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2A. LEGAL PERSPECTIVES ON EU REFORM

Judicial Governance in the European Community of Law:
Adapting the Economic Constitution to Social Change

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Whereas the successful ratification of the Constitutional Treaty stays uncertain, the constitutional qualities of EU law have commonly been accepted. Political and legal scientists have emphasised the proactive role the ECJ played for the constitutionalisation process in the past. Generally, they found that after an era of judicial activism in times of political stagnation, the relaunch of the integration project in the 1980s brought about much more judicial restraint in politically sensitive questions.

However, little has been said on the judicial (re)construction of the European Economic Constitution in a globalising world with dramatic changes in political economies (‘from government to governance’). In this paper, I will argue that the governance turn in integration studies allows us to reassess the Court’s ongoing jurisdiction as ‘governing’ the adaptation of the European Economic Constitution to transnational social change. A concept of judicial governance – not to be confounded with the ‘spectre’ of a government by judges – enables us to understand the interaction of politics, economy and law and to work out more closely the interconnected trends towards constitutionalisation (i.e. more constitutional governance) and regulation (i.e. more regulatory governance).

Inspired by sociological (institutionalist) theory we can thus conceive of European judicial governance as a social ‘field’. This field comprises besides the ECJ a whole bunch of public and private, national, supranational and transnational actors competing for the ‘right’ interpretation of the European Law in general and the European Economic Constitution in particular. In this setting, we can observe the discourse on fundamental rights and freedoms and the processes of constitutionalisation and regulation gaining considerably ground over the last few decades. This shift in the ‘conceptions of control’ (towards both the law and the market) that organize the field can then be related to structural change in the context of globalisation. Therefore, as an arbiter of the transforming European political economy the ECJ cannot but sometimes ‘govern’ – in a Platonian sense – ‘beyond the law’ as it is written.

In this paper, I will demonstrate the structural embeddedness of a nevertheless culturally autonomous jurisdiction first for regulation conflicts in the Internal Market (with national public interests at stake) and second for regulation conflicts in the WTO (with European public interests at stake). I will come to different conclusions regarding the actual state of judicial governance and the relationship between constitutionalisation and regulation in both areas of the European Economic Constitution.
Over the second half of the last century, courts have considerably gained influence as governing institutions of society. Two powerful trends have driven this development: (1) the constitutionalisation of the *Rechtsstaat* (rule of law) and (2) the internationalisation of the law and of constitutional review. Both trends uniquely combine at the European level where the European Court of Justice (ECJ) has proven a motor of the integration process (internationalisation) and established itself as a supranational constitutional court (constitutionalisation) at the same time.

In this paper, I will conceive of the ECJ as an institutional actor in the European multi-level system of governance. Governance or institutionalist perspectives are generally understood to complement conventional integration theories – mainly neofunctionalism and intergovernmentalism – in European studies. The governance turn opened a new perspective on political decision-making at the European level. But although scholars commonly ascribe a political role to the ECJ (generally imputing an integrationist bias to it), judicial decision-making is rarely analysed as governance activity. Another shortcoming of the governance debate is the (almost missing) political-economic foundation of the proverbial ‘governance without government’. In other words, the governance approach provides us with some pointed formulas for the changing role of states but overall falls short of structural explanations both at a system level and on a global scale.

Therefore, in the theoretical part of the paper, I will sketch out a ‘judicial governance’ concept wherein the ECJ is seen as a constituent part of European governance, or as a relative autonomous regulatory institution. Drawing on socio-legal field theory (reflecting both institutional theory and legal sociology), I will specifically take account of the political-economic context of supranational jurisdiction. In the empirical part, I will then address the question of how the ECJ is adapting the European Economic Constitution to transnational social change both in the internal (single market) dimension and in the external (foreign trade) dimension of the European Community (EC). This part is still hypothetical and needs further elaboration.
The governance approach

‘Governance’ has become quite popular in scientific as well as in public discourse. Governance is widely understood as an umbrella term for all kinds of governing activities. Occasionally, it takes on more specific meanings, as in ‘corporate governance’ or ‘good governance’. But properly, as it is argued here, governance stands for a shift of governing functions from governments or states to networks of public and private actors (‘governance without government’). The ‘judicial governance’ concept developed in this paper is therefore meant to explore the (socio-)legal dimension of the transformation of states and in particular the role of courts therein.

