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EUROPEAN "FRANKENSTEIN CONSTITUTIONALISM": TEU ARTICLE 2 AS A FEDERAL HOMOGENEITY CLAUSE

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Eclectic Mélanges of Heterogeneous Elements of Governance

This essay argues that the Court of Justice of the European Union's (CJEU) insertion of a *federal homogeneity clause* into the EU's primary law is an (ahistorical) and dysfunctional "legal transplant" that does not correspond to the state of European integration. It has its place in specific state constitutional systems, which needed or need an axiological backing of their foundational order, but cannot adequately organize the interaction between the EU and member states. In post-war Germany, value constitutionalism had an important stabilizing effect on society. It contributed to the symbolic reproduction of a society that needed new patterns of orientation after the horror of National Socialism. The insertion of such a clause into the basic order of the EU is taken out of context and brings with it dysfunctional and opportunistic results.

First, the "value constitutionalism" promoted by the CJEU has no meaningful place in an order in which a technocratically oriented supranational institutional order meets developed, heterogeneous, and highly politicized member state political systems. Value constitutionalism is a specific constitutionalist reaction to a historical challenge, not an arbitrarily transplantable element of constitutional thinking. Second, the CJEU's efforts to stifle the resurgence of the political in EU member states with a depoliticized top-down construction is damaging the democratic nature of the system as a whole. Third, the CJEU lacks rational standards with which it can decide which further development of constitutional systems is acceptable and which should (allegedly) be inadmissible. This can only be decided in a political-constitutional process. Its decisions amount to subjective arbitrariness.

The term "Frankenstein constitutionalism" stands for constitutional theory and constitutional law thinking that eclectically takes elements of governance and legal institutions of different origins and assembles them into a disparate creature. It describes an approach that inserts implants into a constitutional order that "function" superficially, but at the same time destroy the integrity of the whole and create an entity that breaks with political culture and societal integrity. The idea has also recently been used in the context of describing the evolution of liberal EU member states with dominating counter-majoritarian elements into "illiberal states."[1] The CJEU's case law on the Treaty on European Union (TEU) Article 2 is such a form of constitutionalism.

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[1] Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 Governance 559 (2013).

The Rule of Legal Experts

From the very beginning, the EU has been characterized by tackling political problems and challenges through expertocratic institutions, administrative "reason," and socio-technical steering and control ("social engineering"). Problems are measured with expert knowledge and solved efficiently. The EU is driven by a vision of post-conflict technical problem-solving, which for some represents the utopia of post-modern social integration, but for others is pure dystopia. No one should be surprised if the EU institutions also follow this pattern when confronted with challenges at the constitutional level.

When the EU Commission was confronted with the question of how to react to the changes in member states' systems of government driven by conservative, nationalist, or reactionary movements, it was an almost natural reflex that it resorted to technocratic-administrative management approaches. It drafted "mechanisms," established reporting obligations, formulated "scoreboards," and thus aimed at a quasi-mathematical determination of how far the member states' systems of government deviated from an ideal state of good constitutional governance.[2] It will come as no surprise that counter-majoritarian institutions play a central role in this constitutional thinking. However, a highly political conflict affecting the basic texture of social orientation could not be resolved in the same way as a conflict over power sockets or agricultural market regulation.

Nevertheless, this insight did not persuade the EU institutions to view the conflicts as a political challenge. Instead, they decided to tackle them through juridification. Technocratic administrative reason has been replaced by the rule of legal experts. The CJEU has begun to set standards for what political justice and good governance look like, and it is making these standards binding for the EU member states. This also means depoliticization, albeit in a different way. Independent and uncontrolled judges in Luxembourg now define the constitutional space of EU member states. The Court of Justice sets the standards it has developed against the democratically responsible legislatures of the member states, which remain sovereign. The legal reasoning of the Luxembourg judges trumps the political-democratic process in the member states; it also takes the place of political discourse between EU institutions and member state governments. It is not difficult to see that this will lead to a degeneration of the quality and legitimacy of political decision making in the EU as a whole.

The Development of TEU Article 2 into a Federal Homogeneity Clause

For decades, "constitutional transformations" have been observed worldwide. In these a shift of policymaking authority from democratic representative institutions to autonomous or semiautonomous professional bodies takes place.[3] Decision making shifts from political spaces to expertocratic, isolated forums that are not directly democratically accountable. The European integration process can be seen as a manifestation of this political thinking, which was unproblematic in terms of constitutional theory as long as it concerned technical matters and the opening up or regulation of markets. Currently, however, the emergence of an apolitical EU constitutionalism extends to counter-majoritarian social engineering on the fundamental constitutional level.

