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The Reform Treaty and the Constitutional Finality of European Integration

Jean Monnet's method for realizing *Robert Schuman*'s objective of a 'European Federation' for the preservation of peace envisaged successive phases of economic, legal and political integration for "an ever closer Union". From the 1951 ECSC Treaty up to the 2007 Lisbon Treaty, European integration law evolved on the basis of international treaties reflecting intergovernmental compromises contingent on political support for functionally limited co-operation among European states as well as among their citizens. These multilateral European integration agreements differed fundamentally from European international law prior to World War II. Yet it was only since about the year 2000 – as illustrated by the speech of

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Germany's Minister of Foreign Affairs *Joschka Fischer* on *From Confederacy to Federation: Thoughts on the Finality of European Integration* in May 2000[1] and the approval of the *EU Charter of Fundamental Rights*[2] – that "the finality" of the European integration process became a widely discussed subject of public European reasoning, prompting even pragmatic British government ministers to deliver public speeches on "Europe 2030".[3] Most of these discussions focused on the (con)federal structures among Member States, their national peoples and EU citizens, based on market integration, policy integration and an "area of freedom, justice and security"; in view of the constitutional failures of nation states, even European 'federalists' no longer mention a European federal state as a desirable end-state of the "ever closer Union."

I. Multilevel Democratic Constitutionalism as Europe's Finality?

The European Council, in its mandate of June 2007 asking the Intergovernmental Conference to elaborate an alternative "Reform Treaty" in view of the *referenda* and political opposition against the 2004 Draft Treaty establishing a Constitution for Europe, stressed that the new Treaties "will not have a constitutional character": "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned."[4] However, this politically motivated de-constitutionalisation strategy does not change the fact that – both in terms of a formal, positivist concept of constitution (e.g. as referring to the long-term, basic rules of a higher legal rank constituting the governance system for a political community) as well as in terms of a substantive concept of democratic constitutionalism (e.g. as referring to constitutional citizen rights and basic rules constituting legislative, executive and judicial self-governance) – EU law and the Lisbon Treaty remain based on European constitutional rules, as

1 Reproduced in *Joerges / Mény / Weiler* (2000), 19-30.

2 OJ C 364 of 18 December 2000.

3 Cf. the speech by British Foreign Secretary *David Miliband* on *Europe 2030: Model Power, not Superpower*, delivered at the College of Europe, Bruges, on 15 November 2007.

4 Presidency Conclusions of 21/22 June 2007, Annex I, at 15. For an analysis, see the contribution by *Stefan Griller* to this book.

explicitly acknowledged in Article 6 of the existing EU Treaty and Article 2 TEU-L. In contrast to the 1945 UN Charter – whose rules of a higher legal rank (cf. Article 103) for protecting human rights and sovereign equality of states already constituted a functionally limited, multilevel governance system with supranational governance powers (e.g. those of the UN Security Council and the International Court of Justice)[5] – and the constitutions (*sic*) establishing the International Labour Organization, the World Health Organization, the Food and Agricultural Organization or the UN Education and Scientific Cooperation Organization, EU law goes far beyond merely formal, positivist conceptions of constitutionalism. For example, the EU's comprehensive, multilevel guarantees of human rights and other fundamental freedoms, democratic governance and judicial protection of the rule of law directly protect ever more comprehensive citizen rights in all EU Member States. This constitutional *acquis communautaire* justifies the question discussed in this contribution: What is the finality of the EU's "common law constitution"? Will it never be replaced by a shorter treaty constitution that is readable and comprehensible for all EU citizens?

US President Ronald Reagan used to describe the North American Free Trade Agreement (NAFTA) as an international economic constitution protecting mutually beneficial free trade among constitutional democracies. Even though some NAFTA rules serve "constitutional functions" by providing for more effective legal and judicial guarantees of investor rights (cf. Chapter 11) and trading rights (cf. Chapter 19) than those in the respective national laws of NAFTA countries, the legal structures of NAFTA law remain dominated by rights and duties among sovereign states without multilevel, constitutional and judicial safeguards similar to those recognised in European law. The diverse constitutional structures of the European Convention on Human Rights (ECHR), of EU law and the European Economic Area (EEA law as interpreted by its EFTA Court) illustrate the diverse forms of multilevel constitutionalism in European integration. As institutions remain contingent on changing political contexts, it seems premature to speculate whether some of the European institutions may be "final." Yet, as long as the European courts continue to exist, their multilevel constitutional constraints make it almost inconceivable that the EU courts, the EFTA Court and the European Court of Human Rights (ECHR)