Although the inflationary use of ‘governance’ fits well into postmodernity, its deeper meaning stems from classical philosophy: If we retrace the English verb ‘to govern’ to its ancient equivalents *gubernare* in Latin and *κυβερναν* in Greek, we will be reminded of its original sense which was ‘steering a ship’ and not ‘ruling a country’. The metaphorical turning-point is best documented in the writings of Plato (both in Politeia and Politikon) where he sketches out an ideal state to be ruled by a philosopher king. To illustrate his point, Plato compares the governor of a state with the cox on a ship and emphasises that both would rank the ‘art’ of doing what is right higher than to keep the ‘law’ as it is written. Therefore, the anti-legalistic connotations of today’s governance vocabulary seem to have a long history.

But of course the celebrated ‘governance turn’ would not make sense if there were not – beyond etymological and metaphorical relatedness – some striking differences between the meanings of government and governance: Whereas the former refers to a concrete institution or group of people in charge of governing, the latter focuses on the activity of governing without specifying a subject. Governance is thus much more abstract and procedural in character than government and thereby proves paradigmatic for a new generation of theory related to the problem of *politische Steuerung* or ‘political steering’ (in a literal translation). *Steuerung*, a German term with Germanic roots, contains exactly the same metaphorical dimension as ‘governing’ and may thus also allude to the Platonian idea of a ship-like state and a cox-like king. Moreover, although *Steuerung* has a longer tradition in political science than ‘governance’ the former is probably still the best translation of the latter. In the context of the *Steuerung* debate, the governance turn can be interpreted as a gradual shift from hierarchical, exclusive, transitive forms of steering (i.e. government) to more cooperative,
inclusive, reflexive forms (i.e. governance). It results that, from an organisational point of view, the governance turn is linked with a growing significance of networks.

Characteristic of governance networks is their binding together of public and private actors as a means for collective problem-solving. For this reason, some scholars prefer to talk about ‘network governance’ instead of ‘governance’ alone, while in this paper, both terms will be treated as synonyms. The network is often described as an institutional compromise between the state and the market. If the (hierarchical) state and the (anarchical) market represent opposite poles of the organisational spectrum, the (heterarchical) network will arguably be found somewhere in the middle. Consequently, it will be the ‘shadow of the market’ that motivates governments to enter into negotiations with private actors and, vice versa, ‘the shadow of the law’ that makes private actors become more cooperative. In other words, as network governance means redressing the balance between state and market or public and private sphere, it becomes part of the transformation of states in the era of globalisation.

Besides the network metaphor the idea of ‘multi-level governance’ has gained much influence in European studies. On the one hand, ‘multi-level’ seems a perfect attribute for the European polity that comprises international, supranational, national and subnational levels. On the other hand, it is expected that ‘multi-level’ would become a general feature of the postmodern type of state with the EU and its member states simply taking the lead.

Towards a judicial governance concept

The ‘judicial governance’ concept to be developed here can be understood as a contribution either to (European) Integration Studies where ‘governance’ ranks high on the agenda or to (European) Legal studies where this concept is almost missing. But apart from terminology, there is a common interest in the transformation of states in general and its legal dimension in particular. Moreover, both research fields display a certain tendency to distinguish between ‘integration’ on the one hand and ‘regulation’ one the other hand.

As regards Integration Studies, we find (explicit) ‘governance’ theories that either focus on the integration dimension, for example the theory of supranational governance represented by Fligstein, Sandholtz, Stone Sweet et al., or on the regulation dimension, for example the institutionalist theory of the single market developed by Armstrong, Bulmer, Wincott et al. Whereas the former suggests an overall explanation for the integration process based on the
interplay between economy, law and politics, the latter analyses the conditions of institutional autonomy and the mechanisms for institutional change in the field of market regulation. Although both theories classify the ECJ as governance actor or regulatory institution, they do not really concentrate on judicial governance. As regards Legal Studies, there is indeed a critical discussion about the European courts playing a political role. Nevertheless, as most arguments stem from legal theories or theories of democracy, its focus is strongly normative. Moreover, as the integration paradigm still seems to dominate the debate, contributions on governance or regulation problems as such are extremely rare.