One can speak of the third phase as a constitutionalization of the EU. In the early (first) phase of European integration, the CJEU was primarily concerned with making the policy decisions of democratically responsible

[2] *See, e.g.*, Géraldine Mahieu, Paul Brans & Daniel Schulz, *The Recovery and Resilience Facility Under Next Generation EU: A Breakthrough in Economic Policy Coordination and Policy Programming*, 118 AJIL Unbound 144 (2024) (explaining how NGEU funds have incentivized EU states to adopt country-specific recommendations rapidly); Elena Kempf & Katerina Linos, *NGEU: A New Marshall Plan for Europe and a Template for Global Finance*, 118 AJIL Unbound 151 (2024) (describing how conditionality and scoreboards are key features of loans and grants given through European Union, International Monetary Fund, World Bank, and other donors).

[3] Martin Loughlin, Against Constitutionalism (2022).

institutions binding through the development of legal doctrines and institutional guidelines.[4] In the second phase, which began with the fall of the Berlin Wall, the EU committed itself to free and liberal patterns of fundamental rights. In this context, some believed that the EU could serve as a projection screen for the idea of the "end of history."[5] In the latest phase of European constitutionalism that can currently be observed, the aim is now to legally "lock in" certain political preferences in such a way that they can no longer be called into question by political and democratic means.

If the juridification of political disputes about what fair and good governance looks like were to take place on the basis of clear and sufficiently specific provisions of the EU Treaty, there would be no objection to the rule of the legal experts: it would then have been so legitimized by the treaty-making member states. However, this is not the case. Instead, the CJEU is reinterpreting a provision that speaks of values (TEU Article 2) into a federal homogeneity clause; so far only for the concept of the rule of law, but in principle for all "values." A "rule of lawyers" has taken the place of a European "rule of law," according to the not entirely far-fetched conclusion. We are observing the transplantation of legal concepts that have their place in politically integrated federal systems into an order in which the European level is still lacking the necessary quality of a political polity.

Characteristics of the Federal Homogeneity Clause

The federal homogeneity clause developed by the CJEU is a transplant that turns the EU into a creature. It has features that make it dysfunctional. Three of these features are briefly described here.

Non-minimalism: Anyone reading TEU Article 2 may ask what the problem is when the CJEU champions values such as the rule of law, democracy, and human rights. Aren't all right-thinking people committed to these values? And what is the argument against reminding the member states, who as treaty-makers have spoken of values in TEU Article 2, of their statements? Leaving aside the fact that there is a categorical difference between the affirmative statements of values made in TEU Article 2 and legal obligations, the following is of particular relevance: the terms mentioned, just like other topoi mentioned in TEU Article 2 ("justice," "solidarity," "tolerance," etc.) are not only semantically highly indeterminate, but are also understood in extremely different ways. All terms stand for essentially contested concepts.

Against this background, it would be expected that the CJEU would give the legal concepts a minimalist meaning that goes no further than the general political consensus. The CJEU, however, makes a quasi-maximalist interpretation binding for the member states. This becomes clear when one looks at what is considered to be part of the "rule of law." For the CJEU, TEU Article 2 results in a non-specific prohibition of the arbitrary exercise of sovereign power.[6] It also reads a series of human rights requirements into it.[7] The court thereby leaves the field of the uncontroversial[8] and makes judicial legal policy. To justify its maximalist understanding, the CJEU can rely neither on the will of the contracting member states nor on the results of an open political-public discourse. Instead, it relies on the opinion of experts outside of democratic contexts of control and responsibility (Venice Commission). Juristocracy and expertocracy thus support each other through mutual references to each other, establishing loops that can no longer be penetrated democratically. The de-politicization of the

[4] Joseph Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991).

[5] The CJEU has defended its "end of history" claim in Repubblika v. Il-Prim Ministru, C-896/19, ECLI:EU:C:2021:311, Judgment (Apr. 20, 2021).

[6] Republic of Poland v. European Parliament & Council of the European Union, C-157/21, ECLI:EU:C:2022:98, Judgment, para. 321 (Feb. 16, 2022).

[7] *Id.*, para. 327.

[8] *See* Lord Bingham, *The Rule of Law*, 66 Cambridge L.J. 67 (2007).

discourse is taken a step further when statements by the EU Commission or the views of academic activists engaged in European politics are used as evidence.

Constitutional identity politics: The CJEU does not merely present its case law on TEU Article 2 as the result of a legal analysis of an important treaty provision. Rather, it exaggerates its case law in terms of identity policy: it stipulates that the EU's commitment to the values of TEU Article 2 represents the core of its identity. The English version of the February 16, 2022 decision states: "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order." The "cult of one's own," and the belief that political conflicts can be solved rationally by reference to one's identity, which is cultivated in so many social contexts, has now also reached the European court. One is not sure whether to laugh or cry when one sees that the CJEU is now following the étatist-identity policy turn initiated by the member states as treaty-makers (TEU Article 4, paragraph).

The process of juridification thus extends not only to specific political conflicts or fields of action, but also to the definition of the self-image itself (raison d'être). The EU and EU member states can now hold their respective "identities" up to each other in legal or political conflicts. Future disputes will no longer be treated as a conflict over interests and objectives, but as a struggle for their respective identities. This changes the nature of a dispute; it becomes existentialized.