5 Cf. *Petersmann* (1997), 421-474.

could effectively abandon their constitutional self-commitment to judicial protection of inalienable human rights deriving from respect for human dignity and fundamental rights protected by EU law, EEA law and the ECHR. The historical experiences of European states – that national democratic constitutions (e.g. of the Weimar Republic) may fail to effectively protect human rights and constitutional rights of citizens – may repeat itself. Yet, even though European constitutional law does not prevent individual states from withdrawing from the European "treaty constitutions", the EU's multilevel constitutional law provides for far more comprehensive, legal and institutional "checks and balances" protecting EU citizens against abuses of national and European governance powers than any other regional integration agreement outside Europe. This constitutional premise – i.e. as long as European integration continues, it will continue to be founded on multilevel constitutional guarantees of freedoms and other fundamental rights – justifies the follow-up question discussed in this contribution: Which other principles of European constitutional law are likely to be irreversible, apart from multilevel constitutional guarantees of fundamental freedoms and other basic human rights?

Most reasonable people adopt a pragmatic 'wait-and-see attitude' *vis-à-vis* unpredictable future events, including the 'finality' of European integration. As explained by *John Rawls*, it is unreasonable for constitutions of modern democratic societies with a plurality of moral, religious and political conceptions of justice among free and equal citizens to prescribe comprehensive political doctrines of justice; democratic constitutionalism must limit itself to protecting an "overlapping consensus" of reasonably diverse moral, religious and political conceptions that are likely to endure over time in a democratic society.[6] Co-ordination in areas of common interests, with due respect for pervasive, reasonable disagreement among free citizens, is law's main function in well-ordered democracies. As illustrated by the imbalance between the over-ambitious "empowering constitution" of Germany's Weimar Republic (e.g. its comprehensive guarantees of economic and social rights) and its inadequate "limiting constitution" (which did not prevent the parliamentary delegation of governance powers to a dictator), finding the right balance between constitutional safeguards and constitutional limits of freedom and reasonable disagreement can also be

6 *Rawls* (1993), 154 *et seq*.

viewed as the main constitutional problem of European integration. Paradoxically, the success of European constitutionalism will depend on its limitation to essential constitutional principles and basic rules of a higher legal rank. Hence, it is reasonable to ask what European constitutional processes should not aim at; for example, it has turned out to have been politically unreasonable to ask European citizens to approve a "Constitution for Europe" including more than 470 pages with extremely complex, constitutional as well as legislative rules.[7]

The evolution of European constitutional law will continue to differ from the constitutionalisation of national legal systems.[8] Not only the pervasive distortions and "discourse failures" in "deliberative democracies" (as illustrated by the ownership of major Italian television channels by Italian Prime minister *S. Berlusconi*), but also constitutional liberalism itself make it unlikely that public reason will enable a comprehensive, constitutional agreement among European citizens with such diverse traditions and conceptions of justice and of a good life. Reasonable differences of opinion will especially continue in areas like economic and social policies with redistributive effects. The following chapters discuss "six finalities" and perennial "constitutional problems" of European constitutionalism that are likely to determine the future structures of European integration and its support or opposition by European citizens, without excluding the irreversible nature of other parts of Europe's constitutional *acquis*.

II. The Perennial Task of Limiting Abuses of Power Requires Multilevel Constitutionalism beyond the EU

Since antiquity, the *myth of Europe* has been described in terms of reconciling power with self-determination.[9] The European tragedies

7 Cf. Treaty Establishing a Constitution for Europe, OJ C 310 of 16 December 2004.

8 Cf. *Rawls* (1971), 195 *et seq*, who envisages a four-stage process of national constitutionalisation proceeding from (1) the choice of the principles of justice in the 'original position', (2) the framing of a just constitution, (3) the choice of legislation by representatives of the people, and (4) the application of constitutional and legislative rules by administration and judges to particular cases.