In the following, I will outline the two key components of the judicial governance concept as applied to the EC context. The first component mainly concerns the vertical dimension of integration, here connected with the constitutionalisation of the European Rechtsgemeinschaft (literally ‘rule of law community’). As regards the relations between law and politics, Community and Member States, the overall trend has obviously been a strengthening and constitutionalisation of the supranational law. In contrast, the second component of the concept focuses on the horizontal dimension of regulation which can easily be related to the Europeanisation and internationalisation of legal systems and their constitutions, at least when transnational actors and market forces provide the missing link. What is at stake here is the relationship between law (and politics) on the one hand and the economy on the other hand. It will be assumed that the European law has to be increasingly understood as part – cause and effect – of the globalising political economy.

The political dimension of judicial governance

A way to explore the political dimension of judicial governance is to start with the debate on ‘government by judges’ and the definition of ‘judicial activism’ and ‘judicial self-restraint’ in this context. The term ‘government by judges’, which is mostly used in a pejorative sense, was coined in 1914. But strictly speaking, the debate on the limitation of judicial power in democracies dates back to the age of enlightenment with Montesquieu as a central figure. In the recent decades, term and debate have spilled over into the European context, apparently provoked by the evolving case law of the ECJ and the ECHR. The underlying question is still how to interpret the separation of powers principle and how to apply it to the judicial branch of government.
The conventional view can be summarised as follows: As in a democracy the parliament is considered to be the legitimate legislator, it is generally not to be overruled by the judiciary. Thus, if independent judges make political decisions that interfere with the will of the people represented by the parliament, this is perceived as a ‘government by judges’ which by definition constitutes a violation of the basic rules of democracy. The problem of judges overstepping their legitimate authority arguably becomes even more acute on the supranational level with its persistent ‘democratic deficit’ compared to traditional democracies. If judicial independence is to be preserved and direct sanctions are out of reach, the only remedy against judicial activism seems to lie in a doctrine of judicial self-restraint evolved by the courts.

The powerful trend towards a constitutionalisation of legal systems, including the constitutionalisation (and supra-constitutionalisation) of fundamental rights, threatens to undermine this conventional view. For example, the ECJ which ‘ensures that the law is observed’ also stands for the ‘supranational control of the supraconstitutional’, that is the active protection of fundamental rights. Thus, the so-called new constitutionalism has turned constitutional courts – and to a certain extent also ordinary courts – into ‘negative’ and even ‘positive’ legislators (à la Kelsen), as in a constitutional democracy judges do exercise substantial control over parliamentary legislation. Under these conditions, it will be much more difficult to draw the line between judicial activism and judicial self-restraint, to distinguish legitimate and illegitimate engagement of courts with politics, and to reconcile norms (separation of powers) with facts (overlapping of functions). Therefore, a new action model as suggested by Stone Sweet could indeed prove useful.

Coming back to the idea of judicial governance we can now draw from this normative debate on (how to prevent) a government by judges a more analytical concept on interactions between elected politicians and independent judges in a constitutional democracy. Both the legislature and the judiciary exercise influence on each other activities by means of direct or, more often, indirect control resulting in a logic of reciprocal expectations and anticipatory reactions. Therefore, in ‘constitutional politics’ legislation and constitutional review are closely intertwined “each process becoming at least partly constitutive of the other” (Stone Sweet 2002, 61).
In Stone Sweet’s process model, constitutional politics consists of alternating phases of politicisation of constitutional review and judicialisation of legislation. Whereas politicisation means turning political conflicts into legal cases, judicialisation means introducing legal arguments into political debates. Also included in the discursive and interactive evolution of constitutional law are administrators, ordinary judges, legal scholars, private litigants, and the interested public. The Rechtsgemeinschaft can thus be interpreted sociologically as a field of social relations in which the law is constructed. As far as the EC is concerned, this institutional setting can be taken as the legal dimension of the European multi-level system of governance. Judicial governance would then refer to the role of courts – either national or supranational – in this context, the latter being particularly interesting: for the ECJ can be understood as a pioneer of judicial governance not only in form (building a multidimensional governance network) but also in substance (acting as a catalyst for the transformation of states).

