

HUMAN RIGHTS, TRADE AND INVESTMENT LAW AND ADJUDICATION: THE JUDICIAL TASK OF ADMINISTERING JUSTICE

According to J.Bentham, ‘when judges sit at trial, they stand on trial’. Trials also illustrate that ‘where you stand (e.g. regarding one’s legal arguments) is likely to depend on where you sit’ (e.g. as a judge, complainant or defendant). The same is true for a German keynote speaker - in the Anglo-Saxon capital of commercial arbitration - on the vast subject of the conference today, on which Anglo-Saxon and European traditions of human rights, ‘majoritarian democracy’ and constitutionalism often diverge. This introductory speech discusses 10 legal principles for transforming ‘legal fragmentation’ into ‘coherence’. Some of these principles remain contested in the jurisprudence of specialized trade, investment, economic and human rights courts and arbitration. So, let’s discuss and – also in the specialized sessions of this conference later today – clarify ‘public reason’.

1. **Unity of private and public law?** International economic law (IEL) is composed of an ‘overlapping plurality’ of private and public, national and transnational legal systems, whose normative dimensions (e.g. as legal orders based on rules and principles) and social-political dimensions (e.g. as social institutions and law-creating practices) differ enormously. Over the past 35 years, I practiced IEL mainly *from a public law perspective* in national, European and worldwide institutions. But the private law and public law dimensions of trade, investment and human rights law are often inseparable. For instance, human rights protect both private and public autonomy; most economic transactions among citizens take place from a *private law perspective* of traders, producers, investors and consumers and derive their value from respect for ‘normative individualism’; also investment law has both *public* and *private law* dimensions, whose dialectic evolution may be viewed positively (e.g. as progressive ‘multilateralization’ of bilaterally agreed standards) or negatively (e.g. as power struggles for imposing conflicting interests). Hence, in investor-state arbitration, the legal distinction between ‘treaty breaches’ (e.g. of ‘fair and equitable treatment’ obligations) and ‘contract breaches’ (e.g. of ‘corporate social responsibilities’ as recognized in the 2006 ‘Equator Principles’ applied by the World Bank and IFC), or between ‘public interests’ (e.g. as defined by human rights) and private ‘legitimate expectations’ of investors (e.g. in case of privatization of essential water, health and electricity services), must go beyond dogmatic ‘public-private law divides’. Also in commercial arbitration, the constitutional limits of private party autonomy and of the freedom of arbitrators must be determined in conformity with human rights and public order.

2. **From legal fragmentation to legal coherence?** Trade law (e.g. since the trade agreements among ancient city republics in the Mediterranean), investment law (e.g. since the Italian city republics during the Renaissance), human rights (e.g. since the American and French human rights revolutions/declarations during the 18th century) and transnational adjudication (e.g. since the Roman *praetor peregrinus* and the thousands of judgments by the Imperial Chamber Court/*Reichskammergericht* since the 16th century) historically evolved as fragmented legal (sub)systems. Due to ‘globalization’, they now interact in ever more complex and often contested ways. As legal theory is less about discovering ‘scientific truth’ than about ‘public reason’ for resolving social problems, our conference offers opportunities for empirical testing of which legal principles offer the most efficient, legitimate and coherent solutions to the complex legal problems that national and international tribunals have to resolve in international economic and human rights adjudication by judicial reasoning that can be supported by ‘public reason’.

3. **Justice as a constitutive principle of law?** Legal positivists tend to define ‘law’ not only by ‘primary rules of conduct’ but also by legal practices recognizing, developing and enforcing rules in conformity with ‘secondary rules’ of recognition, change and adjudication.

The universal recognition of inalienable human rights by all UN member states entails that principles of justice have become universally recognized as integral parts of national and international legal systems. The ancient symbol of the independent, impartial judge administering justice by ‘weighing’ the arguments of both sides (*justitia* holding the scales) and enforcing the existing law (*justitia* holding the sword), like the common linguistic core of the legal terms *jus*, *judex* and *justitia* (or *justice* and the designation of judges as *Lord Justice*), recall much older traditions of recognizing justice as the main objective of law; according to many lawyers and judges, law may be defined most appropriately by ‘the prophecies of what courts will do in fact’ (US Supreme Court justice O.W.Holmes) and by how courts of justice will apply legal rules (e.g. ‘general principles of law’ in terms of Article 38 ICJ Statute). Unjust rules (e.g. violating *jus cogens*) may not be a valid part of positive law. Human rights require limiting ‘rule by law’ through ‘rule of law’.

