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Reasonableness and Law

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Originally developed for the free movement of goods, the notion of mandatory requirements is now firmly established in all the fundamental economic freedoms,[8] and a similar instrument is in its embryonic stage in the field of procedural law (see Joined Cases C-430-431/93, *Jeroen van Schijndel*, in ECR 1995 page 04705; Case C-312/93, *Peterbroeck*, in ECR 1995 page 04599). The basic idea behind such developments is the need to balance rules and exceptions, giving adequate flexibility to the law and consideration to the different interests involved. In this sense, it is not inconceivable to draw an analogy with the "American" rule of reason, been as the outcome of both is a reasonable exception to the rule. Nonetheless, it is important to note that, unlike the "American" rule of reason, which allows the weighing of economic effects on the relevant market, the notion of mandatory requirements ensures the taking into account of non-economic general interests such as the protection of the environment, consumer protection, cultural diversity, public health, and more.[9]

It follows from the above that, if the mandatory requirements doctrine were transposed to EC antitrust law, the latter's rules could be overridden, subject to proportionality, whenever contrary or harmful to a legitimate non-economic general interest pursued by an agreement.[10] This would stand in stark contrast with the effects that would ensue from the application of the "American" rule of reason, and could allow interests not contemplated by Article 81(3) ECT (economic effects) to be taken into account.). However, it must be emphasised that this reasoning may conflict with the wording of Article 10 of Regulation 1/2003 and relevant guidance letters. In fact, although the latter grant the European Commission the power to declare that an agreement does not conflict with competition rules, it seems that only economic factors can be considered for this purpose.

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[8] For application in the free movement of services, see Case C-76/90, *Manfred Säger*, in ECR 1991, page 04221; for the free movement of workers, see Case C-415/93, *Jean-Marc Bosman*, in ECR 1995, page 04921; for the freedom of establishment, see Case C-55/94, *Reinhard Gebhard*, in ECR 1995 page 04165; for the free movement of capital, see Case C-503/99, *Commission of the European Communities v. Kingdom of Belgium*, in ECR 2002, page 04809.

[9] It must also be noted that an increasingly important role seems to be accorded to fundamental rights. This is apparent in Cases C-112/00, *Eugen Schmidberger, Internationale Transporte und Planziige and Republic of Austria*, in ECR 2003 page 05659 and C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, in ECR 2004 page 09609.

[10] Such an approach has been proposed by Advocates General Jacobs and Leger in their opinions in *Pavlov* (Case C-180-184/98, *Pavlov*, in ECR 2000 page 06451, paragraph 163) and *Arduino* (Case C-35/99, *Arduino*, in ECR 2002 page 01529, paragraphs 89–91) respectively. Both seemed to accept that, in cases involving a *State* measure infringing Articles 81(1) and 10 ECT, it is appropriate to allow the Member State to justify its conduct on grounds of public interest, so long as the principle of proportionality is respected. A similar logic was also defended by the European Commission in its observations on *Macrino et Capodarte* (Case 202/04, *Macrino et Capodarte*, in ECR 2006, page 11421), where it argued that an anti-competitive State measure infringes Articles 10 and 82 ECT unless it is justified by public-interest objectives and proportionate to such goals. On the more general issue of the relationship between national legislation and EC law, see Triantafyllou (1996, 57).

3 The "Grey Area" Between Competition and Free Movement

Deciding whether a matter is to be considered a competition or an internal market issue is not always clear-cut. In this respect, the case-law of the European Court of Justice reveals that a "grey area" exists between EC free-movement and antitrust rules. An example of this may be noted in the field of services of general interest where, in cases such as *Corsica Ferries* (Case C-266/96, *Corsica Ferries*, in ECR 1998 page 03494), the ECJ found that restrictions to both sets of norms, notably Articles 82 ECT (abuse of dominant position), 86 ECT (public services), and 28 ECT (free movement of goods), could be envisaged.[11]

For the purposes of this paper, it is interesting to note that the ECJ seems to have accepted that the doctrine of mandatory requirements, developed in the free movement context (Section 2 above), may apply to some agreements or practices falling into such "grey areas." In *Albany* (Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, in ECR 1999 page 05751), for example, the restrictive effects on competition, inherent to an understanding creating compulsory affiliation to a sectoral pension scheme, where held to be necessary in order to pursue social objectives. In light of this, the agreement was considered not to fall within the scope of Article 81(1) ECT.

