
Human Rights, International Economic Law and Constitutional Justice: A Reply†

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Together with developments in international criminal justice and humanitarian law, the human rights revolution in international law has had a profound structural effect on the international legal order as a whole; we are today only beginning to discern and to digest this effect, to say nothing of the broader consequences for global politics.¹ New actors have been empowered in the international legal system (not only individuals but various kinds of non-state collectivities as well); conceptions of responsibility have been altered; classic notions, such as territorial sovereignty and recognition of statehood, have sometimes subtly and sometimes radically been reshaped or adapted; and the balance of institutional actors charged with interpreting and applying international law has shifted towards courts and tribunals (a major theme of Petersmann) and away from diplomats and their ministers.²

What, specifically, is the significance of these trends for international economic law? According to Petersmann, the human rights revolution alters or should alter the way that academics, practitioners, and tribunals look at the purposes and normative underpinnings of international economic law. While, according to Petersmann, there is a strong utilitarian case for the trade liberalization guarantees in international economic treaties such as the GATT,³ the human rights revolution now permits us to see

† Petersmann, 'Human Rights, International Economic Law and Constitutional Justice', 19 *EJIL* (2008) 769.

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¹ Teitel, 'Humanity's Law', 35 *Cornell Int'l LJ* (2002) 355.

² *Ibid.*

³ Petersmann writes of a 'consensus' among economists about the gains from free trade, or freer trade, a gross oversimplification, if not outright misstatement, of state of art economic theory. See, for instance, Rodrik, 'Rethinking Growth Policies in the Developing World', Luca d'Agliano Lecture in Development Economics, Turin, Italy, 8 Oct. 2004. The very examples that Petersmann uses of countries which have experienced rapid economic growth, India and China, belie his claim, as these are states which have used many kinds of policies including high tariffs and export subsidies, as well as complex restriction and regulation of their internal markets, which are at odds with the Petersmann free trade description.

the true nature of these legal dispositions: the ‘constitutional’ protection of a sphere of individual economic liberty against the state.

As Petersmann would have it, the human rights revolution allows us to see this for two reasons. First, because it gives individuals a juridical status in the international order – as bearers of rights – thus focusing attention on the limits of the existing formal structures of international economic law, which, at least in the trade area, remain mired in the notion of state-to-state obligation despite the underlying economic activity protected being that of private actors, not states. Secondly, the human rights revolution imports into dispute settlement a conception of constitutional judicial review: the role of the adjudicator ought not to be that of an arbitrator seeking a satisfactory settlement between sovereign states, but rather her function is to discipline or constrain the sovereign state in order to protect the entrenched economic autonomy of the individual – freedom of contract and property rights.

In terms of the American constitutional tradition, this vision would be termed *Lochnerian*, after the notorious 1920s case where the US Supreme Court struck down legislation limiting hours of work in bakeries on the basis of a concept of substantive due process that protected an individual’s right to make a contract in her business.⁴ This concept of substantive due process was abandoned by the US Supreme Court in the 1930s; but, according to Petersmann, a similar notion is alive and well today in the European Court of Human Rights (ECtHR):

Even though the ECtHR respects a wide margin of appreciation of states to limit and interfere with property rights (e.g., by means of taxation) and to balance individual and public interests (e.g., in case of a taking of property without full compensation), the Court’s expansive protection – as property or ‘possessions’ – of almost all pecuniary interests and legitimate expectations arising from private and public law relationships reveals a strong judicial awareness of the importance of private economic activities and economic law for effective protection of human rights and personal self-realization in the economy and civil society. The Court’s review of governmental limitations of, and interferences with, property rights is based on ‘substantive due process’ standards that go far beyond the ‘procedural due process’ standards applied by the US Supreme Court since the 1930s [i.e., when the *Lochner* doctrine was abandoned] (at 779).

Petersmann does not cite any supporting case law for the *Lochnerism* of the ECtHR. I am not an expert in the ECtHR jurisprudence; but my generalist’s observational powers suggest that *Lochnerian* judicial activism, if it does exist in the ECtHR, has not done much to limit the scope or reach of government regulation of the economy in Europe.

Should economic freedom – freedom of contract, private property rights – be protected against democratic majoritarian politics through human rights guarantees and judicial review? If so, what kind of balance ought to be struck between other interests (and indeed other rights) and economic rights?