9 Cf. *Pagden* (2002).

of holocaust and totalitarian regimes leading to World War II illustrated not only the failures of international law as a "gentle civilizer of nations" (*Martti Koskenniemi*); national constitutionalism also turned out to be fragile in the face of *Machtpolitik* invoking emergency situations (*Carl Schmitt*'s *Ausnahmezustand*).[10] European integration law has successfully used diverse approaches (as illustrated by the EC Court, the EFTA Court and the ECHR) for progressively changing individual, national and international legal practices and beliefs – within, among and beyond the 27 EU Member States – by transforming national constitutionalism into a stronger, multilevel constitutionalism (following the plywood principle).[11] The Lisbon Treaty further strengthens the coherence of European law, for example by submitting also the EU's common foreign and security policy to more effective constitutional and judicial constraints, corresponding better to law's intrinsic claim to justice.[12] The self-conception of Europe and of EU law remains contested, however, as reflected in the Lisbon Treaty's Preamble beginning with "His Majesty the King of the Belgians" and committing European majesties, Presidents and government representatives "to enhancing the efficiency and democratic legitimacy of the Union". The decision to avoid publication – in the EU's Official Journal – of a consolidated text of the EU Treaties prior to ratification of the Lisbon Treaty confirmed not only the criticism (e.g. by *Giuliano Amato*) that the EU Reform Treaty was deliberately made unreadable for EU citizens so as to avoid calls for referendums; it also showed how *Machiavellian opportunism* often trumps Europe's legal ideals (e.g. of democratic self-governance) and political discourse (e.g. about Europe's borders *vis-à-vis* "others"). As tensions between rational egoism and limited social reasonableness are the *condicio humana*, the perennial task of limiting abuses of power through multilevel constitutionalism will remain Europe's finality. The more EU citizens exercise their freedoms in relations with third countries (e.g. by travelling abroad and consuming im-

10 Cf. *La Torre* (2007). On emergency legislation and jurisprudence relating to the "war on terror", see *Posner* (2006). On failures of international law, see *Koskenniemi* (2004).

11 On the emergence of a new "legal culture" in Europe, see *Gessner* / *Nelken* (2006).

12 On my long-standing criticism of the EC's foreign policy and security constitution, see *Petersmann* (1996).

ported goods), the more it will be necessary to "constitutionalise" also the external relations law of the EU (e.g. by means of judicial protection of human rights *vis-à-vis* UN Security Council decisions) as well as to "internationalise" domestic laws for the benefit of EU citizens (e.g. by enabling EU citizens to rely on rule of law also in the EU's external relations, including EU compliance with its WTO obligations).[13]

As stated in its Preamble, the consolidated Treaty on European Union "mark(s) a new stage in the process of European integration", whose final status remains unforeseeable. The reference, in the Preamble's second paragraph, to "the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" as having developed from "the cultural, religious and humanist inheritance of Europe" identifies the final sources of European values: according to Article 2 TEU-L, "(t)he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". This "constitutional imperative" requires future

13 The interrelationships between these two tasks of citizen-oriented constitutionalism (in the sense of a legal method for protecting citizen rights at all levels of national and international governance) – i.e. the need for (1) not only justifying and interpreting international law rules in terms of their "constitutional functions" for protecting constitutional citizen rights, but also (2) for interpreting domestic laws in conformity with democratically ratified international treaties for the collective supply of international public goods – have long been, and continue to be, neglected, cf: *Petersmann* (1991a). Following the fall of the Berlin wall and the universal recognition of inalienable human rights as a constitutional foundation of European and international law, my publications focused especially on the need for multilevel "constitutional democracy" protecting human rights in the collective supply of international public goods, including judicial protection of citizens as legal subjects also of international law and of their mutually beneficial economic co-operation in and among civil societies, cf. *Petersmann* (1995). Most Europeans continue to argue not only for state-centred constitutionalism (based on "We the People") rather than for rights-based constitutionalism proceeding from normative individualism and civil society as foundational values for multilevel self-governance beyond the state; they also perceive international law as deriving its legitimacy from state consent, and rarely examine the collective action problems of the collective supply of international public goods beyond the EU from constitutional perspectives.

European integration to constantly review the state-centred international law rules from the perspective of human rights and constitutional safeguards of EU citizens *vis-à-vis* the ubiquitous abuses of private and public, national and international governance powers. The perennial constitutional question – what do human rights, democracy and rule of law mean in practical terms for constructing multilevel governance in Europe? – remains inevitably contested among EU citizens and their governments, even though the EU Charter of Fundamental Rights suggests a broader political consensus on rights-based democratic self-governance in the EU than, e.g., in the United States.[14] The third paragraph of the Preamble of the TEU-L recalls the dark sides of Europe's failures to protect citizen rights: Security ("the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe") and peaceful "unity in diversity" remain the most important reasons for the European integration project. As illustrated by the jurisprudence of the European courts on judicial protection of human rights *vis-à-vis* UN Security Council measures against alleged terrorists, the EU's "overlapping consensus" on "inalienable" human rights, and the indeterminacy of Europe's multilevel constitutionalism, are likely to remain under constant challenge, notably in the EU's external relations and "foreign policy constitution".