Another interesting example of such reasoning can be found in the *Wouters* judgment (Case C-309/99, *J. C. J. Wouters*, in ECR 2002 page 01577), regarding a 1993 regulation adopted by the Bar of the Netherlands, prohibiting multidisciplinary partnerships between members of the Bar and accountants. Although such legislation had clear anti-competitive effects, the ECJ stated that not all agreements or decisions which restrict the freedom of action of one or more parties must necessarily fall within the framework set by Article 81(1) ECT.[12] In fact, the background against which the agreement or decision is concluded, and the objectives it pursues, must be taken into account. Following such an appraisal, it has then to be determined whether "the consequential effects restrictive of competition are inherent in the pursuit of those objectives" (*Wouters*, paragraph 97), and if that is so, the measure is deemed not to infringe Article 81(1) ECT.[13]

In the above cases, the ECJ showed it was willing to balance anti-competitive effects against public-policy objectives. Despite the fact that the concept of

[11] Similarly, in Joined Cases C-115/97, 116/97 and 117/97, *Brentjens*, in ECR 1999 page 06025, the ECJ evaluated the compatibility of a compulsory affiliation to a sectoral-pension scheme with competition rules. It held that "Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector" (Paragraph 123).

[12] The Courts conclusions on Articles 43 (freedom of establishment) and 49 ECT (free movement of services) will not be analysed here, as the applicability of a rule of reason in those areas of law is not in doubt (see Section 2 above).

[13] In *Wouters* the ECJ concluded that, despite its inherently restrictive effects on trade, the 1993 regulation adopted by the Netherlands Bar association was necessary to ensure a proper organization of the legal profession (emphasis being placed on the public interest ground linked to professional ethics), and consequently not in breach of Article 81(1) ECT.

"inherent restriction" remains vague, applying the Courts reasoning can lead an agreement which restricts competition to be *compatible* with Article 81(1) ECT where it pursues legitimate non-economic objectives. Although such an approach is clearly reminiscent of the mandatory-requirements doctrine applied for free-movement norms, the absence of a proportionality test is striking and, given the stated parallelism, difficult to explain.

Recent case-law suggests that sporting activities are also amid freemovement and competition rules. In *Deliège* (Joined Cases C-51/96 and 191/97, *Christelle Deliège*, in ECR 2000 page 02549) the ECJ accepted that sports rules requiring professional or semi-professional athletes to obtain an authorisation (or be specifically selected) by their federation, in order to take part in international competitions, could not be considered as infringing the rules on the free movement of services insofar as such requirements were *inherent* in the organisation of sporting events. Even if not expressly mentioned, such a decision evidently stems from the Court's consideration of the non-economic objectives attached to the subject-matter. As to the applicability of competition rules, the ECJ refused to assess them citing a lack of information and the consequent impossibility of issuing an informed ruling on their interpretation.[14]

In the *Meca-Medina* judgment (Case T-313/02, *David Meca-Medina*, in ECR 2004 page 03291), the Court of First Instance (hereinafter the CFI) confirmed *Deliège* when it held that "purely sporting" rules can not be linked to an economic activity or to an economic relationship of competition. Moreover, been as this characteristic is inherent to such rules, they not only fall outside the scope of Articles 39 and 49 ECT but are also not caught by Articles 81 and 82 ECT.

Notwithstanding the above, the concept of "inherent restriction" has suffered a blow following the appeal of the CFI's judgment in *Meca-Medina* to the ECJ (Case C-519/04, *David Meca-Medina*, in ECR 2006 page 06991). This latter case reversed the previous decision with regard to anti-doping rules and criticised the CFI's reasoning. In particular the judgement indicates that, in excluding the said rules from the scope of Articles 81 and 82 ECT on the ground that they are classified as being of a "purely sporting" nature with regard to Articles 39 and 49 ECT, the CFI made an error of law. In fact, it should have positively determined whether they fulfilled the specific requirements set by EC antitrust rules, rather than merely recalling their inherently non-economic characteristics.

