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Governing by judicial fiat? Over-constitutionalisation and its constraints on EU legislation

Abstract: With the declaration of direct effect and supremacy of European law, the EU has a constitution, all but in name. Different to constitutions of nation states, the constitution of the EU is rich in policy content (and low on principles safeguarding the rule of law). The Treaty's policy content rooted in the four freedoms and competition law allowed the Court to provide important impetus to the integration process, as for instance the *Cassis* judgment did for the single market. Political science has paid comparatively little attention to this process, beyond its criticism that the Court favours negative integration. However, the parallel venues of judicial and legislative policymaking imply further challenges, and are increasingly dysfunctional, I argue. Case law of the ECJ accumulates and can hardly be overruled, constraining European secondary law in multiple ways, thereby resulting in significant legal uncertainty for EU citizens. The paper analyses the interaction of judicial and legislative policymaking on the basis of case studies, showing the repercussions of over-constitutionalisation on EU policymaking.

Keywords: European Court of Justice, judicialization, EU policymaking

Introduction¹

Analyses of European integration generally acknowledge that the European Court of Justice (ECJ) has been a particularly important actor (Pollack 2003). European integration is 'integration through law' (Cappelletti *et al.* 1986; Byberg 2017). And yet, in political science analyses of EU legislation, the ECJ is notably absent. Situated in a 'comparative paradigm' with analytical concepts taken from comparative politics, analyses of European Union (EU) legislation focus on the respective relevance of the Commission and its different Directorate Generals, the different member states in the Council and party groups in the European Parliament (Kreppel/Oztas 2016). However, much more than in national political systems the ECJ plays a pronounced role in the political system of the EU. Grimm (2017) has coined the term 'over-constitutionalisation' to explain this relevance.

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While national constitutions focus on liberal individual rights and state organization, the origin of the European constitution is an intergovernmental treaty. As such it defines goals for cooperation relating to policy. This concerns in particular the four freedoms and competition law defining the economic constitution of the EU since the Treaty of Rome, followed by citizenship rights introduced in the Treaty of Maastricht. With supremacy and direct effect established through different rulings of the Court, these policy aims in the Treaty gain constitutional status. Rules that are ordinary law at the national level, as for instance competition law, are constitutionalized in the EU. This is captured by 'over'-constitutionalisation. If the European legislature establishes EU secondary law, this is conditioned by these Treaty provisions as they are interpreted by the ECJ. Its rulings add onto the understanding of the EU's constitution. The EU is in a unique situation, because the Court and the EU legislator may act as parallel policymakers.

In political science, the implications of over-constitutionalisation for policymaking have been discussed as a bias in favour of negative integration (Scharpf 1996). While the Court can unilaterally liberalise markets, re-regulation requires action by the EU legislature that is bound by demanding decision rules. While there has been some discussion of how negative and positive integration interact, as liberalisation gives incentives for subsequent reregulation, European integration research has largely ignored the role of the Court in the policy-process (Schmidt 2018). In an EU that is crisis-ridden and challenged by populist movements attention to the implications of over-constitutionalisation seems particularly relevant. On the one hand, it is plausible to connect the populist challenge with the dominance of non-majoritarian decision-making in the EU, of which the Court is a long-standing and important proponent. On the other hand, the lack of flexibility of EU governance is rooted in its judicial regime. Calls for decentralisation and subsidiarity must fail in the light of the ECJ's extensive interpretation of free movement rights, of competition law or citizenship. As the former ECJ president Skouris put it, the fundamental freedoms touch on virtually all aspects of politics (Höpner 2010: : 175). Accumulating case law on constitutional provisions implies rigidities, which neither the Court through jurisprudential about-turns nor member states via a revision of a Treaty are likely to fundamentally change.

In this paper, I analyse the interaction between judicial and legislative policymaking. Over-constitutionalisation pushes European integration along, and there has been some attention to the Court in this sense. However, it has not been analysed in greater detail, what it means for policymaking, when case law of the Court has this impact. Regarding policy-content, Scharpf and others have emphasized the liberal bias (Scharpf 1996). But what does it mean for the process of policymaking, when the legislature has to take account of parallel case-law development? Drawing on different case studies situated in the case law

on the freedom to provide services, free movement of workers, and citizenship, I analyse the repercussions on policymaking of parallel case-law development.

In the following, I start by elucidating where the ECJ's case law enters the EU legislative process. I then turn to describe the accumulation of case law as a dialogue between national courts and the ECJ, driven by litigants and cooperating courts, and resulting in growing restrictions on policy options – accompanying a Union of increased diversity in membership. Taking the example of EU citizens' rights, I analyse in greater detail different forms of interaction between judicial and legislative policymaking. Over-constitutionalisation has pushed European integration along; but an analysis of the resulting case law in its interaction with legislation shows many drawbacks, such as contradictions between case law and secondary law, regulatory gaps, and continued legal uncertainty; over-constitutionalisation also means that the EU is doomed to rule by judicial fiat. These consequences have been little recognized by political science and legal scholarship alike.