III. European Constitutional Pluralism Entails Perennial Struggles by EU Citizens for their Self-Governance

All 27 EU Member States are constitutional democracies with diverse legal and political traditions (e.g. in terms of national peoples

14 On the pervasive disagreement among conservatives and democrats on human rights and democracy inside the US see *Dworkin* (2006), who argues for redefining the basis of American constitutionalism proceeding from two basic principles of human dignity, i.e. first, that each human life is intrinsically and equally valuable and, second, that each person has an inalienable personal responsibility for realizing her unique potential and human values in her own life. Arguably, rights-based, multilevel European constitutionalism protects equal citizen rights through more precise constitutional restraints (e.g. in terms of individual rights, corresponding public policy objectives, multilevel institutional and procedural constraints) than state-centred legal positivism and economic utilitarianism.

and citizenships). Legal and constitutional pluralism also characterise the diverse European legal regimes (e.g. of EU law, EEA law, the ECHR) and international legal systems (e.g. of lawmaking and adjudication in worldwide organisations). The common foundation of modern "constitutional pluralism" in inalienable human rights – conceptualised as deriving from respect for human dignity (e.g. in the sense of respect for human autonomy and equality as a source of moral responsibility) rather than from state consent – appears to be legally irreversible in European law, notwithstanding diverse conceptions of human dignity (e.g. regarding its relationship to god and freedom of religion). Yet the national and international legislative, administrative and judicial protection of individual freedoms and other fundamental rights may legitimately differ depending on the relevant legal and political contexts in diverse national and international jurisdictions. Democratic constitutionalism is founded on human rights, but may legitimately differ among diverse national jurisdictions and international governance systems. The pervasive collective action problems in intergovernmental organisations, as well as the problems of co-ordinating competing private and public, national and international legal regimes, confirm how reliance on state consent – rather than on common constitutional principles and citizen interests (e.g. in open markets and rule of law promoting consumer welfare) – can impede international integration and effective protection of human rights.[15]

The EU Treaty (e.g. in Articles 1 and 2 as revised) describes the EU as a union among Member States, "an ever closer union among the peoples of Europe", a citizen-driven internal market and an "area of freedom, security and justice… in which the free

15 Due to the diversity of national constitutional traditions, domestic implementation of international rules is likely always to remain diverse. For example, should fundamental rights be interpreted and applied by way of balancing (as "optimization precepts" as proposed by *Alexy*), or should they be considered as "trumps" (*Dworkin*) and definitive rules which cannot be overruled in certain situations by public policies and public goods? Are "market freedoms" and other fundamental freedoms necessary consequences of respect for human liberty, or are they "Kitsch" (*Koskenniemi*) that should be replaced by more flexible utilitarianism? On the diversity of domestic legislation and adjudication implementing international economic rules, see *Hilf / Petersmann* (1993). On the diverse conceptions of constitutional rights, see *Kumm* (2007).

movement of persons is ensured" by legal protection of individual freedoms and other fundamental rights. The legal relationships between these different value premises (e.g. state sovereignty, popular sovereignty, individual sovereignty) are likely always to remain contested. Depending on their respective values (e.g. normative individualism versus communitarian values) and self-interests (e.g. private self-regulation versus government intervention), EU citizens and their political representatives often legitimately disagree on how the diverse EU actors (e.g. state governments, EU institutions, EU citizens, their parliamentary representatives, non-governmental civil society institutions) should interpret and further develop the state-centred, intergovernmental, supranational and citizen-oriented dimensions of EU law and policies. The foundational "values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" (Article 2 TEU-L), and recognition of EU citizens as democratic owners of EU law and institutions, justify not only struggles by EU citizens as "democratic principals" against abuses of power by national and international governance agents (in the sense of *R. Jhering's Kampf ums Recht*). National and international courts are also increasingly requested to act as "constitutional guardians" reconciling conflicts among competing constitutional rights (e.g. freedoms of trade versus human rights, freedom of services and establishment versus labour rights) so as to protect citizen rights against selfish power politics (e.g. including the frequent violations of the EC's WTO obligations for rules-based common commercial and agricultural policies maximizing consumer welfare).[16] The empowerment of EU citizens through multilevel, rights-based constitutionalism entails that such perennial conflicts among rational self-interests of citizens (e.g. in the rule of law) and the self-interests of their rulers (e.g. in limiting their judicial accountability) will remain part of the "finality" of the EU, calling for ever stronger "constitutional safeguards" protecting rule of law and the legitimacy of European integration.