In conclusion, it should be noted that, even though the case-law in "grey areas" leans towards the application of a rule of reason similar to that developed in free movement cases, it is evident that there are still some uncertainties in the Courts' approach. In fact, following the *Meca-Medina* saga, the flexible stance to "exceptions" adopted in *Wouters/Deliège/Meca-Medina* (the CFI judgment), seems to be counterbalanced by a stricter approach in which a rigid application of the Treaty rules is preferred.

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[14] See *Deliège*, paragraph 38. Even so, it seems that when considering possible violations of free-movement rules *and* of Articles 81 and 10 ECT, the courts will as far as possible focus on the former in order to benefit from the application of the mandatory-requirements doctrine.

4 The "American" Rule of Reason and Article 81 ECT

Despite the fact that the mandatory-requirements doctrine is well established in the free movement context and has been applied, albeit inconsistently, in grey areas, the use of a rule of reason in "pure" competition cases seems much more problematic.

The difficulties found in this area of the law can readily be appreciated in the *Montecatini* judgment (CaseC-235/92 P, *Montecatini SpA*, in ECR 1999 page 04539). In this case, the EU Court of First Instance dismissed the rule-of-reason theory with reference to Article 81(1) finding that, owing to the highly damaging nature of a price-fixing agreement on competition, there was no need to enquire whether this could be offset by positive effects. The agreement was to be considered a *per se* violation of Article 81(1), thus preventing the application of exceptions by virtue of a test of reasonableness.

Although such a decision was upheld by the ECJ on appeal, the latter's logic was far from identical to that of the CFI. Indeed, the highest jurisdictional Court of the EU, pointed out that "even if the rule of reason did have a place in the context of Article 81(1) of the Treaty" (paragraph 133), its application was precluded by the clear nature of the infringement in question. Such terminology seems to open the door to a possible future application of a rule of reason in EC competition law, especially in cases where an agreement is not manifestly anti-competitive.

Notwithstanding the above, four recent judgments handed down by the CFI expressly reject the application of a rule of reason, explicitly confirming that it has no place in Article 81 ECT.

First of all, in *Métropole télévision (M6)* (Case T-112/99, *Métropole télévision (M6)*, in ECR 2001 page 02459) it was observed that the use of a rule of reason has never been confirmed by Community courts and, furthermore, that there are numerous judgements that suggest that its existence is doubtful (see *Métropole*, paragraph 72). Nevertheless, according to the CFI, this does not necessarily imply that all agreements restricting the freedom of action of one or more parties must automatically fall within the scope of the prohibition in Article 81(1) ECT. On the contrary, when assessing compatibility with the latter, the economic context in which undertakings operate and the actual structure of the market concerned must be taken into account (see paragraph 76). In this way, the prohibition in issue is not extended "wholly arbitrarily and without distinction" (see paragraph 77) to all agreements affecting free competition.

The "pliant" interpretation of Article 81(1) proposed in *Métropole*—and followed in a number of other judgments (see, in particular, Case C-56/65, *Société technique minière and Oude Luttikhuis and Others*, in ECR 1966 page 00235, and Case C-250/92, *DLG*, in ECR 1994 page 05641) does not, however, entail an analysis of the agreement's pro- and anti-competitive effects. The CFI explicitly states that such an analysis can not be intrinsic to Article 81(1) ECT, thus dashing all hopes of letting the "American" rule of reason in "through the back door."

Secondly, in *Van den Bergh Foods Ltd* (Case T-65/98, *Van den Bergh Foods Ltd*, in ECR 2003 page 04653) the CFI, referring to well-established case-law, offered

another reason for not accepting the existence of a rule of reason in EC competition law. In fact, it stated that it would be difficult to conceive the interpretation of Article 81(1) as comprising such a balancing exercise, given the structure of the EC Treaty itself. Article 81(3) ECT expressly provides the possibility of exemption for agreements that restrict competition but which satisfy a number of conditions. It follows that it is only within the framework set by that rule that the pro- and anti-competitive effects of an agreement can be weighed (see paragraph 107).[15]

Thirdly, in *Brasserie Nationale* (Joined Cases T-49/02–51/02, *Brasserie Nationale*, in ECR 2005 page 03033) the application of the mandatory requirements doctrine, the "European" rule of reason, was excluded in the context of competition law. The CFI found that

> Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Article 81(1) EC by virtue of the fact that it also pursued other objectives. (Paragraph 85)

If read in combination with the CFI's rejection of the applicant's reference to the *Cassis de Dijon* case-law, it is obvious that a firm refusal to allow free movement reasoning to permeate competition law is in place.