Beyond negative integration: case law and the EU's legislative process

Although the Court's importance for the integration process is widely acknowledged, there is little attention to the relevance of its case law in the EU's legislative process. When analyzing legislation, attention to the Court is paid mainly with view to the enforcement of legislative decisions (Börzel *et al.* 2012). While there is much recognition of the peculiarity of the EU's political system, where the Commission has the formal monopoly of initiative, there is little discussion of the role of the judicial branch. Because the Commission also acts as the guardian of the Treaty, it has to base its legislative proposals on case law as it stands. This implies that the Commission's interpretation of case law will be decisive in legislative proposals. The legal service of the Commission is a powerful internal veto player when it comes to Commission proposals (Rasmussen 2012; Hartlapp *et al.* 2014). The European Parliament and the Council similarly have internal legal services that advise which policy proposals are legally feasible given the provisions of the Treaty and the case law.

It is because of the bias of the Treaty towards free movement and competition law that negative integration is institutionally favoured over positive integration in the EU (Scharpf 2006). If private actors can successfully claim in court that market regulation hampers their exercise of one of the four freedoms, even if this relates only to a potential or indirect restriction of trans-border activities, EU law applies and it may be that market regulation is regarded as violating the proportionality principle. The Court established in the case *Dassonville* (case 8/74) in the 1970s that the free movement of goods has to be interpreted as prohibiting restrictions of this freedom, giving it a broad meaning, and has subsequently applied this broad interpretation to the other freedoms (Tryfonidou

2010). Whenever member states differ in their regulation of markets, this may give private actors the right to choose the most favourable regulatory setting. They can be active throughout the single market from any member state. The resulting regulatory competition with the danger of a race to the bottom (Sun/Pelkmans 1995) is often regarded as giving incentives for reregulation (and positive integration) at the European level.

The former German constitutional judge Dieter Grimm has recently coined the term 'over-constitutionalisation' to capture the power of the Court in the EU (Grimm 2017). In the context of the discussion of the legitimization deficit of the EU polity, he emphasizes that the constitutionalization of material policy strengthens non-majoritarian at the expense of majoritarian decision-making. In the context of concerns about the populist challenge as well as Brexit, the diagnosis of over-constitutionalisation appears highly important. Both of these crises reflect, among others, a lack of voice within the EU system; and integration being driven in a non-majoritarian way by a Court is one important cause of such a lack of voice. 'Over'-constitutionalisation results from the many policy goals in the European Treaties that are subsequently constitutionalised with the case law on direct effect and supremacy. Over-constitutionalisation allows the Court to develop material policy, resulting predominantly in negative integration, given the Treaty's liberal bias. But there are also repercussions on the process of policymaking and its ability to set general and binding rules. The interaction of judicial and legislative policymaking may give rise to complementarities, conflict, and contradictions between these two venues of EU policymaking. In the following, I discuss how over-constitutionalisation can shape EU legislation. But case law of the Court may only be regarded as a constraint, if this case law is not itself shaped by member states' political preferences, as some of the literature argues. We therefore have to consider this question first. On this basis, I discuss how case law develops in interaction with national courts, implying that over-constitutionalisation increasingly constrains policy-options.

Reining in the Court? Member states influence over the Court

Because of direct effect and supremacy, the ECJ plays the role of a constitutional court in the EU. It interprets the 'law of the land', the expectation being that member states abide. As with any constitutional court, the interpretation of the constitution adds onto the constitution's meaning (Kranenpohl 2009). Secondary law cannot over-rule primary law. If constitutional courts interpret the constitution in a way that the legislature and the executive disagree with, there is the possibility to change the constitution, or to hope that political contention surrounding the case law of the constitutional court will lead the court to align its jurisprudence in the future.

Over-constitutionalisation roots in the many policy goals of the European treaties. It implies that the constitutional impact of the Court is much broader

than we find in the national context – relating to policy decisions that are up to legislative or even executive decisions in member states. This breadth of constitutional case law in a heterogeneous union of 28 member states, each representing different traditions is bound to find the support of some, and the opposition of others. The history of Treaty reforms does not show that member states sought the occasion to rein in the Court, with the exception of the famous Barber protocol (Dehousse 1998: : 148-56). From an intergovernmentalist position this is a sign that the Court is effectively doing what member states intended it to do (Garrett 1995). In fact, recent political science research lends empirical support to the view that the Court is very attentive to member states' preferences. Should this be the case, case-law constraints on policymaking would be of little importance.

Analyzing member-state submissions to the Court, which member states may or may not provide, allows checking how much the Court diverts from member states' preferences. Quantitative analyses show that the Court follows member states in about half the cases (Carrubba/Gabel 2014; Larsson/Naurin 2016; Martinsen 2015). Not all member states submit observations. But those, whose preferences are at stake in a ruling, should be expected to do so. Tracking the relationship of cases following or diverting from member states can tell us something about the level of Court activism through time. But when cases deal with constitutional issues, one case is not like the other. Each ruling matters not only for the dispute at hand, but changes the parameters for integration. From the perspective of integration, the enormous repercussions of rulings like *van Gend* and *Costa* (on direct effect and supremacy), *Dassonville* (on the interpretation of the free movement rights), *Centros* (C-212/97, on the freedom of establishment) or *Grzelczyk* (C-184/99, on EU citizenship) make the Court very important, notwithstanding whether such cases represent half, a quarter, or a mere three per cent of cases, where it diverts from the preferences that member states officially submit. Thus, it is important to pay heed to the way case law structures subsequent jurisprudence through precedent (Darlén/Lindholm 2013) and ask what this means for EU policymaking.