IV. Integration through Law as Finality – Rule of Whose Law?

Post-war European integration has resulted from law rather than from culture. Law – as the most effective instrument for preventing conflicts of interests and settling disputes among individuals and

16 Cf. *Petersmann* (2008b).

governments with conflicting interests – is part of the "finality" of the EU. The more multilevel governance for the collective supply of international public goods leads to multilevel structures of competing legal orders, the more traditional concepts of the "rule of law" have become contested. EU law acknowledges not only that equal freedoms, human rights and democratic self-government require the "rule of law" (Article 2 TEU-L) and its judicial protection (Articles 251 ff TFEU); it also admits, and has long done so (e.g. in the existing Article 6 EU), that EU law derives its legitimacy from the protection of EU citizen rights and constitutional principles common to EU Member States rather than from "We the People", a European constitution approved by a constitutional assembly, or from state sovereignty and state consent. Since the 1970s, the EC courts have increasingly recognised this foundation of EU law in human rights, democracy and rule of law. Yet, the EC Court's characterisation of the EC as a community of law – in which "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. In particular, … the Treaty established a complete system of legal remedies"[17] – is hardly consistent with reality. The ECJ's restrictive interpretation of EC provisions on individual access to the Court, the Court's political refusal to review EC trade restrictions on the basis of the EC's worldwide GATT and WTO obligations, and the case law of national courts on the constitutional limits of their judicial compliance with EU law illustrate the political limits of the rule of law inside the EU; rights-based democracy and rule of law remain contested in important areas of EU integration, to the detriment of EU citizens and their legal security.

The reality of constitutional pluralism is also illustrated by the fact that the relationships between national laws, European treaty regimes and international treaties can often no longer be explained by formal conflict rules (such as *lex specialis*, *lex posterior*, *lex superior*) and, arguably, challenge the state-centred "rules of recognition" of the Westphalian system of international law. The authority of EU law depends not only on the Reform Treaty's hidden claim (in Declaration 17) to legal primacy. National courts rightly insist on reviewing the legal, jurisdictional, democratic and substantive legitimacy of EC acts in terms of respect for fundamental rights and

17 Case 294/83, *Les Verts* v *Parliament* [1986] ECR 1339, para. 23.

democratic procedures.[18] The foundation of EU law on human rights deriving from respect for human dignity, as explicitly recognised in the EU Charter of Fundamental Rights[19] as well as in Article 2 TEU-L, requires respect for this European reality of multilevel constitutional pluralism, for example by interpreting private law, state law, EU law and international law for the collective supply of international public goods as complementary instruments for individual and democratic self-governance, with due respect for judicial "balancing" of competing principles in concrete disputes and for democratic "margins of appreciation" concerning domestic legislation implementing international law. The increasingly citizen-oriented conceptions of European and international law, the "balancing paradigms" applied by ever more national and international courts, the internationalisation of "deliberative democracy", and the changing "political equilibria" (as reflected in the numerous compromises leading to the 2007 Lisbon Treaty) entail that legal formalism often no longer offers legitimate criteria for defining the 'rule of law' in the interface between national, transnational and international legal systems.[20]

For example, the presumption that legality requires applying EU law may be rebutted by countervailing constitutional principles of greater weight; as argued by national constitutional courts in

18 Cf. *Kumm* (2005).

19 On respect for human dignity and inalienable human rights as a constitutional foundation not only of European law, but also of modern international law, see *Petersmann* (2006). On the implications of the universal recognition of vaguely defined human rights, and of their diverse "constitutional concretisation" in national and regional legal systems (e.g. in the EC guarantees of fundamental freedoms), for "rules of recognition" and the judicial function, see *Petersmann*, (2008a).

20 Since human rights have become recognised as an integral part of EU law and international law, the debates between positivists (denying that moral values play any role in the determination of legal validity) and non-positivists (affirming the opposite thesis) are increasingly replaced by legal discourse on the 'constitutional principles' common to national laws, EU law and international law. On the insight that legal normativity cannot be something external to human thinking that can be studied "from the outside" as social facts, and that our knowledge of the law is the outcome of "reflexive" judging constrained by reasons, see *Pavlakos* (2007).

