legally binding awards on national and EU ‘rights to regulate’ and on adversely affected investor rights and remedies risk impacting individual rights without respect for the ‘due process’ and ‘procedural justice’ principles of EU law. In order to restore citizens’ trust in the EU and reconnect with civil society support for welfare-enhancing trade regulation, the EU must keep its promise of concluding ‘transformative FTAs’ that empower and protect citizens in the collective supply of PGs in conformity with EU guarantees of fundamental rights, democratic governance, conferral of limited powers, subsidiarity, rule of law, and legal, democratic and judicial accountability of multilevel governance institutions. Judicial rights and remedies of citizens – as protected by the EUCFR – are a ‘republican strength’ of the EU, even if European courts impose legal limits on EU foreign policy discretion and – by annulling EU foreign policy measures (for instance, on ‘smart sanctions’ against alleged terrorists, private data transfers violating Articles 7 and 8 EUCFR) – force EU negotiators to insist on foreign policy reforms protecting rights of citizens. Contrary to regrettable claims by some EU trade politicians, the EU principles of conferral, subsidiarity and proportionality (Article 5 TEU) constitutionally constrain the exercise of *all* EU powers, including trade policy powers. The EU’s ‘cosmopolitan foreign policy mandate’ (e.g. in Articles 3, 21 TEU) limits diplomatic claims that EU institutions should not be held legally and judicially accountable in domestic courts for violating FTA rules if American and Canadian governance institutions exclude similar legal and judicial accountability inside their domestic jurisdictions. In order to realize the EU treaty mandates of ‘strict observance of international law’ and of legal, democratic and judicial protection of fundamental rights of citizens, the EU must insist that FTAs among transatlantic democracies – like FTAs among European states – protect fundamental rights to hold multilevel governance institutions legally, democratically and judicially accountable. If, similar to the case of the EU-Switzerland FTA, the different constitutional traditions in NAFTA countries (e.g. lack of constitutional protection of property rights in Canadian constitutional law) should justify particular treaty safeguards, related limitations of EU fundamental rights and remedies must meet the proportionality, necessity and other justification requirements set out in Article 52 EUCFR.<sup>34</sup>

### ***Transatlantic economic adjudication should be designed as ‘cosmopolitan law’***

EU law, EEA law and the European Convention on Human Rights (ECHR) have evolved into ‘cosmopolitan law’ protecting citizens beyond national frontiers through multilevel legal and judicial protection of fundamental rights. Similarly, Articles 3 and 21 TEU mandate the EU to protect rights and remedies of citizens also in transatlantic market regulations with constitutional democracies in the Americas. The CJEU has repeatedly expressed concern about international dispute settlement procedures that risk undermining EU constitutional law (e.g. the principles of primacy and autonomy of EU law, the competences of the CJEU under Article 19 TEU, the ‘preliminary ruling procedures’ connecting national courts to the CJEU) and fundamental rights of citizens.<sup>35</sup> The failures of national and European parliaments to protect – also in external EU governance of transnational PGs – the fundamental rights of EU citizens reflects disregard for the fact that the effectiveness of European integration law was essentially due to the decentralized empowerment of citizens and local interests to invoke and enforce EU, EEA and ECHR rules and remedies.<sup>36</sup> Intergovernmental ‘re-feudalization’ of external market regulations based on outdated paradigms of ‘Westphalian chessboard governance’

<sup>34</sup> Cf. E.U.Petersmann, Citizens and Transatlantic Free Trade Agreements: How to Reconcile American ‘Constitutional Nationalism’ with European ‘Multilevel Constitutionalism’? in: *EUI Working Paper* 2016/17.

<sup>35</sup> See *Opinion 1/91 (EEA)*, EU:C:1991 I 60791; *Opinion 1/00 (European Common Aviation Area)*, EU: C:2002 I 3498; *Opinion 1/09 (European and Community Patent Court)*, EU:C:2011 I 1137; *Opinion 2/13 (ECHR)* of 18 December 2014.

