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POLISH YEARBOOK
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2012

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Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishing, 2012

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Among the publishing success stories of 2012 one should undoubtedly mention Ernst-Ulrich Petersmann's *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, issued by Hart Publishing. The book invites readers to critically reassess assumptions concerning structural features, not necessarily inherent, of international economic law (hereinafter "IEL"). The author, currently Professor Emeritus at the European University Institute, provides 540 pages of dense reasoning arguing for a restructuring of IEL, aimed at strengthening judicial protection of "cosmopolitan" human rights against market and governmental failures, along two principal axes. First, efficiency of collective action to provide global public goods¹ requires a "paradigm change" (p. 44) from the Westphalian model of inter-state relations (rivalry) to multilevel governance. Second, the transition from a "Westphalian international law of coexistence" to the "post-war law of cooperation" (p. 113) requires the establishment of "cosmopolitan" foundations of constitutional pluralism.

While the former postulate alone might not contribute much to the debate on the necessity of reform of international economic relations, presenting the latter separately would likely discourage practitioners of trade and finance and be viewed as another utopian quest for a vague notion of justice. And yet the author's credentials – his vast experience in international commerce, including in the Foreign Trade Department of the German Federal Ministry of Economics and Division of Legal Affairs in the GATT/WTO – and his realistic, consistent argumentation compel even the most cynical reader to reconsider the legitimacy deficit of IEL as inseparable from common action problems, and not merely as "another chapter" of the reform agenda.

Although it was not Prof. Petersmann's intention to provide a systemic overview of economic law (p. 38), his major postulates are formulated following a meticulous historical and comparative analysis of the evolution of IEL. He argues that the incomplete transition from legal norms focused on the individual pursuit of wealth – which in the normal course of dealings may lead to establishment of a monopoly or oligopoly, detrimental to the entire society – to a system establishing checks and balances aimed at eliminating political and entrepreneurial abuses (pp. 35-36), constitutes one of the recurring themes of the early 21st century.

¹ In economics, public goods are defined as non-excludable and non-rival in consumption. For instance, the amount of knowledge does not diminish due to an increased number of users. The same is true for national security, or New Year's fireworks.

Back in 2011 President Obama, in remarks at Osawatomie High School (Kansas), claimed that “a country succeeds when everyone gets a fair shot, when everyone does their fair share, when everyone plays by the same rules”.² What sparked comment and criticism overseas, although it did not capture much attention in Europe, was his questioning of the American dream of meritocracy, which allegedly justifies social inequalities.³ The polarised reactions to the truism that individual fortune is influenced by one’s social environment reflect the same dynamics that both push and harness the evolution of IEL.

In the Medieval times a humble artist, careful not to commit the cardinal sin of pride, remained anonymous. Liberalism and the notion of self-realisation restored subjectivity to the creator, and the French revolution paved the way for anthropocentrism. Only recently has the social nature of a human being been rediscovered. This social aspect of human life, fully embraced in the collective human rights of the third generation, has not been equally acknowledged in other legal fields (just to list one example: the current controversy surrounding the just balance between protection of Intellectual Property Rights and Internet freedom in the Anti-Counterfeiting Trade Agreement, ACTA). Also, in public international law one can distinguish between the individualistic approach (be it the British commitment to hegemony or French support for multilateralism) and the “communitarian” way of thinking about the international community in terms of common values and goals.⁴ The latter approach to the constitutionalisation of international law has been particularly advocated by German scholars.

The same split between an individual and his social environment can be observed in economic relations (law). John Lock, John Stuart Mill and Adam Smith laid the grounds for the *homo economicus*, whose pursuit of self-interest contributes to the prosperity of the entire nation. This does not mean, however, that market powers should remain unrestrained: “Adam Smith’s invisible hand (...) is invisible, at least in part, because it is not there”⁵. Prevention of market failures, restraints on rent-seeking and market abuses, and thus the creation of equal opportunities for all individuals is indispensable not only to tap the human potential for economic growth, but also for the well-being of democracy. A political system that deprives too many of the chance to participate in a nation’s success is unsustainable in the long term.⁶

Professor Petersmann also remains attached to the German “free but regulated” tradition of “communitarian” IEL, having called for its constitutionalisation for many years now.⁷

² The White House, *Remarks by the President on the Economy in Osawatomie, Kansas*, December 06, 2011, available at <http://1.usa.gov/Yd0Bfb> (accessed 21 February 2013).