some EU Member States, effective protection of fundamental rights of citizens against EU acts, respect for jurisdictional subsidiarity (Article 5 TEU-L) and procedural democratic legitimacy may justify constitutional review of EC acts by national courts, based on "balancing" of common, national as well as European constitutional principles and their public, deliberative explication. Even if the 'rule of law' remains a precondition of the legitimacy and success of European integration and part of the EU's *finalité*, its legal conception (e.g. as being founded in state consent, EU institutions, peoples, EU citizenship, human rights) will remain contextual and contested. It took European civilisation more than 3,000 years to "invent" the five major principles of national constitutionalism (legality, division of power, human rights, democratic governance, "checks and balances" among governance powers)[21] which finally enabled an increasing number of European citizens and states to cooperate in freedom and peace during the second half of the 20th century, albeit in the continuing shadow of unstable "balances of power". It remains uncertain whether EU citizens will ever learn how to realise the *Kant*ian dream of "perpetual peace" across Europe, which (according to *Kant*) depends on ever more precise, multilevel constitutional protection of equal freedoms *vis-à-vis* the perennial abuses of power in all human interactions at national, transnational and international levels. Re-conceiving the fragmented international legal system from a constitutional perspective as a necessary instrument for protecting human rights in transnational relations will challenge not only state-centred international law doctrines (e.g. perceiving international economic law as mere "global administrative law"), but also introverted, nationalist biases in constitutional law doctrines and resultant "constitutional failures" in nation states.[22] Europe's legal recognition and judicial empowerment of citizens as subjects of international law offer effective incentives for governments to restructure international law in con-

21 On the reality of "mixed constitutions" resulting from these five "political inventions", see *Riklin* (2006).

22 Cf. *Petersmann* (1991b). Most international lawyers continue to shy away from such "constitutional approaches" to international law as a necessary instrument for protecting human rights of citizens, just as most national constitutional lawyers continue to shy away from recognizing national constitutions as merely "partial constitutions" that cannot unilaterally protect human rights across national frontiers.

formity with the cosmopolitan ideal of mutually complementary national, transnational and international constitutional restraints promoting procedural as well as substantive justice in the transnational co-operation among citizens.

V. *Sisyphus* and the Perennial "Paradox of Liberty"

Similar to the existing Article 6 EU which names "liberty" as the first principle on which "the Union is founded", Article 2 TEU-L (following the entry into force of the Lisbon Treaty) lists "respect for human dignity" and "freedom" before other foundational principles of the EU. This "constitutional pre-commitment" to liberty subject to constitutional restraints – which is in conformity with modern theories of justice (from *Kant* to *Rawls*), prioritizing equal individual freedoms as a "first principle of justice" deriving from respect for human dignity (e.g. in the sense of individual autonomy, reasonableness and responsibility) – is likely to remain an irreversible part of constitutional law. However, the tensions between rational egoism, limited social reasonableness and "constitutional ignorance" (*Hayek*) of individuals, and their competition for scarce and arbitrarily distributed resources, entail inevitably conflicts of interests and related disputes (e.g. over the interpretation of EU rules) as a finality of European integration. Individual and collective freedoms are not only preconditions of human self-development and indispensable incentives for social progress (e.g. in terms of learning, development of human capacities and opportunities); they also risk destroying themselves through selfishness and abuses of power unless freedom of choice is constitutionally restrained. The myths of *Sisyphus* and *Ulysses* (whom some myths describe as the son of Sisyphus in view of the mythical cleverness of both) explain why constitutional self-restraints offer the only way out of this human and European dilemma.

The EU Treaties remain the only multilateral treaties regulating this "paradox of liberty" through comprehensive, multilevel constitutional guarantees and restraints of private and public freedoms at national, transnational and international levels. EU citizenship confers on citizens of EU Member States transnational freedoms and complementary rights (cf. Article 20 TFEU) which citizens never enjoyed before. By making the EU Charter of Fundamental Rights legally binding, providing for EU membership in the European Convention on Human Rights, and by broadening procedural and substantive EU citizen rights, the Lisbon Treaty will fur-

ther strengthen legal and judicial protection of equal freedoms in the European integration process. Paradoxically, the effectiveness of these individual freedoms depends on the EU's constitutional and judicial restraints of abuses of private freedoms (e.g. market freedoms restrained by EU competition law, common market law, environmental and social law) as well as of collective public freedoms of Member States and EU institutions. This citizen-oriented, multilevel constitutionalism has transformed Europe into a unique "civilian power", whose civilizing effects on ever more neighbouring countries offer the most persuasive alternative to the state-centred, hegemonic policies prevailing outside Europe.[23] The recent EU measures against terrorist threats, illegal immigration, and against the failures in international financial market supervision (e.g. of lax lending standards, complex "credit products") illustrate that abuses of freedom, as well as of countervailing measures, will remain perennial, constitutional challenges for EU law and policies.