These are questions that engage legal and political philosophy. Petersmann’s article is utterly lacking in detailed or rigorous reasoning on these questions; he writes as

⁴ See Sunstein, ‘*Lochner*’s Legacy’, 87 *Columbia L Rev* (1987) 873.

if mere mention of such high-sounding concepts as ‘self-realization’, ‘human dignity’, and the like could substitute for *justification* of his particular view of ‘self-realization’ or ‘human dignity’.

We can give only the briefest indication here of the manner in which this rhetoric distorts the moral sensibility behind the post-World War II human rights revolution. The most telling example is Petersmann’s treatment of Nazism. According to Petersmann:

the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany’s 1919 Constitution for the ‘Weimar Republic’ had led to ever more restrictive government interventions into labour markets, capital markets, interest rates, as well as to expropriations ‘in the general interest’ which – during the Nazi dictatorship from 1933 to 1945 – led to systemic political abuses of these regulatory powers.⁵

Petersmann thus suggests that the real sin of the Nazis, or what led to that sin, was abuses in the over-regulation of the marketplace. On this perspective, there is essentially no difference, morally or in human rights terms, between, for example, the taking of property as part of the systemic strategy of destruction of a people, and any other unjustified exercise of eminent domain.

Petersmann invokes Rawls and Dworkin in support of the cause of constitutional judicial review; yet neither thinker has ever advocated *Lochner*-style constitutional jurisprudence which Petersmann identifies with the key function of constitutional judicial review. Indeed, Dworkin has explicitly criticized the libertarian approach to economic freedom under the constitution, and the doctrine of *Lochner* specifically.⁶ Dworkin’s conception of constitutional judicial review most decidedly does not endorse the protection of a sphere of private economic autonomy against egalitarian regulatory intervention.

Beyond these brief indications, the absence of sustained argument in Petersmann’s article to which to respond makes it difficult for me in this comment to address theoretically the relationship of ‘economic freedom’, whether understood in libertarian terms or otherwise,⁷ to the vision of ‘humanity’ or ‘human dignity’ arguably implicit in, or driving, the human rights revolution in international law. I have articulated elsewhere, at length, a conceptual approach to the place of economic (and social) rights in constitutionalism, in the context of Canadian constitutional reform.⁸ I would add here only that rejection of *Lochnerism* does not entail turning a blind eye to human rights abuses because they take place in the economic sphere, or because the seizure of property and the denial of the right to earn a livelihood for instance are the *means* used to violate a person’s human rights. Indeed, the reverse – because state intervention may be required to protect human rights in the economic sphere (equality and affirmative

⁵ Text of fn. 19.

⁶ R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (1996), at 82.

⁷ See, for instance, A. Sen, *Development as Freedom* (2001).

⁸ R. Howse, *Economic Union, Social Justice and Constitutional Reform* (1992); see particularly the concept of equal economic citizenship.

action legislation for instance) conceiving of economic rights in terms of a zone of autonomy secure from state intervention *à la Lochner* is as likely to undermine effective human rights protection in the economic sphere as to enhance it. Petersmann's unbalanced view of the issue – and his indifference to the ways in which private power can limit autonomy (unless it is consumer autonomy; he believes in anti-trust) – is well reflected in his reference to collective bargaining: the right to strike is an assault on companies' ability to exercise their 'market freedoms' (at 18).

The tension between Petersmann's Lochnerian vision and the positive international law of human rights is most evident in the case of the Covenant on Economic, Social and Cultural Rights. Examining the interaction of this instrument with WTO law leads to a dramatically different, indeed anti-Lochnerian, view of the relationship of the human rights revolution and international economic law. Instead of international human rights law enhancing the purported function of WTO legal norms as protections for private economic actors against the activist state, consideration of human rights implies flexibility under WTO law for the state to take positive action to protect *individuals* and *communities* against the excesses of economic globalization. For example, if states are fully to discharge their obligations with respect to the right to food or the right to health under the CESC, they may need to rely on various exceptions or safeguards provisions in WTO treaties. Interpreting such treaties in light of the human rights obligations in question would help to ensure that the exceptions or limitations provisions in question allow states the policy space to fulfil these obligations.⁹