³ I. Sawhill, S. Winship, K. Searle Grannis, *Pathways to the Middle Class: Balancing Personal and Public Responsibilities*, Brookings, Social Genome Project Research, No. 47, 20 September 2012.

⁴ A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *Harvard International Law Journal* 223 (2006).

⁵ J. Stiglitz, *There is no invisible hand*, *The Guardian*, 20 December 2002.

⁶ F. Fukuyama, *The End of History and the Last Man*, Free Press, New York: 2006 (reprint edition).

⁷ Petersmann’s writings include numerous publications on the constitutionalisation of IEL; available at the European University Institute’s website, <http://bit.ly/12RcihA> (21 February 2013).

Although IEL should constitute a tool for improving general welfare, Petersmann argues that international economic regulation largely failed to secure global public goods such as human rights or the rule of law. The principal reason for the consistent failure to revise obsolete international regulations, chiselled in the Westphalian-State model, despite ever more rapid changes in the globalised economic environment, is the lack of universal, pluralistic theories of justice which would allow all the parties concerned to agree on the technicalities of system restructuring. As a result, the laws in force face an increasing crisis of legitimacy, whereas renewal initiatives stumble on democratic dissent.

As the Westphalian conceptual framework does not entirely fit the contemporary international community,⁸ Prof. Petersmann calls for a new theory of justice for IEL, which would allow for the establishment of “judicially enforceable, cosmopolitan rights of citizens” including equal market freedom, non-discriminatory conditions of competition, and judicial protection of constitutional rights and transnational rule of law for the benefit of citizens. Referring to Dworkin’s writings, the author reiterates that law and governance must be justified not only on utilitarian grounds but also in terms of morality and justice, which in turn should be included in, according to Hart’s classification, secondary “rules of recognition.” “The relationship between theories of justice and IEL must be clarified by interpreting IEL in the light of the human rights obligations and diverse constitutional obligations (...) with due regard to economic and social rights of the poor” (p. 23). The legitimacy, and thus sustainability, of such renewed IEL would largely depend upon the efficiency of the constitutional and judicial protection mechanisms in place to protect basic values. In this respect the book draws much inspiration in Kantian legal and constitutional theories. Most importantly, however, the *International Economic Law in the 21st Century* adopts Rawl’s approach to the principles of justice, including each person’s right to “the most extensive basic liberty compatible with a similar liberty for others” and positive discrimination in favour of the socially disadvantaged.

Obviously one could question the book’s diagnosis of IEL’s weaknesses, which are explained by the scarcity of legal instruments, rather than attributed to the consolidation of interests of principal economic operators versus dispersed consumers. Arguably, if the latter was not the case, the equilibrium of IEL could be changed even within the current legal framework. In this context, the attainment of a global “participatory, deliberative and constitutionally accountable democracy” may appear unlikely, or even potentially dysfunctional if actually realised. Undoubtedly, however, a reform effort based on common convictions rather than on political compromise behind closed doors is more likely to gain public support. A universally shared, pluralistic theory of justice treating,

⁸ See notably, A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton: 2005. Prof. Petersmann notes that while the Westphalian narration still dominates the UN discourse, IEL lawyers tend to perceive economic laws from five different, often uncoordinated perspectives: public international law, global administrative law, conflicts law, multilevel constitutional regulation, or multilevel economic regulation of the economy (p. 78).

in line with Petersmann's arguments, the rule of law and economic cooperation as common goods, might transform the "prisoner's dilemma" of international exchange into a "cooperative game" (that is without a dominant strategy of betrayal). Thus "the 'animal spirits' and rational egoism of individuals need to be restrained by stronger constitutional and institutional protection of 'public reason', based on cosmopolitan freedoms and other 'principles of justice'" (p. 6). The enforcement mechanisms of IEL could then be harnessed for the realisation of human rights goals (p. 10).