VI. *Janus* and the Perennial "Paradox of Equality"

The inherent tensions between equal human rights, unequal distribution of resources (including human capacities) and territorial fragmentation of constitutional systems are another perennial problem of European law. European integration is a response to centuries of welfare-reducing border discrimination and other discriminatory state regulations, for example defining citizen rights by exclusion and discrimination of "the others." Like the double-faced Roman god and guardian of doors *Janus*, the EU's requirements of non-discriminatory treatment of EU citizens (cf. Articles 18 ff TFEU), and the EU's positive obligations "to eliminate inequalities, and to promote equality, between men and women" (Article 8 TFEU) and "combat discrimination" (Article 10 TFEU), aim at reconciling the outside with the inside in mutually beneficial ways. The EC Court continues to progressively extend the scope of the general and specific EC prohibitions (e.g. in Article 12 EC) of "discrimination on grounds of nationality" to ever more areas of EC law, far beyond the single market paradigm.[24] The Lisbon Treaty, for example by transforming the "equality rights" of the Charter of Fundamental Rights (Articles 20 ff) into positive EU law, defines

23 Cf. *Joerges / Petersmann* (2006).

24 Cf. *Griller* (2006), 204.

the "European identity" in uniquely egalitarian, cosmopolitan and rights-based ways. In conformity with *Robert Schuman*'s famous Declaration of May 1950 that Europe "will be built through concrete achievements which first create a *de facto* solidarity", the progressive realisation of these egalitarian and redistributive dimensions of European integration must be accompanied by the development of a European civic identity, inducing citizens, governments and courts "to extend civic solidarity beyond their respective national borders with the goal of achieving mutual inclusion".[25]

The Lisbon Treaty's shelving of the "symbols of the Union" (as defined in Article I-8 of the 2004 Treaty establishing a Constitution for Europe), and its requirement to "respect the equality of Member States before the Treaties as well as their national identities" and "territorial integrity" (Article 4 TEU-L), underline that the EU project remains based on non-discriminatory competition (e.g. in the single market) among citizens wishing to preserve diverse EU Member States and distinct national peoples. The new legal, parliamentary and judicial safeguards to ensure that "the use of Union competences is governed by the principles of subsidiarity and proportionality" (Article 5 TEU-L), and the EC Court's future jurisdiction to secure respect of the Charter of Fundamental Rights in all acts of the EU, will reinforce not only the need for multilevel co-operation and judicial clarification of the constitutional principles common to European and national laws, but also the need to respect the often legitimately diverse normative conceptions among citizens as well as among their national and EU governance agents. Reconciling the cosmopolitan human rights principles of EU law with its exclusive, national and EU citizenship principles will remain a constant constitutional challenge (e.g. in the detention of illegal immigrants, constitutional tolerance *vis-à-vis* Muslim minorities inside EU Member States, recognition of non-territorial nationality claims by the Roma people and other minorities).

VII. Europe's 'Overlapping Consensus': 'United in Diversity'

According to *Rawls*, "in a constitutional regime with judicial review, public reason is the reason of its supreme court"; it is of constitutional importance for the "overlapping, constitutional consen-

25 On this need for developing a European identity, see *Habermas* (2006), chapter 6.

sus" 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.[26] The citizen-oriented interpretations of the intergovernmental European integration agreements, like other cosmopolitan and constitutional dimensions of European law, are largely due to the judicial protection of individual rights by European and national courts. The "public reason" (*J. Rawls*) of EU law and its interpretation by "(inter)governmental reasoning" are increasingly challenged by multilevel "judicial reasoning" and transnational "deliberative democracy". The legitimacy and persistence of widespread, reasonable disagreement among free citizens, as well as among their political representatives, about human rights, justice and law imply that multilevel judicial discourse and "balancing" of constitutional principles[27] will often remain the most legitimate means of clarifying indeterminate European legal rules and principles. Theories of justice, national constitutions, EU law and public international law offer no clear answers to many European and worldwide integration problems. International agreements among states with diverse constitutional traditions often depend on the use of "constructive ambiguity" and on delegation of the clarification of indeterminate rules to independent and impartial courts. The "common law approach" to European constitutional law, as illustrated by the judicial clarification and protection of "constitutional principles" common to the EU and its Member States, has proven not only more successful than over-ambitious codification of "treaty constitutions" that remain incomprehensible to most EU citizens. Pragmatic focus on the limited "overlapping consensus" among EU citizens with divergent moral, legal and political conceptions is also more respectful of citizens in the face of their reasonable disagreement on the constitution and finality of European integration.