<sup>36</sup> Cf. E.U.Petersmann, Cosmopolitan constitutionalism: linking local engagement with international economic law and human rights, in: L.Biukovic/P.Pitman (eds), *Local Engagement with International Economic Law and Human Rights* (Cheltenham: Elgar 2017), 26-54.

weakens citizen-driven 'network governance'.<sup>37</sup> As the EUCFR requires the EU to 'place the individual at the heart of its activities' (Preamble), it is regrettable that the 'Joint interpretative Declaration on the CETA' of October 2016 failed to confirm that the primary objective of transatlantic FTAs should be to strengthen the rights and general consumer welfare of all citizens as 'primary agents of justice' responsible for holding multilevel governance institutions accountable for 'strict observance of international law' (Article 3 TEU) and of EU fundamental rights as protected in the EUCFR. Among democracies, national treatment and impartial settlement of transnational economic disputes in domestic courts are more in conformity with the 'principle of subsidiarity' (Article 5 TEU) than transnational arbitration privileges for foreign investors. Beyond the judicial settlement of disputes, (trans)national courts among constitutional democracies have additional legal functions, such as clarifying indeterminate treaty provisions, controlling abuses of power, and protecting rights of citizens and peoples to hold multilevel governance institutions accountable through constitutional, participatory and deliberative democracy, as prescribed in Articles 9-12 TEU. Out-sourcing transatlantic disputes to 'private' or 'diplomatic justice' is not a legitimate policy option for the EU as an international organization with a constitutionally limited mandate. Empowering EU citizens will not only strengthen the EU capacity of concluding FTAs that are then also democratically supported by those same citizens. 'Cosmopolitan FTAs' among democracies can also 'advance in the wider world' (Article 21 TEU) the republican insight underlying European integration that multilevel governance of transnational PGs requires multilevel legal and judicial protection of equal rights of citizens. Just as the EU has used its competition, development and environmental policies for 'exporting' and protecting rights-based principles of EU law in external relations, so must the EU trade and investment policies prioritize 'protection of its citizens' and 'strict observance of international law', as required by Articles 3, 21 TEU in conformity with European human rights law in order to maintain the democratic legitimacy of the European project of 'integration through law'. The more multilevel European governance of transnational PGs depends on incorporating international PGs treaties as 'integral parts' of EU law, the more depend the legitimacy and effectiveness of EU governance on designing PGs treaties as inclusive 'democratic law' empowering and protecting citizens to invoke and enforce precise and unconditional treaty guarantees in domestic jurisdictions.

## **Conclusion: Democratic and republican functions of EU citizen rights**

The insight that national and transnational governance institutions must be constrained by 'civil societies' empowering citizens through fundamental rights, active citizenship (*'cives Romanus sum'*) and judicial remedies in order to protect collective supply of PGs, can be traced back to ancient democratic and republican constitutionalism in Mediterranean 'city republics' (like Athens and Rome). Modern constitutional theories justify constitutional rights and restraints not only on deontological grounds of 'justice' (like respect for the 'trinity' of human rights, rule of law and democratic self-government). Democratic discourse justifications of governance procedures and civil society institutions also respond to the 'human condition'<sup>38</sup> and sociological insights that the imperfect nature of human choices (e.g. due to rational egoism, emotions, 'animal instincts', 'bounded rationality' limiting the 'reasonableness' of citizens) requires 'institutionalizing public reason' (J.Rawls) through constitutional self-restraints on 'public choices' and collective decision-making processes in multilevel governance institutions.<sup>39</sup> As discussed in *sections I to III*, in contrast to regional integration law in Africa, the

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<sup>37</sup> Cf. A.M.Slaugther, *The Chess-Board and the Web. Strategies of Connection in a Networked World* (New Haven: Yale University Press 2017) (elaborating strategies for designing, improving and managing social networks for resolving collective action problems at local, national and transnational levels of governance).