So far we have focused on the relationship between law and politics in the constitutionalised EC. In the following, we will explore the (political) economic dimension of judicial governance, that is the relationship between law (and politics) and the economy in the light of Europeanisation and globalisation processes. At the same time, we will take a more sociological stance based on different strands of structuralist and constructivist theory. The central concept will be the ‘social field’ which is well known in sociological institutionalism and thereby entered into European Studies. Conceiving of judicial governance as a legal field then, we can to a certain extent combine the external view on law of sociologists with the internal view of jurists. Similarly, we can take into consideration both what ‘governing’ judges have in common with and what distinguishes them from other governance actors, especially politicians.

The economic dimension of judicial governance

The ‘political-cultural approach’ developed by Fligstein focuses on how power and meaning structure social relations. Correspondingly, institutions are understood as “rules and shared meanings […] that define social relationships, help define who occupies what position in those relationships, and guide interaction by giving actors cognitive frames or sets of meanings to interpret the behavior of others” (Fligstein 2001a, 108). In general, institution-building is seen as a means to reduce uncertainty and contingency of social life. A ‘social
field’ is the kind of institutional order that grows out of the social relations and ongoing interactions between certain kinds of actors and organisations. Typically, social fields show a polarised structure (with two or more ‘poles’) which is expressed or enacted in internal struggles for the resources at stake as different types of economic, cultural, social and symbolic capital.

The social organisation of a field comprises “the set of principles that organize thought and are used by actors to make sense of their situations (what might be called cognitive frames or worldviews), the routines or practices that actors perform in their day-to-day social relations, and the social relations that constitute fields that may or may not be consciously understood by actors“ (Fligstein 2001b, 29). What results then is a specific ‘conception of control’ taken for granted by all actors in the institutionalised – and thus stabilised – field, despite their different positions, interests and strategies. Under certain circumstances (policy changes, economic shocks, interaction effects), a given field enters into a crisis in which its power and meaning structures undergo a change. In this case, uncertainty persists until a new institutional order is established and has crystallised into a new conception of control.

The field concept can be applied flexibly to interaction contexts in different sectors and on different levels, for example to certain markets or policy domains or, as done here, to the European legal (or judicial) field. Judicial fields include all members of the legal community who take part in the interpretation of the law. For Bourdieu, arguably the main founder of the sociology of fields, the judicial field not only produces law but also creates a symbolic order that officially sanctions a given social structure. It is conceived of as a constitutive part of the so-called field of power which roughly corresponds to the prevailing political economy. Therefore, significant changes in the underlying social order also provoke adaptations in the symbolic structure of the legal field. Besides a general polarisation between ‘conservatives’ with orthodox strategies and ‘progressives’ with heterodox strategies (‘incumbents’ versus ‘challengers’ in Fligstein’s diction), we can assume a fundamental contrast between the autonomous pole where law is in its purest form and the heteronomous pole where it is reduced to a mere instrument. Thus, both ‘formalism’ and ‘instrumentalism’ have their real bases in the legal field and, therefore, do not exclude but complement each other in a comprehensive legal sociology.
Above we have already pointed out that the theory of supranational governance could provide the general frame for a judicial governance concept despite the former’s vague governance term and its integration bias. Sociological institutionalism, and in particular the theory of social fields, seem to constitute the proper basis for an elaboration of the different dimensions of judicial governance. Indeed, Fligstein and Stone Sweet made a step in this direction and explained the dynamics of European integration as an effect of “interconnected market, legal, and political fields” (Fligstein/Stone Sweet 2002, 1239). In this approach, linkages between the fields are mainly produced by transnational actors with a stake in European law: for example firms engaged in the single market that go to Luxembourg as litigants or to Brussels as lobbyists to defend their interests. But the model stays rough and neglects most of what can be learned from field theory.

In particular, Fligstein and Stone Sweet stop short from conceptualising these interconnected fields, including the European legal field, as fields in a permanent state of crisis (otherwise the integration would not proceed). They neither speculate about when the driving forces of this transformation process – challengers by definition – will have established a new institutional order and what it will look like. Nor do they really take into account the globalisation context of European integration and its imperatives of regulation. Nevertheless, these deficiencies can be remedied by adding certain elements of regulation theory (or international political economy): in particular the idea of globalised ‘conceptions of control’ intruding into local – here: national and European – fields and the concept of transforming states thereby giving the governance concept more substance.