26 *Rawls* (1993), 231 *et seq*.

27 Principles differ from the "if-then" structure of legal rules of conduct by their more general definition of essential legal values underlying rules of conduct.

VIII. Conclusion: Europe's Multilevel Democratic Self-Governance Depends on Respect for Reasonable Disagreement

International trade law is one of the oldest branches of international law because markets offer decentralised information, co-ordination and sanctioning mechanisms promoting mutually beneficial co-operation without requiring citizens and governments to relinquish their diverse conceptions of law and social justice. The progressive transformation of the EC's customs union into a common market and an economic and monetary union was rendered possible by pragmatic agreements on a constitutional framework that respected reasonable disagreement among EU governments and citizens. This paper has discussed six "constitutional finalities" emerging from European integration: the multilevel constitutionalism and inescapable limits of EU law in its attempt to limit power politics (chapters I-II); the perennial struggles for competing political conceptions and rights of EU citizens (chapter III); the need for multilevel judicial clarification and "balancing" of national and European constitutional principles necessary for the coherence and legitimacy of multilevel governance based on "rule of law" in Europe (chapter IV); the "constitutional paradox of liberty" requiring ever more constitutional limitations of liberty in the national, transnational and international co-operation among citizens and their multilevel self-governance (chapter V); the "constitutional paradox of equality" requiring a reduction of the pervasive inequalities among EU citizens and the exclusion of others (chapter VI); and the wisdom of limiting the "overlapping constitutional consensus" among EU citizens and their political agents on essential human rights and constitutional principles, with due respect for pervasive and persistent, reasonable disagreement about social and legal justice (chapter VII).[28] The future of European integration – as a treaty-based, constitutional project guided by public reasoning and democratic contestation – will depend on protecting human rights, including participatory and 'deliberative democracy', as the constitutional core of the European identity.

The limited purpose of this contribution was to argue that, rather than discrediting "finality" as another "F word" in favour of

28 On the creative forces of reasonable disagreement in law, see *Besson*, (2005).

pragmatic 'wait-and-see' attitudes,[29] reflections about "finality" may help identify the reasonable limits and perennial, constitutional problems of EU law. For example, discourse about a unitarian 'United States of Europe' and one 'European people' has, fortunately, become as rare as nationalist discourse ignoring the past "governance failures" of European nation states. Of course, there are other "finalities" of European integration than those discussed above, such as:

- the constitutional dependence of European integration on a division of powers;
- the ever more complex constitutional "checks and balances" in the EU;
- *demoi*-cratic participation of "the peoples of Europe" (Art. 1 TEU-L) in the exercise of EU governance;
- rights-based rather than communitarian forms of European citizenship (in the sense of "A Citizen's Europe" that "places the individual at the heart of its activities", as declared in the Preamble of the EU Charter of Fundamental Rights);
- the perennial need for market regulation in response to changing citizen demand for public goods (e.g. protecting 'sustainable development'); and
- the ever increasing importance of international law and international governance institutions as indispensable instruments for the collective supply of international public goods demanded by European citizens.

Just as past successes of European integration resulted from combining the pragmatic "Monnet method" and constitutional "common law approaches" with more ambitious, federalist conceptions of integration (e.g. on legal primacy, direct effect and direct applicability of EC Treaty provisions), so political and legal "trial and error" will remain a *finalité* of future European integration. The absence of dogmatic preconceptions has enabled European integration to develop into the most successful international legal framework for peaceful co-operation among citizens across state borders, offering a model also beyond Europe for reducing the pervasive

29 Cf. *Wallace* (2000), 139, 142: "The notion that, on some distant horizon, an 'end-state' of perfect integration exists simply carries little cogency in the British discussion. It seems too abstract, too speculative, and, hence, not a productive area of debate."

collective action problems in the international supply of public goods. Future European generations, in searching answers to the perennial question '*Quo vadis, Europa?'*, can no longer ignore – but have to build on – the constitutional structures that emerged from half a century of uniquely successful European integration, with due respect for reasonable disagreement on how European integration should further evolve. Even if future European integration should succeed in making some of its constitutional achievements an irreversible foundation of Europe's 'overlapping consensus', the 'future of European Constitutionalism' (i.e. the subject of this conference) remains unforeseeable and contested.

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