<sup>38</sup> Cf. P.Allot, *Eutopia: New Philosophy and New Law for a Troubled World* (Cheltenham: Elgar 2016), who derives from the 'human condition' (analyzed in Part I) the necessary 'human powers' (Part II) and 'human will' for individually and collectively designing law and society (Part III of the book).

<sup>39</sup> See, e.g. *World Development Report 2015: Mind, Society and Behavior* (Washington: World Bank 2015) (discussing rational choice theory, behavioral economics, public choice and deliberative democracy theories on how individuals, institutions,

Americas and Asia, European integration law has responded to the ‘governance failures’ revealed by World Wars I and II by using three complementary conceptions of multilevel constitutionalism for constituting, limiting, regulating and justifying governance institutions in Europe:

- *Constitutionalism as a normative justification of agreements* for collective supply of national and transnational PGs (like the ECHR, EU and EEA law) constituting the basic legal order of peoples based on ‘principles of justice’ and agreed rules and institutions of a higher legal rank protecting equal rights of citizens as ‘agents of justice’, ‘constituent powers’ and ‘democratic principals’ of multilevel governance institutions.
- *Constitutionalism as a sociological ‘six-stage process’* of ‘constitutionalizing multilevel governance of PGs’ by transforming (a) the agreed constitutional principles into multilevel (b) constitutional, (c) legislative, (d) administrative, (e) judicial and (f) international rules and institutions protecting transnational PGs and equal rights of citizens by ‘institutionalizing public reason’ beyond national boundaries.
- *Constitutionalism as a judicial methodology* for interpreting, clarifying and enforcing agreed ‘primary rules of conduct’ and ‘secondary rules of recognition, change and adjudication’ in conformity with their underlying ‘principles of justice’ as principal-agent relationships between citizens and multilevel governance institutions.

Just as *state citizens* using their civil and political rights are preconditions for establishing a *democratic polity*, and *economic citizens* using their economic and social rights are preconditions for creating a ‘social market economy’ generating the private and public resources necessary for social welfare, so have multilevel human rights guarantees and *cosmopolitan citizenship* become necessary preconditions for multilevel governance of transnational PGs.<sup>40</sup> This contribution has criticized path-dependent, one-sided prioritizations of civil and political rights of state citizens (e.g. in the theories of justice by J.Rawls and in prevailing interpretations of EU citizenship rights) without adequate recognition of the need for empowering citizens through transnational economic, social and other cosmopolitan rights to participate in, assume responsibility for, and democratically control multilevel governance of transnational PGs. Recognition of the need for ‘stakeholder inclusion’ (e.g. in the sense of all affected interests, or all subject to the jurisdiction of a government) in local, state and regional polities has enabled the EU to develop more comprehensive ‘multilevel citizenship rights’ than in other regional integration projects.<sup>41</sup> Just as the political philosophies of Plato and Aristotle explained the ancient Athenian democracy as a result of civil and democratic struggles for justice (e.g. by Solon, Cleisthenes, Pericles, Socrates), the emergence of ‘European constitutional law’ was often advanced by individual struggles of adversely affected citizens (like the Italian lawyer Mr. Costa, the Belgian stewardess Ms. Defrenne, the German wine grower Mrs Hauer) and non-governmental institutions (like the Dutch transport company Van Gend en Loos) insisting on judicial protection of equal rights of citizens rather than only of states and governments. The effectiveness of cosmopolitan rights as constitutional restraints of multilevel governance institutions often depends on the democratic and republican virtues of politicians, judges and citizens (e.g. in their joint production of ‘social justice’) no less than on the legal and institutional design of multilevel governance institutions, such as their ‘constitutionalization’ by participatory procedures, cosmopolitan rights, accountability mechanisms and independent ‘specialized agencies’.<sup>42</sup>

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and societies make legally relevant decisions, enact laws, adapt to them, and choose among the various theories of choice for regulating individual, collective and organizational decision-making at national and transnational levels).

<sup>40</sup> Similarly: O.Höffe, *Wirtschaftsbürger, Staatsbürger, Weltbürger. Politische Ethik im Zeitalter der Globalisierung* (München : Beck 2004).