Petersmann's presentation of the relationship of human rights to private economic activity, in addition to misrepresenting the significance of taking into account human rights law in the WTO, also arguably provides a very one-sided and inaccurate account of the European legacy of human rights. This legacy is reduced to the contribution of the judiciary to correction of 'government failure'. His anti-state or anti-government bias (indeed, the notions of government and failure most often appear together in Petersmann's essay) blinds him to the extent that judicial activism with respect to human rights itself depends on a political culture supportive of human rights, and of the conception of human personality or humanity on which these rights are based. Petersmann himself cites Hamilton's observation that the judiciary is 'the least dangerous branch'; when up against what Petersmann describes as 'Machiavellic' states, it suffers from all of the weaknesses and liabilities that Machiavelli himself attributes to 'unarmed prophets'. Petersmann's image of constitutional review is really secularized Protestantism, which could be recognized as at the moral root of Weimar liberal legalism. The rule of law through the caste of judges was represented as redemption from the harshness and squalor of real political life – to which the almost inevitable and fateful (anti-liberal) response was to try and save the 'political' by moralizing the embrace of these 'Machiavellic' features as 'decisionism' or 'resoluteness'.

⁹ Howse and Teitel, 'Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization', Friedrich Ebert Stiftung, Occasional Paper No. 30, Apr. 2007.

When Petersmann presents the triumph of human rights in Europe as a *coup de grace* by judges, he cannot help but add that it was accepted by parliaments and citizens. This notion of acceptance seems equivalent, in Petersmann's eyes, to the recognition of a saviour or redeemer – a mystical embrace. But we might ask, less apolitically, whether the ground of the acceptance was not the creation, on the ashes of World War II, of a political culture in Europe that was open to human rights, and whether the very governments or states that Petersmann describes as Machiavellic resisters to human rights supremacy did not play the decisive role in the creation of that culture – building a basis for social solidarity that did not depend on appeals to chauvinistic versions of national identity, and routing a possible revival of extremist anti-liberal politics (on the left and the right) through state-driven economic reconstruction and a wide variety of interventions to ensure social equality, as well as laws restrictive of racist speech and extremist political movements (which pointedly shows, at least in a time of political transition, that limits on 'laissez-faire' may be essential to the fulfilment of the human rights ideal).¹⁰

Direct Effect

It is important to understand that one of Petersmann's primary objectives in recasting the legal obligations in international economic treaties in terms of individual human rights is to make a case for what is often called, perhaps rather loosely, 'direct effect' of WTO law. Petersmann believes that individual economic actors who have suffered harm from the failure of states to comply with obligations in such treaties should have a cause of action in domestic courts. Given Petersmann's identification of domestic enforcement of such obligations by individuals with *Lochner*-like constitutional economic rights, it would be a natural reflex for someone with a non- or anti-*Lochnerian* vision of international economic law to oppose categorically the possibility of such enforcement. But this would be a mistake.

There is a broader policy issue here of whether international economic law – particularly WTO law – is 'underenforced' and indeed of what 'underenforcement' means. The dispute settlement provisions applicable in the WTO, the so-called Dispute Settlement Understanding, provide only for a prospective remedy, namely withdrawal or modification of the offending measure within a reasonable period of time; unilateral countermeasures by the injured state are available if this does not happen. Apparently, in this respect, the DSU modifies the customary rules of state responsibility which would require reparations for the harm suffered by the injured state while the measure was in place. The net result is arguably that the offending state gets a 'free ride' – at least a couple of years during which it can violate the WTO norms with impunity while the dispute complaint is wending its way through the system, and,

¹⁰ Issacharoff, 'Fragile Democracies', 120 *Harvard L Rev* (2007) 1405; Teitel, 'Militating Democracy', 29 *Michigan J Int'l L* (2007) 49.

quite likely, depending on how ‘reasonable period of time’ is interpreted, at least a year more to implement after a final judgment of the dispute settlement organs. There are arguments that this state of affairs undermines the effective incentives to comply with WTO law in the first place, and in fact that it is a betrayal of the rule of law ideal at the WTO. On the other hand, the current situation allows even risk-averse governments to experiment with regulatory options which push the limits of WTO law, knowing that if it turns out that they are in violation the sole responsibility is to remove the measures for the future. In the presence of uncertainty about whether a given regulatory scheme may or may not be found to be in compliance with WTO rules, the absence of retrospective remedies may prevent a ‘chill’ effect on regulation, a concern that many progressives have about the damages remedies available in investor–state arbitration, for example. The benefits and costs of providing damages remedies for private actors thus need to be carefully weighed, along with other options for changing the remedies regime of the WTO.¹¹ The issue can hardly be decided one way or the other simply by invoking the mantle of ‘human rights’.