Finally, in *O2* (Case T-328/03, *O2* [*Germany*] *GmbH & Co. OHG*, in ECR 2006 page 01231) the Community judges seemed to expand the concept developed in *Métropole*. In particular, they stated that in order to ascertain the applicability of Article 81(1), the assessment of an agreement need not be limited to the relevant market structure and the economic (or legal) context in which it was concluded, but could involve the consideration of its object, effects and whether it affected intra-community trade. On this basis, the Court established the need to implement a counterfactual" examination, balancing the impact of the agreement on potential and existing competition against the situation that would have existed in its absence.

Although the methodology used in *O2* ensures that Article 81(1) is not extended indistinctly to all agreements which affect the freedom of action of one or more parties, it must not be confused with a reasonableness test. In fact, the CFI once again makes it clear that the reasoning described does not involve the assessment of pro- and anti-competitive effects and can thus not be associated with a rule of reason (see paragraph 69).

5 Flexibility and Coherence: Towards a General Application of the "European" Rule of Reason?

It is clear from the case-law that the ECJ and the CFI are unwilling to apply the same degree of flexibility when dealing with rules on free movement and those pertaining to antitrust/competition law. As regards the former, the European courts have

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[15] A similar conclusion is reached by the CFI in *Métropole* at paragraph 77 of its judgment.

adopted an innovative test of reasonableness, based on the doctrine of mandatory requirements and allowing for the balancing of non-economic interests, which is visibly different from the "American" rule of reason. A similar, yet not so firmly established, raison d'être seems to pervade the grey areas dealt with in Section 3, where the courts have generally followed a "free movement reasoning." However, in areas of pure antitrust law, it is evident that the courts are unwilling to permit the application of the same analysis.[16]

In this respect, it must be pointed out that such a statement has been tempered by the emergence of a quasi "European State Action Doctrine," where public interest objectives seem to play an important role. The ECJ has confirmed that national measures with an effect on competition law will be deemed unlawful *only* inasmuch as they favour the adoption of agreements, decisions, or concerted practices contrary to Article 81 ECT or reinforce their effects (see C-198/01, *CIF*, in ECR 2003 page 8055, paragraph 46); or where the State divests its own rules of the character of legislation by delegating to private economic operators responsibility for adopting decisions affecting the economic sphere (see Case C-136/86, *Aubert*, in ECR 1987 page 04789; Case C-250/03, *Mauri*, in ECR 2005 page 01267). As noted by Advocate General Poiares Maduro such case-law "must certainly be construed as meaning that it is necessary to be aware what aims the State is pursuing in order to determine when its action may be made subject to competition law" (see Opinion in Case C-94/04, *Federico Cipolla*, in ECR 2006 page 11421, paragraph 33). It follows that, in a manner not so far removed from the doctrine of mandatory requirements, if a national measure is designed to protect a public interest, it will fall *outside* the scope of antitrust rules. On the other hand, where such a general objective is outweighed by a concern to protect private interests, the Member State's action will necessarily fall *within* the purview of the said rules.

Leaving national measures and the "European State Action Doctrine" aside, the rationale behind the case-law rejecting the rule of reason in competition law is the existence of Article 81(3) ECT, which clearly amounts to a reasonableness clause with respect to the general prohibition set forth in Article 8(1). Therefore, it seems that the existence of a rule of reason and consequent "additional exceptions" is limited by the structure of the Treaty itself. Yet, been as the existence of justificatory provisions does not preclude the doctrine of mandatory requirements in the context of the free movement rules, one must question whether applying a different approach to antitrust law, which is an inherent part of the internal market, is both coherent and possible.