Such a qualitative assessment to account for the importance of the Court for EU policymaking has recently been done by Dorte Martinsen (2015) in a much acclaimed book. In an empirical analysis of social policy, she argues that European integration research has over-estimated power of the Court. Distinguishing codification, modification, non-adoption, and override as strategies with which the EU-legislator can react to the Court, she finds the intermediate reactions (modification and non-adoption) to be dominant. However, I see two caveats. First, in her case studies she does not distinguish whether case law refers to secondary law – where overrule is possible by changing legislation, or to primary law, that would require a Treaty change as a political response. Second, and to be discussed further, she does not discuss how regulation via case law differs from regulation via secondary law.

Case law settles the dispute at hand, but courts are not legitimated to set general rules, in the same way that legislatures can do so. For instance, in order to cater for heterogeneous institutional conditions in member states, EU directives often include several options. The Court cannot set rules in this way, but it rather establishes abstract principles to guide member states' courts in their application of EU law. The point is that should the EU legislature wish to codify this case law, additional rules will always be needed, due to the nature of case law. Framing this as modification downplays the constraints that case law imposes on legislation.

An example for such a judicial principle can be found in the case *Levin* (53/81). Here, the Court had to decide when someone is a 'worker' under the free movement of workers. The Court argued that a worker is someone in 'pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'. It would have been less legitimate for the ECJ to establish a rule of a minimum threshold of hours worked per week than to establish the principle of 'not marginal and ancillary'.

Case law knows many such principles. As rulings often result from preliminary procedures, these principles allow national courts to apply them to the facts of the case. With their inherent legal uncertainty as to their precise meaning, they also give the Court sufficient scope for future case-law development (Schmidt 2018), which is important for it to continuously serve as a motor of integration. Staying with the privileges of the free movement of workers, some more principles can be alluded to: These privileges are retained, if there is a 'genuine chance of being engaged' (C-292/89 *Antonissen*, No. 22), or if the person exhibits 'a real link between the job-seeker and the labour market of that State' (C-224/98 *D'Hoop*, No. 38). Should the EU legislature wish to codify the concept of worker under EU law, there would be clear constraints as it would be difficult to set a clear limit of 15 or 20 hours a week, since the ECJ has previously recognized the workers status with only 5.5 hours (C-14/09 *Genc*), under a contract of paid leave and sickness cover. At the same time, these case-law principles as such are not equivalent to legislation so that transforming case law into secondary law always needs additional rules – without that this should be seen as modification, however.

To summarize, because of over-constitutionalisation, the case law of the Court imposes many (constitutional) constraints on EU policymaking that are unknown at the national level. While quantitatively, one can compare periods of different intensity of activism, the analysis how often the Court takes into account member states' preferences cannot tell us much about its longer-term constitutional impact. Because case law deals with single disputes, its rules cannot be equated with legislation. It is unlikely that they can be codified one-to-one. But case law imposes constraints on secondary law, and its formal monopoly of initiative allows the Commission to inscribe its interpretation of case law into the legislative proposals. In particular when legislating in areas directly

rooted in Treaty provisions, it is highly unlikely for secondary law to overrule case law: There would need be a Commission proposal as well as the political qualified majority diverting from established case law; and yet there would always be the danger that courts would interpret EU legislation in the light of the ECJ's case law.

Developing case law in a multi-level setting

The ECJ has a high case load, which is one essential ingredient for developing case law and for judicialisation to become important (Stone Sweet 1999). Of the different judicial procedures, traditionally most important have been infringement procedures initiated by the Commission against member states failing to fulfil their obligations under EU law, and preliminary procedures where courts of member states ask the ECJ for advice on the interpretation of EU law that appears relevant in national court proceedings. In recent years, preliminary procedures by far outnumber infringement cases. In 2016, there were 470 cases reaching the Court in the preliminary procedure against 35 infringement cases, while in 2003 there were 277 infringements against 210 preliminary procedures, at the time from only 15 member states.²

The preliminary procedure allows all national courts, irrespective of their position in the court hierarchy, to address the ECJ with questions, should they regard EU law as relevant for their case. As argued above, it is important to emphasize that the ECJ's judicial activity has to be seen as cumulative. Once the Court establishes, for instance, in the case *Dassonville* (8/74) that the free movement of goods has to be interpreted as a prohibition of restrictions, this interpretation structures subsequent case law (Alter/Meunier-Aitsahalia 1994).

This accumulating case law of the ECJ increasingly defines the meaning of the four freedoms, competition law and citizenship. If much policy content is already decided by the ECJ, this constrains options for European secondary law, judicially closing the available zone of agreement for the EU legislature. Accumulating case law, therefore, reduces options for political compromise though member states' preferences have become more heterogeneous after enlargement given diverse socio-economic circumstances.