Human Rights and the WTO as a Fragmentation Problem

Regardless of one’s view of the relevant human rights, Lochnerian or otherwise, the consideration in WTO adjudication of international human rights norms raises the structural and hermeneutic issues entailed in the application by one international legal regime of norms from another. I do not find the lengthy discussion by Petersmann of legal cooperation and practices of comity among European courts to be particularly illuminating of these international law issues: the problem with respect to WTO tribunals and human rights law is simply not one of overlapping *in personam* or subject-matter jurisdiction. It is perhaps the case, at least hypothetically, that the interpretation by a human rights tribunal of international human rights law in pending or on-going proceedings may be relevant to the use of that law by a WTO tribunal in interpreting a WTO Agreement; but Petersmann does not mention even a hypothetical situation where this could be the case, and after reading and re-reading the long discussion of *Solange* cooperation etc. I was left baffled by what this could offer in the way of guidance to a WTO tribunal, apart from that it would need to pay attention to what the other tribunal says about the meaning of the human rights law in question. As Petersmann notes in his discussion of the *Mox Plant* case, unlike the UN Law of the Sea Tribunal, the WTO dispute settlement provisions do not appear to allow the possibility of suspension of proceedings until another tribunal has made a relevant ruling. Thus, for the WTO tribunal, comity would amount to respectful consideration of the manner in which human rights bodies have already interpreted the human rights norms in question. I wholly endorse such deference, and I fully believe that it

¹¹ See Sykes, ‘Public vs. Private Enforcement of International Economic Law: Standing and Remedy’. 34 *J Legal Studies* (2005) 631.

will be an important check on the possibility that WTO tribunals will import Lochnerian views of human rights into WTO dispute settlement.

Petersmann's presentation of the relevant doctrine in *international* law is also not illuminating, and in fact highly confusing. The source that Petersmann initially cites for the proposition that international human rights law should be brought into judicial interpretation and application of international economic law is the ICJ advisory opinion in the *Namibia* case: '[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.¹² It is mystifying why he should have chosen this ICJ case, rather than the newer *Oil Platforms*¹³ decision, which is more relevant to the question, since it deals with the interpretation and application of a treaty in light of general international law (in this case on the use of force) where the jurisdiction of the adjudicator is *based solely upon that treaty*.¹⁴ This is analogous to the situation of the WTO adjudicator, whose jurisdiction is based upon the WTO Dispute Settlement Understanding, and whose role is to apply the provisions of the WTO treaties ('covered agreements').

With respect to the jurisdiction of the WTO adjudicator, Petersmann suggests that WTO law does not provide an explicit authorization to decide WTO disputes with 'due regard to other relevant rules of international law'. Petersmann laments, 'The often one-sided focus of WTO and investor-state arbitrators on governmental and producer interests is not only reflected by the fact that human rights arguments have never been made in WTO dispute settlement proceedings.'¹⁵

It is quite impossible to follow the thread of Petersmann's analysis. First of all, if the *Namibia* case is correct, why would the WTO adjudicator need to have an 'explicit authorization' to take into account human rights or other relevant international legal rules? Secondly, still more confusingly, Petersmann expresses no view on DSU Article 3.2, which provides, in part, that the WTO adjudicator is to interpret the WTO treaties 'in accordance with customary rules of interpretation of public international law'. The Appellate Body, at least, considers Article 3.2 as an explicit authorization to apply the rules in the Vienna Convention on the Law of Treaties in the interpretation of WTO Agreements, and these, of course, include most relevantly Article 31, which stipulates (at paragraph (3)(c)) 'other relevant rules of international law applicable between the parties' as a *mandatory* source of treaty interpretation. One wonders then if Petersmann disagrees with the Appellate Body on the meaning of DSU Article 3.2, given that he thinks the WTO adjudicator *lacks* an explicit authorization to take into

¹² [1971] ICJ Rep 31, para. 53.

¹³ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, merits [2003] ICJ Rep 161.

¹⁴ Also highly relevant and not discussed by Petersmann is the rigorous and thoughtful consideration of these issues in the ILC Report on Fragmentation, led by Professor Martti Koskenniemi. See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (2006), UN Doc. A/CN.4/1682 (13 Apr. 2006).