Thus far we have worked out a judicial governance concept that seems sufficiently complex to explore the role of courts – specifically the ECJ – in the Europeanisation and globalisation processes. We will now turn to a cursory analysis of how the European economic constitution actually evolves or, more precisely, how the ECJ ‘governs’ (in a Platonian sense) the constitution’s adaptation to transnational economic and social change. First, the field approach will be fit into a two-dimensional model of the EC’s legal development that clearly distinguishes integration and regulation dimension. Second, I will present some insights into the ECJ’s empirical governance function and draw preliminary conclusions.
The changing European economic constitution

Integration and regulation can generally be understood as two different dimensions of the transforming state. Arguably, the so-called governance turn may also be interpreted as a shift from integration to regulation in the overarching theme of European Studies. In a simple model, the vertical (integration) axis stands for a transfer of power from sovereign states to supranational institutions whereas the horizontal (regulation) axis represents a shift from national governments to governance networks. Under ideal conditions, integration and regulation would thus be independent of each other. Yet in reality a full differentiation of both dimensions cannot be taken for granted as may be illustrated by the case of the EC.

As long as deregulation and reregulation at the supranational level were meant to replace regulation at the national level, integration and regulation dimensions seemed rather identical. But the early integrationist vision could never be accomplished under the veto rules of the treaties; and so national rules kept a pivotal role in regulating the single market. Nevertheless, it was not so much political stagnation, but economic change that later favoured a less centralized and more flexible regulatory approach and brought about a ‘transition from government to governance’ both on the national and the supranational level. The difference between the overlapping trends of integration and regulation may be resumed as follows: Whilst the (former) integration efforts had a strong legalistic momentum, the (latter) regulation efforts are clearly more market-driven. Similarly, as constitutionalisation, a strengthening of law against politics, marked the long founding years of the EC, internationalisation, a reorientation of national policies towards world markets, prevails in the recent decades of reform and consolidation of the treaties.

The integration and regulation dimensions roughly correspond to the autonomous and heteronomous poles of the European legal field, although this constellation could change as phases of autonomisation and heteronomisation apparently alternate. Thus, we would locate the transition from integration to regulation as early as in the 1970s when the ECJ launched with Dassonville and Cassis de Dijon a new line of case law that indicates the formation of a new conception of control. Arguably, these landmark cases also symbolise the turning point from autonomisation (with the constitutionalisation of the supranational legal order) to heteronomisation (with the court taking an unprecedented economist stance). Meanwhile, the European legal field has become much more complex what is reflected in the case law of the
last one or two decades. But at least in the core areas of the single market, in particular the free movement of goods, the differentiation of the regulation dimension has made considerable progress. I would suggest that the case law on the principle of mutual recognition is a particularly suited indicator for demonstrating tendencies towards network governance in the European economic constitution. At the same time, it may be shown that the heteronomisation phase has again turned into an autonomisation phase: the beginning constitutionalisation of the governance network.

In contrast to the internal dimension of judicial governance (related to the single market), the external dimension of judicial governance (related to foreign trade) still is highly politicised. This is most obvious in the relationship between EC and the World Trade Organization (WTO). Although today’s WTO (former GATT) law has largely become constitutional, the ECJ hesitates to grant direct effect to WTO provisions. Transnational actors, mainly firms, standing to profit from liberalisation and direct effect are strongly opposed by more ‘protectionist’ European forces. But in this case, not only unfair trading practices are at stake but also legitimate regulatory institutions that have been gradually developed by the EC/ECJ (as the precautionary principle). Therefore, we can observe a struggle between at least two incompatible conceptions of control in the – somewhat globalised – European legal field and possibly even inside the ECJ. Whatever solution the ECJ develops, it will be blamed for interference in politics from one side or another. This means that judicial governance in the field of foreign trade law is stuck in a heteronomisation phase without being clear which regulation concept will finally prevail: the WTO model or the EC model.
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