It is important to take into account the multi-level character of the judicial-legislative dialogue taking place.³ At the national level, courts interpret rules decided by legislatures, with the latter often refining rules in response (Blauberger/Schmidt 2017). In the EU, it is rare that there is a direct dialogue between the ECJ and the EU legislature. Rather, the Court is in a dialogue with rules at the national level in different member states. The results of this case law then feed into the EU legislative process. In the rare cases of direct interaction,

² Annual Report 2016, p. 110. https://curia.europa.eu/jcms/jcms/p1_315740/fr/

³ I thank Fritz Scharpf for pointing me to this.

the ECJ typically allows the EU legislature more leeway than it does towards national rules (Sørensen 2011: : 347).

European integration has much profited from the Court as an 'engine of integration', precisely because of the 'ratchet effect' that over-constitutionalization provides for (Scharpf 2010; Pollack 2003). Increasing challenges to the EU make it pertinent to consider the cost for majoritarian politics, if policymaking is constitutionalised to this extent. On a macro-level, we can argue that accumulating case law in response to questions arising from the heterogeneous setting of 28 member states, increasingly closes options at a time when the political zone for agreement similarly is reduced. To analyse this would require assessing the constraints of case-law development on policymaking, with the difficulty that the opinions of the legal services detailing these constraints are not published (Menendez 2018). Instead, I will opt on a broader focus and analyse how the parallel possibilities of furthering integration via case law and via legislation interact with each other.

Parallel judicial and legislative policymaking

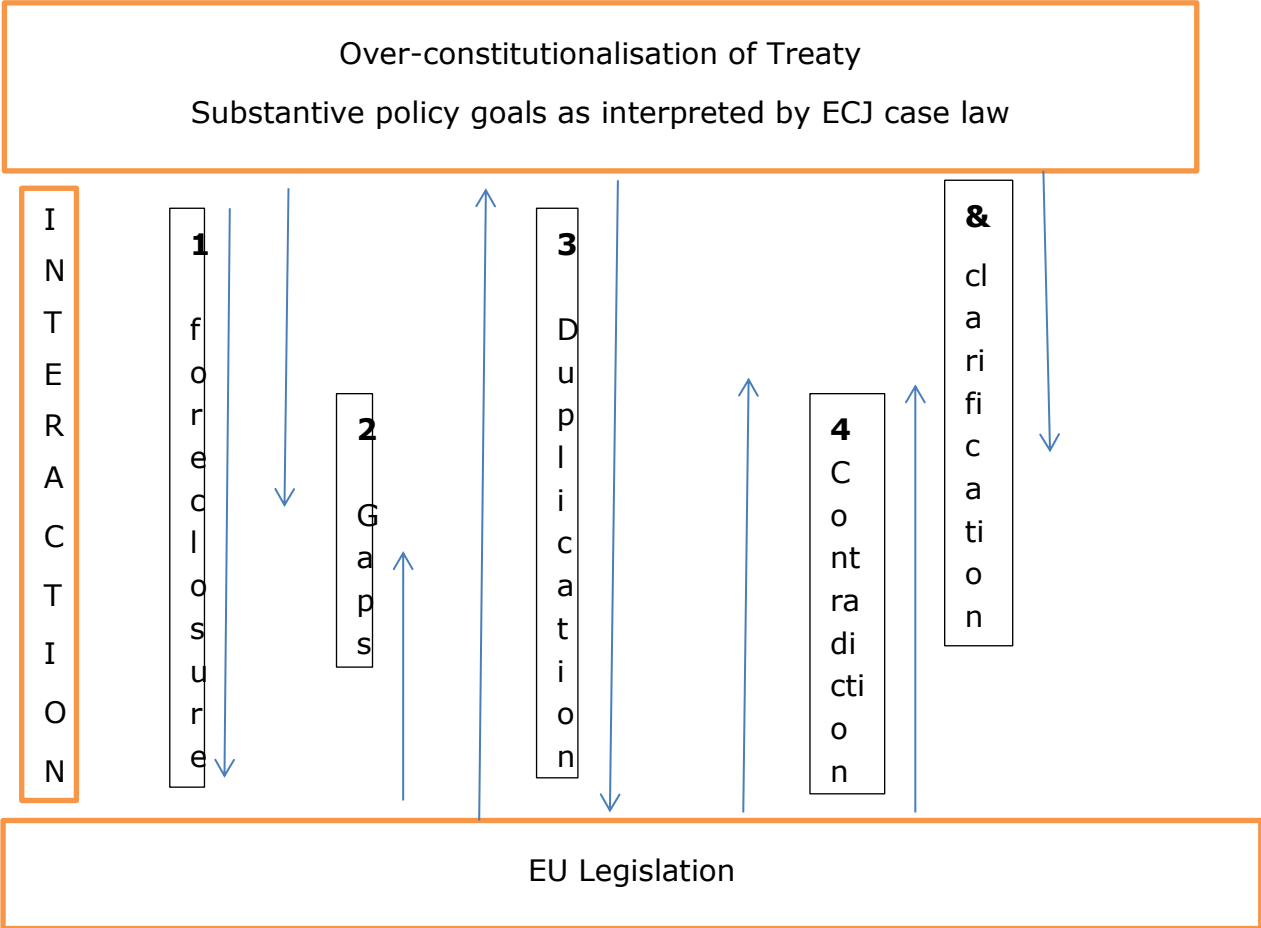
Over-constitutionalisation implies parallel venues for EU policymaking. What does this interaction mean for governance at the EU-level?⁴ The interaction between judicial and legislative policymaking may take several forms. In the following, this interaction shall be discussed with a focus on case law development on citizenship and individual free movement rights and the services freedom. These are areas of case law that have been developed since the late 1990s. Other examples of the interaction could similarly be taken, regarding for instance competition law and procurement (Blauberger/Weiss 2013; Bovis 2006).