4. **Constitutional justice as a human right?** The dual nature of human rights as positive law and moral rights explains why human rights and IEL continue to dynamically evolve (e.g. through judicial clarification). Arguably, the legitimacy of law, governance and adjudication derives from ‘constitutional justice’ (e.g. as illustrated by the ancient Virtue of Justice, modern theories of constitutional justice and ‘public reason’) no less than from ‘democracy’ (e.g. as illustrated by the historical transformation of ‘Renaissance rites of judgment’ into democratic and human rights of ‘access to justice’ requiring governments to protect judicial independence and transparency of courts and of their ‘due process of law’). J.Rawls’ theories of justice and of ‘public reason’ explain why – in constitutional democracies with constitutional adjudication – courts of justice may be more principled ‘exemplars of public reason’ than political institutions based on majority decisions by organized interest groups. Arguably, this is also true in many fields of IEL.

5. **Respect for legitimate ‘constitutional pluralism’ as a human rights principle?** Human rights require respect for individual and democratic diversity and for transnational rule of law protecting human rights and mutually beneficial cooperation among individuals across frontiers. Both national as well as international legal systems recognize their functional interdependencies for protecting human rights and other public goods ‘in conformity with principles of justice’ (Article 1 UN Charter, Preamble VCLT). The globalization of law requires courts and other legal institutions to recognize and mutually adjust legitimately diverse legal systems for the benefit of citizens – with due respect for ‘the permanent fact of reasonable pluralism’ (J.Rawls) and the need for reconciling legitimate legal diversity on the basis of ‘universalizable principles’ of justice. For instance, regardless of whether international arbitration is conceived as (1) a component of the national legal order at the seat of arbitration (assimilating the arbitrator to a national judge), as (2) being anchored in a plurality of national legal orders (e.g. of all states recognizing and enforcing the arbitration award) or as (3) a transnational arbitral legal order (e.g. being part of transnational commercial and investment law), arbitrators and courts should interpret their powers to adjudicate, the applicable rules and procedures governing the arbitration process and the legal effects of the award with due respect not only for the legal autonomy of the parties and of the arbitrators, but also for the interrelationships of the national and international legal systems involved and for legitimately diverse legal conceptions of international arbitration.

6. **The ‘consistent interpretation principle’ as a requirement of human rights?** Just as commitments in national constitutions to respect for international law justify a presumption of interpreting national law in conformity with self-imposed international legal obligations, so does customary international law require interpreting international treaties – and implementing them in domestic law ‘in good faith’ - in conformity with other international legal obligations, human rights and ‘principles of justice’ (cf. Preamble and Art. 31 VCLT). The need for legal and judicial ‘balancing’ of civil, political, economic, social and cultural human rights makes ‘constitutional justice’ (e.g. regarding the constitution of individual and collective law-making, administrative and judicial powers) and ‘balancing’ the ‘ultimate rule

of law' (Beatty). This is also true for IEL reconciling economic freedoms with non-economic values and policy objectives subject to requirements of transparency, non-discrimination, 'suitability', necessity, 'proportionality *stricto sensu*' and legal accountability.

7. **Need for 'procedural justice' limiting power asymmetries?** 'Justice as fairness' requires justification of all law and governance and 'access to justice' as a human right (e.g. in terms of Articles 6,13 ECHR). Due to unequal distribution of resources, power and 'reasonableness', IEL is characterized by welfare-reducing 'protection biases' whose limitation by means of constitutional and competition rules remains a permanent 'constitutional task'. Arguably, J. Rawls' explanation of the need for a '4-stage sequence' of constitutional, legislative, administrative and judicial protection of 'public reason' also applies to IEL. As constitutional rules and 'principles of justice' say little about the optimal design of institutions, the latter legitimately differ among jurisdictions. Comparative institutional analysis confirms that 'cosmopolitan legal orders' - e.g. the multilevel judicial protection of human rights under the ECHR, of common market freedoms in the EU and EEA, of transnational commercial and investment law under BITs and the 1958 New York Convention - can protect fundamental rights of citizens more legitimately and more effectively than 'Westphalian legal orders'.¹ The inadequate constitutional and competition rules in IEL raise difficult questions about the jurisdiction in transnational economic adjudication and the judicial task of administering justice (e.g. in case of 'denial of justice', discriminatory trade protection, 'regulatory takings', 'nullification of legitimate expectations') and of clarifying general legal principles (e.g. of 'fair and equitable treatment', prohibition of 'anti-competitive practices', 'adequate compensation').

8. **Legitimate diversity of substantive 'principles of justice'?** The 'principles of justice' underlying UN human rights law can be construed in diverse ways as illustrated by the diverse democratic and human rights guarantees in European law and outside Europe (e.g. in Anglo-Saxon democracies prioritizing civil and political rights and 'parliamentary freedom', Asian countries prioritizing certain economic and social rights). The legal and judicial protection of cosmopolitan 'trading rights', 'intellectual property rights' and individual access to independent courts in WTO law (e.g. in the WTO Protocol on China's WTO membership), of investor rights in BITs, labour rights in ILO law and of 'corporate social responsibilities' in UN law illustrates that - from the perspective of human rights and courts of justice - multilevel legal and judicial limitations of abuses of power (e.g. by governments in non-democratic host states) may be justifiable also in terms of human rights and constitutional principles (e.g. of 'distributive', 'compensatory' or 'transitional justice'). Arguably, the current 'crises' and 'governance failures' in intergovernmental trade, financial, environmental regulation and poverty reduction enhance the 'constitutional legitimacy' of judicial interpretations of IEL in conformity with human rights, protection of 'public reason' and of 'cosmopolitan rights' (e.g. of third parties adversely affected by investor-state arbitration) as necessary 'countervailing restraints' on obvious abuses of public and private power. Like human rights, IEL reforms often depend on democratic 'struggles for rights' justifying 'reformative justice' over 'conservative justice' (rule-following).