<sup>41</sup> Cf. W.Maas (ed), *Multilevel Citizenship*, University of Philadelphia Press 2013.

<sup>42</sup> This may be true for UN Specialized Agencies no less than for EU regulatory agencies (like central banks, competition authorities and public health agencies), whose autonomy and independence is often justified by their mandate to protect community interests requiring expertise and protection against political biases and rent-seeking interest groups; cf. D.Ritleng (ed), *Independence and Legitimacy of the Institutional System of the European Union* (Oxford University Press 2016).

Due to globalization (e.g. of communications and division of labor), ever more citizens can realize their individual conceptions of a 'good life' and of 'social justice' only in transnational, legal communities recognizing and protecting rights of state citizens, 'economic citizens' (e.g. seeking self-realization through professional education, work, investments or tourism abroad), and complementary rights of 'cosmopolites' (e.g. family member of workers abroad, transnational enterprises, other non-governmental organizations) constituting 'transnational civil societies'; the latter are increasingly protected by transformation of the 'international law among states' into international cosmopolitan law and 'law of peoples' promoting procedural, constitutional, distributive, corrective and 'commutative justice principles' (e.g. based on judicial remedies).<sup>43</sup> Without multilevel protection of fundamental rights and accountability mechanisms, the reality of transnational 'network governance' risks undermining international PGs (e.g. in case of security threats by networks of terrorists, criminal drug and migration cartels, cyber-criminals). Citizen-driven network governance offers efficient and legitimate ways of challenging abuses of public and private power and of making decentralized knowledge and local initiatives available for multilevel governance of PGs, for instance by empowering sub-state actors (e.g. workers in international labour law, companies in international commercial and investment law, cities in climate change prevention agreements, individual victims in international criminal law, every human being in human rights law) and supranational actors (e.g. EU membership in WTO agreements, parliamentary bodies in regional integration agreements, regional courts in human rights and economic agreements) to cooperate in collective supply of transnational PGs. Without cooperation among national and European courts in protecting rights of citizens, the progressive transformations of European economic and human rights law into multilevel constitutional and cosmopolitan legal systems would hardly have been possible over the past 60 years. In order to realize the EU policy objective of 'bringing Europe closer to its citizens', EU citizens must be legally empowered to develop their 'republican virtues' and support of EU governance of PG through more active use of their civil, political, economic and social rights and remedies for challenging the ubiquity of 'governance failures' and 'market failures' so as to defend 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU). Promoting bottom-up a citizen-driven 'civil rights republicanism' based on a shared commitment to common European values is likely to offer more effective incentives for an 'active European citizenship' democratically supporting the EU than 'technocratic top-down governance' based on 'intergovernmental agreements' (like CETA) treating EU citizens as mere objects of 'PGs treaties' approved by parliaments and incorporated into EU law for the benefit of citizens. This contribution has proposed to define the 'European identity' by the unique EU citizenship rights and related fundamental rights as codified in the EUCFR. At a time when US President Trump challenges the basic principles of worldwide and regional 'PGs treaties', and Chinese communist leaders present themselves as defenders of open markets and WTO law, it is a 'republican' and 'cosmopolitan responsibility' of European citizens and of their democratic institutions to defend the global PG of a liberal, rules-based world order based on universal respect for fundamental rights of citizens and democratic governance of transnational PGs.

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<sup>43</sup> See, e.g.: F.J.Garcia, *Global Justice and International Economic Law : Three Takes* (Cambridge University Press 2013), who distinguishes three different conceptions of (1) 'justice as the foreign policy of liberal states' applying their constitutionally agreed principles of justice consistently at home and abroad; (2) the possibility of a 'global community of justice'; and (3) 'global justice as consensual exchange' excluding oppression and similar abuses of power. On 'justice as respect for human rights' and the need for 'civilizing' national, transnational and international human interactions (as suggested first by I.Kant in his essay on *Perpetual Peace* of 1795) see: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart 2012).