Focusing on free movement rights and citizenship has the advantage of showing the drawbacks of this mode of integration particularly clearly. Here, individuals are concerned, which are more vulnerable than legal personalities to uncertainty about the extent of rights.

The analysis of the interaction between case law and legislation can be structured along a temporal relation in the following way: First, established case-law principles may make legislation virtually impossible in an area– even if common rules were desirable (foreclosure). Here, the Court moved first. Secondly, the legislature may want to clarify the rules in a field but be reluctant to go along all the way with the Court's case law, resulting in regulatory gaps. Here, we have parallel action, with the Court, however, setting the scene. Thirdly, the Court may be second to move and enter an area where secondary law already exists, but divert from it and create a parallel policy (duplication). Fourthly, the relationship between different pieces of legislation may be in doubt.

⁴ A focus on the member-state level would analyse the direct implementation of case law through national administrative practice and/or legislation.

Over-constitutionalisation implies that established legal rules of conflict cannot apply. This situation is characterized by the requirement to wait for the Court’s clarification (sustained legal uncertainty).



Foreclosing legislation

When codifying case law, the EU legislature faces the problem that they cannot fall behind the Treaty interpretation of the Court. First, the Commission as the guardian of the Treaty is unlikely to propose legislation contradicting the Treaty as it stands. Second, the political system of the EU favours the status quo. If only few actors prefer it over a change, the latter is unlikely in the face of the joint-decision trap. Finally, with constitutionalised case law being the default condition, any legislative compromise not reflecting it risks that the Court will refer to its own case law when interpreting legislation, as might do lower courts.

Thus, it would hardly be possible, were it attempted, given the principle of 'effective and genuine activities' to define 'worker' in the meaning of the Treaty as someone who works sufficient hours to earn a living, as the Court has

previously in *Genc* (C-14/09) accorded worker privileges to situations, where few hours were worked (O'Brien *et al.* 2016: : 16). Nevertheless, with greater economic heterogeneity in the enlarged union, and increasing labour mobility, it may become politically important to define the thresholds of the worker status. This is because member states are affected in very different ways, depending for instance on whether member states have in-work benefits or whether the labour market is highly regulated without subsidies for low wages, like in Denmark. Even when it is feared that the structure of social benefits overly subsidizes lower-skilled migrant work, as was the case in the Brexit discussion, policy responses of the Union are tied by over-constitutionalisation. Accordingly, after the compromise of the European Council concerning possible concessions ('new settlement') towards the UK in order to avoid a positive Brexit referendum⁵, there was much discussion whether such concessions were legal under the Treaty and could stand up to the Court (Pulvirenti 2016). Brexit, of course, illustrates at the same time the possible consequences of the lack of voice that over-constitutionalisation implies – exit can become more attractive.

Regulatory gaps: the citizenship directive

The parallelism of judicial and legislative policymaking always risks that there are no political majorities in the EU legislature to follow and codify case law. As open dissent is difficult, regulatory gaps are more likely. A case in point is the citizenship directive 2004/38/EC of 2004, which details the rights of EU citizens (Wasserfallen 2010). Agreed upon shortly before Eastern enlargement, the directive establishes a gradual system of rights. For the first three months, EU citizens are free to settle anywhere in the Union, but they have no right to access social assistance in the host member state. After five years of legal residence, EU citizens have equal rights. Between three months and five years of stay, EU citizens need to have sufficient financial resources and a comprehensive sickness insurance. However, if they do require financial assistance, this may not automatically end their right of residence (Article 14 III). This directly reflects the ruling in *Grzelczyk* (C-184/99, No. 43), that was issued in the midst of legislative negotiations in September 2001. Indeed, that the directive leaves it largely open, which rights are enjoyed between three months and five years, reflects that in the case of *Grzelczyk* assistance was granted already after three years.

Grzelczyk was a French student in Belgium, and even though the student directive at the time required financial self-sufficiency for students, the Court argued that member states have to show a 'certain degree of financial solidarity with nationals of other Member States' (C-184/99, No. 44). It was in *Grzelczyk* that the Court argued 'Union citizenship is destined to be the fundamental status of nationals of the Member States' (No. 31). In the legislative process, member

⁵ <http://data.consilium.europa.eu/doc/document/ST-1-2016-INIT/en/pdf>

states were unwilling to grant equal rights before five years of legal residence – but they could not require these five years in the citizenship directive because in *Grzelczyk* the Court had demanded solidarity already after three years, as long as this is not ‘an unreasonable burden on the public finances of the host Member State’ (No. 6).

Consequently, in a central aspect the directive could not provide clear guidelines on the rights of EU citizens. Before five years, member states may voluntarily grant them social assistance. If they do not do so, they may not expel needy EU citizens, but have to engage in an individual assessment to ascertain their degree of integration and whether they are an ‘unreasonable burden’ (Recital 16, directive 2004/38). Only in 2014, the *Dano* case (C-333/13) strengthened the right of member states to deny benefits.