These normative issues, sketched in the Introduction to the book, are explored in depth in the first of eight substantive chapters and followed by conclusions. Chapter I contains suggestions on how IEL should be restructured in order to secure attainment (protection) of global aggregate public goods, including a mutually beneficial trading system, energy security, or financial and environmental systems preventing climate change. Accordingly, the introduction of constitutional protection of human rights and references to fundamental values should, as has happened domestically in Western democracies, subjugate the pursuit of self-interest (also at the State level) to the common good and overcome collective action problems.⁹ After indicating the regulatory shortcomings of contemporary IEL (p. 50), Prof. Petersmann calls for replacing "Westphalian" economic law with a "cosmopolitan" regulation. This would permit filling in the gaps in: jurisdiction, governance, incentives, participation, and the rule of law (pp. 58-59). From the perspective of sustainability of the global economic order, however, only a reform in constitutional spirit would allow for overcoming the two "paradoxes of freedom": the economic and political paradoxes of liberty.

Chapter II deepens the analysis of governance and economic failures in international economic law, both of which stem from the "paradoxes of freedom". It contains crucial definitions, for IEL, of "constitution", "constitutionalism" and "constitutionalisation". It is the global constitutional approach, including a system of checks and balances, that allegedly can pave the way for overcoming the world's jurisdictional fragmentation, which is one of the root causes of the collective action problem. The chapter draws particular attention to the experience of European integration, showing how multilevel governance and focus on the protection of individuals, thus empowering voters (consumers), enhances the common welfare more than a narrowly-perceived economic cooperation. The European example also shows how a pluralistic justice theory, respectful of national constitutional traditions, could contribute to the establishment of a "cosmopolitan" IEL.

Based upon the first two chapters – showing that collective action problems require the constitutionalisation of IEL – Chapter III tends to prove that international relations theories, including realism or institutionalism, do not provide a solution to the problem of efficiency of international law. In line with the Kantian theory of constitutional

⁹ In economics the "collective action problem" describes a situation in which a particular action would be beneficial to all persons concerned, however no one is willing to bear the costs of such conduct. One example of such situation is the so-called tragedy of the commons.

protection of (equal) liberties and Rawl's theory of constitutional protection of public reason, it is argued that the failures of the global economic system, including the crisis of 2008, largely depend on "constitutional ignorance" of economic theories and regulation. A citizen-oriented law, i.e. "civilised and constitutionalised" political and economic markets (p. 191), would limit conflicts of interests among individuals exercising both private and public authority, thus improving economic efficiency more than regulatory or administrative corrective interventions directly on the market. This argument contributes to one of the major premises of the book – that the current "top-down" Westphalian intergovernmental cooperation should be replaced with "bottom-up" governance.

Ways of extending the protection of human rights from the national to international level are described in Chapter IV. Just as the European Court of Human Rights (ECtHR) emphasises the importance of collective enforcement of human rights, so too should equal freedoms, non-discrimination, and the rule of law be protected in IEL through an institutional web of multilevel guarantees. Considerable attention is devoted to empirical evidence, including EU failures to protect general welfare in line with WTO laws, the UN Global Compact for corporate social responsibility, and the WTO's incapacity to protect certain freedoms, such as non-discriminatory market conditions, working to the benefit of consumers. The proposed multilayer approach also leaves space for diversification of protection levels depending on the specific problem area. At the same time however, the various "local" approaches and legal protection should remain globally consistent. Case studies analysed in this part of the book constitute the basis for formulating legal strategies for overcoming the world's jurisdictional fragmentation.

After calling for the integration of various theories of international law providing for collective public goods (chapters I and II) and arguing for the civilisation and constitutionalisation of IEL (chapters III and IV), the fifth chapter of the book focuses on the pluralistic aspect of the IEL reform agenda. Since the multilevel protection of human rights and constitutional values assumes operation within different jurisdictional spheres, the resulting transnational justice ought to enable adaptation of the underlying principles of justice to the peculiarities of each forum. The challenge of competing notions of IEL is again discussed in this context. Also, the issue of regulatory and judicial transnational consistency re-emerges: its relevance is reflected in the need for self-governments' reliance on the transnational rule of law. Prof. Petersmann demonstrates how trade and investment laws – through the "judicialisation" process – already contribute towards the strengthening of legal security, creating a common denominator for the cooperating states. The very meaning of the principles of justice, subject to the "overlapping consensus", is scrutinised in Chapter VI. The importance of the justice theory, which would permit the fundamental transformation of IEL, is elevated, as the global compromise should cover not only procedural norms but also certain substantive provisions. While discussing various theories of justice, another important element is also introduced: "reasonable disagreement." Emphasis is placed on notions of constitutional, distributive, and corrective justice.