The CJEU's efforts to interpret the essence of the EU in terms of identity politics must be surprising above all because they are both under-complex and politically problematic. An organization that exhibits the institutional, sociocultural, and political complexity of the EU can only be reduced to the simple denominator found in the quoted sentence by accepting brutal losses. Politically, it is utterly misleading to reduce an organization in which almost thirty European states, each with its own history, culture, economy, and sociopolitical structures, have joined together to pursue a common path into the future to a few universally inspired values. How can one claim to speak of the essence of the EU without saying something about its history, about the common destiny, about the plurality of visions of a good life?

Selectivity: The CJEU only advances the development of the obligations derived from TEU Article 2 against the member states. Its case law has an exclusively federalist vertical dimension. The CJEU aims to introduce "constitutional supervision" of the EU member states. In contrast, the CJEU does not apply TEU Article 2 against the EU institutions, even though the first and most important task of the CJEU is to monitor the legality of the actions of the EU institutions. The CJEU does not indicate that it wishes to attribute an internal meaning to TEU Article 2, even though TEU Article 2 primarily states that the Union is based on the aforementioned values. It is not far-fetched to accuse the CJEU of obviously applying double standards and pursuing an agenda vis-à-vis the member states that it does not want to (or cannot) enforce vis-à-vis itself and the EU institutions.

Judicial Lock-in of Political Preferences

The observation that constitutions, basic laws, and other hierarchically superior statutes lock in certain policy preferences and remove them from the normal political process is a triviality. It is also trivial to state that the space of the political-democratic process shrinks to the extent that the field of constitutionally locked "policy decisions" is expanded. In extreme cases, the constitutionalization of political preferences can go so far that democracy can only be spoken of in name and the transition to an undemocratic juristocracy takes place.

How is it that this development does not trigger any political resistance? How is it that the vast majority of member states are not resisting their loss of political autonomy and their confinement by the CJEU to a golden cage? The self-empowerment of the CJEU is taking place at a time when a political struggle has emerged in almost all EU member states over the significance and future viability of the specific form of liberalism that has been developed in recent decades by large sections of a globalist-oriented elite. If this perspective is chosen in order

to analytically classify and normatively criticize the recent case law of the CJEU, it is easy to explain why the introduction of constitutional supervision by the CJEU and the loss of significant parts of the "constitutional space" of EU member states is accepted so calmly, and in many cases even positively, by the governing actors in many EU member states. In most EU member states, the previously dominant political groups are under pressure; new political forces are attacking the power of sociocultural interpretation and the ability to shape those "grand coalitions" that have dominated the representative democratic institutions for decades. The self-empowerment of the CJEU means that policy preferences that are no longer undisputed in the domestic arena (and are losing their majority status in some member states) are being stabilized and depoliticized via overriding EU law. Specific political preferences, ideas, and sociocultural orientations are thus immunized at a time when social struggles for their significance and relevance have broken out.

This form of stabilization benefits significantly from the fact that the belief in the neutrality, impartiality, and truthfulness of the decisions of a high court is deeply rooted in the populations of the EU member states. The idea that the CJEU does not act as a politically interested actor, but as a distanced guardian of the law, has so far remained intact. In this way, it has succeeded in legally protecting a liberal-egalitarian political system of meaning and values against the emergence of illiberal and national-conservative aspirations.

The Decline of Democracy

Counter-majoritarian constitutionalist ideas and concepts are like medicine: if they are applied wisely and appropriately, they can correctly direct the political process and prevent undesirable developments. If they are applied incorrectly or to an inappropriate extent, they destroy what they claim to protect. Constitutionalist concepts and structures are intended to frame decision-making processes in such a way that the negotiation and decision of political issues meets the expectations of the rule of law, democracy, and the common good. The idea of constitutionalism is misunderstood if the institutions responsible for overseeing the political process redefine their role and decide questions of a political nature themselves. The emergence of a juristocracy characterized by over-constitutionalization can then be observed. Even a politically liberal system can take on autocratic structures if judges exercise constitutionally illegitimate and uncontrolled rule without being legitimized to do so.

In an under-democratized political system such as that of the EU, any further transfer of decision-making power to (administrative or judicial) experts must give cause for concern. The problematic image that the EU presents from the perspective of democratic standards of public autonomy of political subjects is thus further reinforced. In this context, it is irrelevant whether one agrees or disagrees with the CJEU's defense of specific political preferences. The task of constitutional law scholarship is to stand up for the guarantee of open political spaces, even when developments occur there that one rejects as a citizen. This is what distinguishes the ethos of a real scientist from political activism dressed up as academic search for truth.

Is it compatible of the European *rule of law* that the actors of an under-democratized system now curtail democratic processes in the member states because they observe the emergence of political patterns of an understanding of good governance that break with a former consensus?