¹⁵ At 797.

account other relevant rules of international law; but there is no discussion concerning why DSU Article 3.2 would *not* be an adequate explicit authorization. The mystery only thickens when one notices that Petersmann *does* mention the Vienna Convention on the Law of Treaties as applicable to adjudication in international economic law, but only the Preamble (at 30, 32–33), not the operative provisions on interpretation, most notably Article 31!

In sum, one draws from Petersmann's article a confusing, inconsistent, and obscure picture of the international law framework applicable to the use of non-WTO international law in the interpretation of the WTO Agreements. This is not the place to provide an adequate picture: I refer the reader to the ILC Fragmentation Report, which discusses the practice of WTO panels and the Appellate Body in this regard, as well as to recent work of my own.¹⁶

Conclusion

Petersmann concludes: 'the increasing "legalization" and "judicialization" of IEL demonstrate that it is no longer reasonable for national laws to ignore the general consensus among economists that liberalizing trade and investments is more important for alleviating unnecessary¹⁷ poverty than reliance on redistributive foreign aid' (at 796). Besides the fact that no such consensus among economists exists, I believe that, on balance, the effects of 'legalization' and 'judicialization' of international economic law have been just the opposite. For many years, the insider trade policy community – trade economists, GATT/WTO officials, and the like – interpreted and developed the law and institutions of multilateral free trade in a quiet behind the scenes manner, and with a systematic bias towards free trade-oriented economic ideology. The creation of a genuine judicial instance in the WTO, the Appellate Body, has shifted in important respects the interpretation and application of the norms of the system from the *coulisses* of diplomacy, something Petersmann thankfully endorses, but with quite different implications – how and with respect to what purposes and in the light of what values the rules ought to be interpreted and applied has become more contestable, and the outlook that Petersmann attributes to a 'consensus' of economists has come under much greater challenge by a much wider range of stakeholders. While Petersmann sees the opening up of WTO dispute settlement to *amicus curiae*, for example as a vindication that the system belongs to private economic actors, in fact the major commercial and industrial interests have always been well and virtually represented at the WTO, as they generally had the ear of member governments. The effect of the opening up through judicialization has been to enfranchise (or at least enfranchise the voice of)

¹⁶ Howse, 'The Use and Abuse of International Law in WTO Trade and Environment Litigation', in M. Janow *et al.* (eds), *The WTO: Governance, Dispute Settlement and Developing Countries* (2007), at 635; for the case of human rights in particular, see Howse and Treitel, *supra* note 9.

¹⁷ One wonders what he means by 'unnecessary poverty' – poverty that is not necessary in the name of the protection of his concept of corporations' rights and private property?

other constituencies, the values and interests of which were marginalized or excluded in the past by the way the insider trade policy community operated the system.¹⁸ Very few outsiders had the technical credentials to question what insider economists and other experts said was right or good from an economic perspective: but courts and judges are supposed (and Petersmann himself says it) to administer justice, and justice demands to be seen as fairness. The implication of judicialization is much more explicit attention and scrutiny to the fairness of the multilateral trading system, assessed from many points of view, and certainly not just that of the 'rights' of private capital. Similarly, with respect to investor–state arbitration, the proliferation of investor–state disputes decided by arbitral tribunals, the awards of many of which are now public, and, as Petersmann notes, where *amicus* participation is in an increasing number of cases permitted, has brought unprecedented examination to the actual terms of engagement between multinationals and the governments and peoples of the countries in which they invest, and the fairness of those terms – an examination which was much more difficult where these matters were simply determined by more or less behind the scenes relations of power and money, through invisible deals between often autocratic regimes and huge corporations.

I wonder then if Petersmann's intent is to pre-empt or diffuse these developments, through cabining them within the old insider ideological outlook, somehow recasting that outlook in what he takes to be the idiom of human rights, albeit a Lochnerian idiom largely unrecognizable, if not positively repugnant, to most serious human rights activists. Perhaps this explains all the ill-fitting pieces of this essay: a human rights suit of clothes just doesn't hang properly on an old GATT hand, so Petersmann has had to take them apart and has sewn up the pieces every which way.

¹⁸ See Howse, 'The End of the Globalization Debate: A Review Essay', 121 *Harvard L Rev* (2008) 1528.