A closely related question is whether the reliance on social benefits may indeed contribute to the required financial self-sufficiency. Here, rights under regulations 883/2004 and 987/2009 on the coordination of social security overlap with the citizenship directive and I discuss this under my fourth point.

Parallel venues - duplication in patient mobility

The parallel venues of judicial and legislative policymaking under over-constitutionalization are not necessarily synchronized. In the citizenship directive as in many other important pieces of legislation, the EU legislature was bound by existing case law. In a sense, it moved too late. As the Court had already interpreted how it understood the freedoms, the legislature had to play by these rules. However, given over-constitutionalisation, the Court need not feel constrained by established legislation.

A well-known example is the patient-mobility directive of 2011 (2011/24/EU). It codified the case law of the ECJ starting in 1998, where the Court had interpreted patient mobility as being subject to the passive services freedom (Cases C-120/95 *Kohll* and C-158/96 *Decker*). In these and other cases, the patients had not played by the rules established in the two regulations coordinating social security, which require an ex-ante authorization before having planned medical services in other member states. Other cases followed (C-157/99 *Smits/Peerbooms*, C-368/98 *Vanbraekel*, C-385/99 *Müller-Fauré & Van Riet*, C-372/04 *Watts*), putting member states increasingly under pressure of having to liberalize part of their health sectors (Kloka/Schmidt 2015). Thus, although there was legislation on cross-border treatment, the Court chose to establish an alternative venue of realizing cross-border health care drawing on the (passive) free movement of services (Martinsen 2009).

Following this line of rulings, member states were interested to codify the case law. This was an opportunity of signaling their preferences to the Court. Moreover, it was argued that the matter should not be left to the Court in this

instance of 'social Europe' (Schmidt 2018: : 148). The legislature felt pressured to step in and take responsibility. Interestingly, the fact that the Court had disregarded existing secondary law was not politically contested. Despite the constraints of case law, the codification was successful. It should be mentioned that Eastern European member states had not been subject to the earlier judicial disputes. They remained highly critical of codification for fear of having to face difficult national healthcare reforms as a result, with Poland, Slovakia, Portugal and Romania being outvoted in the end (Kloka/Schmidt 2015: : 242).

But successful codification could not overcome the problem that cross-border treatment faces several contradictions now, depending on whether it is based on the coordination regulations, or on the directive. There are two alternative regimes for receiving healthcare in another member state (COM(2014) 44 final). The regulation requires ex-ante authorization and covers all cost, the directive requires few authorizations, but covers cost only to the extent of the equivalent treatment in the home country. Pensioners living abroad face and have to master a set of two different, complex rules.

'The existence of different routes of reimbursement has created complexity and confusion, not only for patients but also for providers and national administrations. Patients just want to access cross-border healthcare and be reimbursed. They do not understand the complexity of the current routes that require them to make choices' (Strban *et al.* 2017: : 50).

The monitoring of the directive shows that among member states there is large variation in the way the rules are being used. Thus, of 6,009 total requests for ex-ante authorizations in 2016, 3,886 requests were from France, and 1,014 requests from Ireland. Of the mobility without prior authorization (no numbers of outgoing patients available from Germany) of 157,063, 69,321 patients moved alone from France to Germany, Spain, and Italy.⁶ Whether such contradictory regulation with very uneven impact is desirable given the costs of rule-making and of implementation can be doubted. Accumulating case law gave incentives for codification. But political and ongoing administrative resources are spent without improving the overall quality of policy for EU citizens.

Contradictory rules – providing legal certainty without rules of conflict

Over-constitutionalisation, as has become clear, adds new dynamics to policymaking with an increased possibility compared to the national level that the ECJ's interpretation of the constitution intervenes into policy processes.

Whenever there are seeming contradictions between primary law and secondary law, only the Court can give directions. Furthermore, also contradictions between different pieces of secondary law often require the Court to intervene. In the

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https://ec.europa.eu/health/sites/health/files/cross_border_care/docs/ev_20171019_co01_en.pdf [accessed March 2019]

national context, contradictions between different pieces of secondary legislation are overcome with the help of accepted conflict rules: *lex specialis*, *lex posterior*, and *lex superior* give direction which rule applies when. To my knowledge, it has not been discussed for the European polity, whether over-constitutionalisation does not prolong legal uncertainty regarding such conflicts. In the European context, it does not suffice to establish how rules relate to each other regarding their quality as *lex specialis* or *posterior*. The question easily becomes whether the Treaty provisions are relevant as *lex superior*. In an over-constitutionalised setting, the question how rules relate to each other finally depends on judicial fiat.