In support of the courts' position it could be argued, that whilst Articles 30 ECT *et similia* are exhaustive and to be applied restrictively, Article 81(3) is not subject to such limitations. On the contrary, it provides a series of conditions an agreement must satisfy in order to benefit from the exemption provided therein, and does not

[16] However, on the convergence of free movement and competition rules see:, Mortelmans (2001, 613), Van de Gronden (2005, 79), and Wesseling (2005, 59).

therefore establish a closed list of justifications. When coupled with the fact that the distinction between distinctly and indistinctly applicable measures does not subsist in EC competition law, it is not entirely surprising that the Court has rejected the application of a rule of reason.

As mentioned above, the application of Articles 81 and 82 ECT has been reformed (as of May 1, 2004) by Council Regulation No. 1/2003 (16 December 2002, in Official Journal L 1, 4.1.2003, pages 1–25). According to the new rules, although the European Commission still retains the power to impose fines and grant block exemptions, it no longer maintains exclusive competence for the application of Article 81(3) ECT. In fact, it now falls to Member States and to national authorities, administrative and judicial alike, to apply Article 81 ECT as a whole. It follows that, once it is determined that the requirements set forth in Article 81(3) are met, national authorities have the power to legitimately conclude that an agreement is not anti-competitive according to Article 81(1). Nonetheless, does this imply that they can also consider that an agreement or practice" falls outside the scope of Article 81(1) due to positive effects for the general interest? To this end, can national authorities apply the proportionality test to determine exceptions to the rule, as occurs in the framework of the mandatory requirements doctrine? Alternatively, can they compare the costs and benefits an agreement entails for competition, in conformity with the “American” rule of reason?

It seems likely that national judges, not accustomed to the subtle distinctions the ECJ has developed in different fields, will deem that,in order to ensure unity of interpretation of internal market rules, a uniform application of the same is necessary. In giving effect to such a presumption it is possible that judges will apply the free movement reasoning to competition law. Moreover, it may be argued that since the entry into force of the so-called modernization regulation, such logic is no longer necessarily contrary to the case-law of the ECJ and CFI. In fact, if to-date the rejection of the rule of reason to EC competition law has been linked to the interpretation of Article 81 ECT as established by Council Regulation No. 17, the same conclusion might not be justified in light of the changes implemented by Regulation 1/2003. We suggest that only a clear pronouncement by the ECJ and CFI judges in Luxembourg can forestall a gradual drift towards a rule of reason. In this sense, the ECJ may be called to interpret the new regulation via a preliminary reference procedure whilst, on the other hand, the CFI is likely to rule on the issue in actions against European Commission decisions imposing fines.

In support of the above, it must be recalled that the Common Market has, since its creation, evolved into an internal market, establishing itself and growing beyond expectations. It is therefore worth questioning whether the system of exemptions provided by Article 81(3), and the economic interests listed therein, are still the only exigencies worthy of protection. This is even more so, if one considers that the market's evolution has caused a parallel growth in the relevance of non-market considerations. In this respect, a few recent developments in EC law appear to confirm the socioeconomic character of the internal market, conferring value to non-economic objectives not considered in Article 81.

Firstly, the family of integration clauses inserted into the ECT,[17] require certain non-economic objectives to be integrated into the definition and implementation of all community policies.

Secondly, the new Lisbon Treaty seems to place added emphasis on services of general interest, rather than on free competition itself, and a recent communication of the Commission (Communication of 20 November 2007, "Services of general interest, including social services of general interest: A new European commitment," in COM 2007, 725) stresses the importance that non-economic objectives play in this context.

Thirdly, the Commission Communication on the application of Article 81(3) (27 April 2004, in Official Journal C 101, page 97) states that objectives pursued by other Treaty provisions must be taken into account. It follows that in applying such an Article, analysis should not be limited to considerations of market efficiency.

Finally, Recital 37 of Regulation 1/2003 states

> This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

This statement was most probably inserted to ensure respect for the right of defence and the sharing of the burden of proof. Nonetheless, it is uncertain whether it also allows national competition authorities to take fundamental rights into consideration as mandatory requirements, thereby enabling them to determine when competition rules apply to agreements.[18]

In light of the above developments, the necessity to fill the lacunae of Article 81(3) ECT is evident. In this respect, however, the "American" rule of reason seems inadequate , as the internal market is a reality that goes beyond the protection of mere economic interests and requires a high degree of uniformity to ensure its proper functioning.