9. **Democratic legitimacy of judicial rule-clarification?** By interpreting, clarifying and progressively developing the contested meaning of rules and principles, judicial decisions narrow the scope of competing interpretations and produce legal effects and stabilize normative expectations beyond individual disputes, as acknowledged in Article 38 ICJ Statute (referring to judicial decisions as 'subsidiary means for the determination of rules of law'). From the perspective of human rights and 'constitutional justice', judicial protection of human rights and other cosmopolitan rights - like judicial review of the 'constitutionality' of majority legislation and of administrative decisions - can serve 'democratic functions' and

¹ Cf. E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford : Hart Publishing, 2012).

limit democratic deficits especially in intergovernmental rule-making and specialized economic organizations that often elude effective parliamentary control and are dominated by vested interest groups (including diplomatic self-interests in limiting legal and judicial accountability vis-à-vis citizens). Due to their often contested meaning, human rights and IEL principles are increasingly shaped by judicial justifications and judge-made law resulting from interactions among multilevel rulemaking, judicial protection of cosmopolitan rights (e.g. by regional and national economic and human rights courts), governmental acceptance and implementation of judicial decisions (e.g. by the WTO Dispute Settlement Body, the EU Commission as guardian of EU competition law, national courts enforcing international arbitration awards, the Council of Europe's Council of Ministers supervising the enforcement of judgements by the European Court of Human Rights). Judicial precedents and citations - not only of the legally binding *ratio decidendi*, but also of non-binding *obiter dicta* of national and international judgments (e.g. in their judicial balancing and 'proportionality analyses') - strongly influence 'public reason', law-making and administrative decisions in IEL and human rights law.

10. **Democratic legitimacy of judicial system-building?** IEL and regional human rights law are characterized by ever more 'multilevel judicial governance' clarifying and adjusting not only specific rules, but also the systemic development of, e.g., WTO law, investment law, regional economic and human rights agreements and their domestic implementation. Notwithstanding the lack of legally binding precedents (*stare decisis*), the ever more comprehensive jurisprudence by the WTO Appellate Body, ICSID arbitration and annulment awards, EU and EFTA Court judgments and the European Court of Human Rights (e.g. its 'pilot judgments') promotes 'principled coherence' and 'judicial dialogues' (e.g. on standard-setting precedents) in multilevel judicial protection of cosmopolitan rights and 'judicial balancing methods'.² From a constitutional perspective, such 'judicial development of the law' may be no less justifiable for clarifying 'incomplete agreements' and promoting 'public reason' in judicial interpretation of vaguely formulated, general principles (such as 'national treatment', 'fair and equitable treatment', 'full protection and security' of foreign investors, sovereign rights to protect 'public morals' and 'public order') than legislative and administrative rule-making; yet, judicial decisions need to be justified convincingly and transparently, with due regard to all interests affected, and must protect constitutional rights of citizens and transnational rule of law vis-à-vis the ubiquity of abuses of power in IEL. Empirical studies confirm that most national parliaments no longer effectively control many developments of IEL, notably the obvious 'governance failures' to protect general citizen interests in enhancing consumer welfare through open 'social market economies' based on non-discriminatory conditions of competition, monetary stability, respect for human rights and transnational rule of law for the benefit of citizens. The more national parliaments, intergovernmental rulemaking (e.g. in the WTO, BITs, UN environmental negotiations, EU violations of WTO and EMU obligations) and non-transparent economic adjudication (e.g. by WTO panel reports with more than 1'000 pages of legal findings that remain incomprehensible for most citizens) disregard human rights and consumer welfare in IEL, the more may judicial protection of cosmopolitan rights (e.g. of access to transparent judicial procedures, submission of *amicus curiae* briefs), 'dynamic' and 'systemic interpretation', judicial 'balancing' of economic and non-economic interests, and other 'judicial checks and balances' of discretionary foreign policy powers be constitutionally justifiable. Even if WTO rules, BITs, arbitration agreements and certain other areas of IEL fail to specifically mention human rights and consumer welfare, 'constitutional justice' and the modern reality of 'overlapping legal pluralism' may justify interpreting the inherent powers of national and international judges broadly so as to protect all affected interests and human rights more effectively. -

² Cf. S.W.Schill, System-Building in Investment Treaty Arbitration and Lawmaking, in : *German Law Journal* 12 (2011), 1083-1110.