The author's GATT/WTO experiences are fully exposed in Chapter VII, which draws the readers' attention to the logical conclusion that the disaggregation of the State in the globalised world of governance not only renders the Westphalian, atomised model of intergovernmental relations (partly) obsolete, but also compels ever more important international organisations to adapt to the ever changing legal environment. The declaration that "global interdependence transforms national constitutions into 'partial constitutions' that cannot unilaterally protect human rights in transnational relations" (p. 373) may give persons attached to the more conservative notion of state cause for concern.

All the above-mentioned threats are synthesised in Chapter VIII, explaining why multilevel protection of "individual cosmopolitan rights" is necessary for the constitutionalisation of IEL, which in turn should serve the purpose of protecting "public reason", thus resolving the paradox of freedom. The goal of protection of (individual) freedom is attained to some extent through limitation on the exercise thereof (at least collectively), as in the long term unrestrained freedom would prove self-destructive for the entire system. The constitutional protection of rights, on the one hand limiting private and public abuses of power, and on the other compensating for Westphalian-State limitations, secures the provision of global public goods, beneficial to each and everyone. Accordingly we complete the journey "From 'Constitutional Nationalism' to Multilevel Judicial Protection of Cosmopolitan Rights in IEL."

The author's detailed exposition allows him to answer, in his Conclusions (pp. 487-514), fifteen fundamental question posed at the beginning of the book (pp. 38-40). While the answers to some appear obvious given the initial assumption of the book (#2, does the IEL need to be justified by theories of justice?), or by its very structure (#4 what are the roots of the current financial, environmental and poverty crises?), others require a strategic analysis of the future global economic order (#9, what is the legitimate role of the judiciary in interpreting IEL and "public interest regulation?"), or even compel the reader to critically reassess the existing legal environment (#14, can parliamentary democracy remain effective without stronger protection of deliberative, participatory, and cosmopolitan democracy?).

In the end readers may be left with some mixed feelings. In terms of subject matter, even though the narration is maintained in a realistic tone and based upon empirical evidence, the ratio between arguments referring to the notion of justice and those focusing on social and economic patterns of human behaviour render the final message closer to theoretical postulates than practical solutions. This, however, is obviously a subjective perception. On the more technical plane, Prof. Petersmann's adherence to German jurisprudence is not limited to his subject-matter dedication to the communitarian vision of international law. He also appears to reject the Anglo-Saxon model of an easy-to-read narration. Despite the risk of being perceived as an untrained reader, I must admit that numerous parts of the book are not an easy read. The very first page, which introduces the topic through reference to structural changes of economy, risks of regionalism, legitimacy shortcomings in IEL regulatory attempts, and the inaptness

of the Westphalian model requires considerable concentration to follow the path of the author's reasoning. Although this is not necessarily a drawback, it should be stated that this is a book which requires the reader's exclusive attention. Also the "spiral structure" of the book hinders a quick orientation to its contents: the same themes remerge throughout the book in various configurations, which often makes it difficult to assess upfront to which thread of reasoning a particular passage relates. Having said that, each chapter definitely moves the reasoning process forward however, even if it is not always immediately evident in which direction. Indirectly this is reflected in the summaries of preceding chapters that appear at the beginning of subsequent: some topics that were described previously as already covered re-appear later on, either enlarged to include a new chapter or to re-emerge in subsequent parts. Given this complex structure and the often demanding language, the numerous tables included, the outlines of chapters, and the very precise index in the book provide important assistance.

This book will both broaden practitioners' perspectives on their discipline and provide many scholars with a fresh perspective, one which combines profound theoretical studies with a practical approach. Although the reader should be forewarned that it is a demanding read, it deserves every recommendation.

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