For these reasons it would probably be better to open the door of EU antitrust rules to the "European" rule of reason. In fact, a "drift" in this direction appears likely, given the newly acquired competence that national judges and authorities have recently been entrusted with in the context of EU antitrust rules.

We suggest that this will not, however, entail abandoning the objective of fair competition (as the Lisbon Treatyinstead, seems to suggest). In fact, the mandatory requirements analysis is well established and allows an effective balancing of different interests, whilst the proportionality test ensures that the measure adopted

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[17] The first integration clause, relating to the environment, was inserted by Article 130R (now 174–76 ECT) of the Single European Act. The Treaty on European Union inserted five further integration clauses dealing with new European policies on culture (Title XII ECT), public health (Title XIII ECT), industry (Title XVI ECT), economic and social cohesion (Title XVII ECT), and development cooperation (Title XX ECT).

[18] From a legal point of view, this is a difficult theory to defend as the recital refers to the regulation and not to substantive norms (such as Articles 81 and 82 ECT). Numerous authors have thus held that recital 37 merely aims to guarantee the respect of the right of defence of undertakings involved in a competition procedure. See Kerse and Khan 2004; Wils 2006, 3.

is necessary, suitable and the least restrictive option. In this sense, the evaluation carried out by the ECJ is strict, and seldom does a national measure satisfy all requirements. Keeping this in mind, the existence of a legitimate objective will be even more difficult to demonstrate in competition law, where private, and not public, concerns are normally involved.[19]

For this reason, applying the doctrine developed in the free movement context, will give undertakings the possibility (albeit remote) of justifying their agreements on "added grounds," simultaneously guaranteeing that competition is not distorted amongst them.

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[19] Nonetheless, on some occasions, the European Commission and the Courts in Luxembourg have shown an inclination to allow the public interest to effective competition to prevail over the private interests of undertakings (see Case C-374/87, *Orkem,* in ECR 1989 page 03283; Joined Cases C-46/87 and 22788, *Hoechst*, in ECR 1989 page 02859; and Case T-66/99, *Minoan*, in ECR 2003 page 05515).

From State-Centered towards Constitutional "Public Reason" in Modern International Economic Law

Ernst-Ulrich Petersmann

The cosmopolitan ideals of constitutional protection of equal basic freedoms go back to ancient Greek and Roman republicanism. In the Greek and Roman republics, they were realized only for a small part of the population (essentially male citizens owning property). Yet, as illustrated by Immanuel Kant's theory of constitutional rights to equal freedoms and "cosmopolitan hospitality" as well as by the universal recognition of human rights following World War II, cosmopolitan theories have contributed to "normative learning processes" that have fundamentally changed the perception of national and international legal systems, notably their often discriminatory treatment and "exclusion of others" (e.g., through gender, racial and colonial discrimination). The "intergovernmental reasoning" underlying the Westphalian system of "international law among states" is increasingly challenged by citizens as well as by courts mandated to settle disputes "in conformity with principles of justice and international law" and universal human rights, as prescribed in the Preamble of the 1969 Vienna Convention on the Law of Treaties (VCLT). Governments often continue to portray international law as reciprocal rights and obligations among governments so as to protect their foreign policy discretion, limit their judicial accountability and pursue other self-interests (e.g., in concluding international loan agreements benefiting government elites). Citizens, by contrast, increasingly invoke human rights and constitutional democracy also vis-à-vis foreign policy measures so as to hold governments legally and judicially accountable for governmental restrictions of the transnational exercise of individual freedoms and other constitutional rights. In citizen-driven areas of international law—like international economic and human rights law—, national and international courts increasingly accept claims by citizens to perceive intergovernmental agreements and organizations as mere instruments for individual and democratic self-governance. The judicial protection of individual rights of "access to justice" and to reasoned justification of governmental restrictions of individual freedom illustrates how independent courts often turn out to be the most impartial guardians of constitutional rights and democratic

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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).