As Sørensen (2011) shows for the realm of free movement rights, the Court will generally interpret EU secondary law as to give effect to free movement. But, of course, how the Court draws the boundary between legitimate restrictions of member states and free movement cannot be foretold, otherwise one would not need to approach the Court. I will give two examples of legal uncertainty linked to this problematique, both concerning how rules of the citizenship directive 2004/38 relate to the regulations for the coordination of social security 883/2004 and 987/2009. The coordination of social security goes back to regulations No. 3 & 4 of 1958. Regulation 883/2004 and the directive were adopted in the Council on the same day in 2004. Regarding the preconditions of the citizenship directive for equal rights after five years (being financially self-sufficient and having comprehensive sickness insurance), the coordination regulations are important. The regulations stipulate principles for determining the responsible member state for social security. This is firstly *lex loci laboris*, the place of work, and secondly the place of residence. It is important to note that social assistance is not part of the coordination regulation, but left under exclusive national purview (Martinsen/Falkner 2011: : 138).

These principles of social coordination led to the question of whether economically inactive EU citizens could rely on social security of the host state to cover the financial self-sufficiency that is needed for legal residence following the directive. Behind this question lies that the so-called SNCBs, special non-contributory benefits, i.e. tax financed social benefits, complementing social security, fall under the responsibility of the country of residence. After much haggling between member states and the Court, where the latter repeatedly lifted national restrictions on SNCBs, council regulation 1247/92 allocated the responsibility for SNCBs to the country of residence, declaring these benefits at the same time as non-exportable to other member states (Cornelissen 2013: : 92). SNCBs are now regulated in Article 70 of regulation 883/2004 and detailed in Annex X. Access to these social benefits depends on factual residence, which was defined by the Court in the case C-90/97 *Swaddling* as relating to the place someone 'habitually resides' (No. 29f) and where her/his centre of interest lies (Cornelissen 2013: : 93). 'After 1992, it was no longer necessary to prove that the person claiming the 'special non-contributory' benefit in the member states

of residence had previously worked there; he was entitled to be treated in the same way as nationals of the host state' (Cornelissen 2013: : 104). This interpretation implies equal treatment rooting in residence, leaving open that social assistance is not covered by the regulations.

Until different Court rulings (*Brey* C-140/12, *Dano* C-333/13, *Alimanovic* C-67/14, and *Garcia Nieto* C-299/14) settled the relationship of both pieces of legislation from late 2013 onwards, it had widely been argued that the social security regulations had to be regarded as *lex specialis* to the directive, implying that social benefits of the host country could cover financial self-sufficiency of the directive (Coucheir *et al.* 2008: : 32). (Please note that the regulation is referred to with its earlier number in the following quotation):

'This seems to be logical. Any other conclusion would make this special coordination system meaningless. If a person first had to prove that her or his residence in the host State is in line with the subsistence requirement under Directive 2004/38/EC before s/he could even claim a minimum subsistence benefit under Regulation 1408/71, it would never be possible for him/her to do so' (Coucheir *et al.* 2008: : 32).

Regarding the question of 'unreasonable burden' that an early reliance on the host state could imply, the report notes: 'It would be absurd to consider relying on Regulation 1408/71 for the application of an Annex IIa benefit as being unreasonable' (Coucheir *et al.* 2008: : 33). These arguments can be similarly found in an explanatory note of the Commission on the social security coordination from January 2011 (European Commission 2011).

It was only after the series of Court rulings that the relationship between the regulation and the directive could be settled. Increasingly, it is accepted that legal residence of the directive has priority over the factual residence of regulation 883/2004. In these Court proceedings the Commission failed with its interpretation that rights to benefits based on residence can automatically cover the precondition of sufficient resources of the directive.

Consequently, due to over-constitutionalisation it took several years to settle the question. Legal uncertainty is necessarily a side-effect of the dynamic interpretation of the EU Treaties by the ECJ (Schmidt 2018). In the beginning of integration, this concerned the parameters of economic activity with the interpretation first of the free movement of goods, later extending to services and establishment. But with the development of rights for those that are economically inactive, legal uncertainty concerns EU citizens with often dramatic consequences for individuals (O'Brien 2017).

These very negative repercussions of judicially driven rights can be observed in the discussions concerning rights of EU citizens after the UK leaves the EU. Next to sufficient financial resources, the directive requires comprehensive sickness insurance (CSI) as a second precondition for legal residence. From the perspective of the UK government, health cover through the NHS would not meet

this requirement of CSI that was established to protect the public finances of the host state. But in line with its approach to sufficient resources, the Commission regarded access to the NHS as following from residence under the coordination regulations (European Commission 2011: : 5, fn 8). In 2012, the Commission sent a reasoned opinion as part of an infringement procedure, holding that all EU citizens have access to the NHS, which covers their CSI.⁷ Access to health care in this view was part of the prohibition to discriminate along national lines (Strban *et al.* 2017). The infringement procedure has not been handed to the Court, though the Commission noted in 2017 that it was still pending.⁸

Domestic courts, however, backed the position of the British government.⁹ As in practice it was not difficult for EU citizen residents in the UK to access the services of the NHS, it was only when wanting to clarify their long-term legal residence after the Brexit decision that many EU-citizens learned of their predicament. Based on ordinary residence under the regulation access to the NHS was possible, at the same time the lack of a self-financed CSI implied that the five years of legal residence under the directive could not be met – even by EU citizens that had spent many more years living in the UK (Herbecić 2017).

In the meantime, the UK has agreed to lift this restriction (Department of Health United Kingdom 2016). But the saga of CSI, as well as the question of sufficient financial resources does exemplify another problem of over-constitutionalisation. While it allows the Court to push integration along, there is bound to be political contestation to the opening of national welfare states in an increasingly heterogeneous Union. If rights are continuously incrementally extended by the Court, the legal uncertainty as to their scope and limits implies significant legal uncertainty. Different to economic integration, where legal persons and often large companies are subject as to their rights, for EU citizens it is much more difficult to live with the possibility that entitlements may not exist. In the end, it depends on judicial fiat how rules relate to each other, as long as the Treaty has such far-reaching implications for the interpretation of secondary law.

Conclusion

The constitutionalization of the Treaty of Rome by establishing direct effect and supremacy, described as a 'juridical coup d'état' (Stone Sweet 2007), has allowed the Court to give many important impulses to European integration. The

⁷ 'Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law.' (IP-12-417_EN).

⁸ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2017-003659&language=MT> [accessed March 2019]

⁹ *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988. Thanks to Stéphanie Reynolds.

TFEU is rich in policy-content, so that the Court's jurisprudence assures not only the implementation of agreed cooperation, but re-defines the content of this cooperation. In interpreting laws, all courts add on to their meaning. But over-constitutionalisation in the EU implies that many rules that are of a secondary-law nature in the national context enjoy constitutional protection in the EU. Whereas in the national realm the legislature will reform those rules where judicial interpretation strayed too far, this is not possible at the European level (Blauberger/Schmidt 2017).

Over-constitutionalisation provides for parallel venues of judicial and legislative policymaking. As the Court develops its case law on the four freedoms, on competition law and on EU citizenship, the Commission as the Guardian of the Treaty will base its legislative proposals on its readings of the case law. With accumulating case law, much is already decided at the level of the EU's constitution. The political compromise of the European Council in 2016 in the Brexit context, and its legal contestation, give an indication on the non-majoritarian closure of majoritarian decision-making. Under conditions of preference heterogeneity in a widened EU, over-constitutionalisation may protect the 'deepened' integration, but Brexit shows that it is also a destabilising force. It is only when paying attention to the ECJ's case law in political science analyses of EU legislation that the extent of judicial closure of zones of agreement for legislative political compromises becomes apparent.

Focusing on the parallelism of judicial and legislative policymaking in the EU, I have analysed several implications with view to the temporal relationship of both avenues. Case law of the Court may effectively foreclose subsequent legislation, though such rules are politically wanted. If legislation is started, but there are no legislative majorities to codify the case law, there may be regulatory gaps left open, as can be seen with the citizenship directive. But even if there is secondary law, the Court may interpret rights directly out of the Treaty, leading to a parallel set of policies, as happened with patient-mobility. Finally, over-constitutionalisation implies that in many policy areas it is upon the Court to decide how different rules relate to each other, as normal conflict rules cannot give direction once there is *lex superior*. For individual beneficiaries of rights, extended periods of legal uncertainty while waiting for judicial fiat may well prove more disadvantageous than less far-reaching rights that are known from the beginning. The lack of a comprehensive sickness insurance in the UK threatened to have disastrous consequences for many EU citizens.

As emphasized by Grimm (2017), over-constitutionalisation means non-majoritarian instead of majoritarian decision-making. Its deficit in legitimation makes far-reaching case-law development vulnerable to subsequent political contestation – neither having the power of the purse nor of the sword, courts depend for the implementation of their decisions on the executive and/or the legislature. When dealing with welfare rights of EU citizens, the matter is particularly difficult. Here, the ECJ grants rights of non-discrimination to EU

citizens in their host states, where the latter have to cover the costs, as social policy is only coordinated and not integrated at the EU level. It is a general feature of the EU polity, that member states' administrations have to implement EU policy and the EU needs to rely on their legitimacy relationship to their constituents (Scharpf 2009). Opening up national welfare states risks undermining the provision of public services as liberal individual rights are strengthened at the expense of republican values. Furthermore, the classical understanding of the separation of powers legitimates courts to protect individual rights against the state; redistribution, in contrast, depends on parliamentary consent and its power of the purse (Sieberer 2006). Consequently, the Court steps on thin ice when justifying these rights with its own judicial constructs rather than by reference to agreed EU secondary law.

The European Union is facing many crises. Among these, over-constitutionalisation receives little attention, though it is intricately linked to the long-standing democracy deficit (Grimm 2017), the more recent Brexit (Nicolaidis 2017), and rising populism, all of which are related to the dominance of non-majoritarian decision-making in the EU. Also the inherent contradiction between widening and deepening requiring more flexibility in policy choices may bring the constraints of over-constitutionalisation to the fore. Different ideas exist, how to de-constitutionalise the EU – presented by Grimm (2017), Höpner (2017), and Scharpf (2017). Accepting supremacy and direct effect would require an end to the constitutional status of substantive policy goals in the Treaty (four freedoms, EU citizenship, competition law) in order to leave more scope to majoritarian decision-making. The EU's over-constitutionalisation has allowed 'integration through law' and deepened integration to an extent political majority could not have mustered. The analysis of its interaction with legislation has shown that negative repercussions abound on many levels. Without backing of political majorities, over-constitutionalisation endangers the legitimation of the Union – and also the rule of law in the long run.

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