Constitutionalizing the Political Economy?

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Constitutions emerged as frameworks for politics and markets. They are based on the distinction between governance and economy, between public power and private goods. The forms of constitutional law are thus always also forms of a particular economy.

If this is true, what does it mean for Law and Political Economy (LPE) as a movement? More specifically, is constitutionalization a process that LPE should aim for? This is the question the editors of this symposium have asked me to address, and it is a key strategic issue for the movement. The message of this blog post is: Be careful what you wish for, you might just get it.

Progressive economic constitutionalism vs. the class-conscious proletariat

On July 21, 1919, Hugo Sinzheimer presented the draft for section 5 of the new German constitution to the National Assembly in Weimar. He explained that the new Republic would no longer leave the economy to itself. In the Kaiserreich, the law had only protected property, that is capital. The new constitution, Sinzheimer promised, would correct this and transform the economy socially. That law is an "intrinsic part of the creation of markets" – now a standard LPE phrase – Sinzheimer and the other delegates were well aware of this. Sinzheimer went on to praise the draft: For the first time ever in a constitution, labor would be recognized as a constitutional value (Article 157). He then cited draft Article 151: "The economic order must comply with the principles of justice" – a reference to Aristotle for the Christian conservatives – "and guarantee a dignified existence for all human beings." This, by the way, is the first time a German constitution mentions the word "dignity," standing here for the social transformation of the economy sought by the left.

Sinzheimer's speech was praised across party lines (Nörr: 15). However, there were unlikely dissenters: Lore Agnes, one of the 37 women in the National Assembly and a leading women's rights activist, like Sinzheimer a member of the SPD, but from its left wing – "Frau Agnes und Genossen," as the protocol notes, moved to strike section 5. They explained why: "It is not the socialist, but the bourgeois worldview that *prevails* in this new constitution [...] You could go through article by article of [...] section [5] and find evidence everywhere that the capitalist system flourishes [...] The class-conscious proletariat knows only too well what it has to think of the 'principles of justice'".

On one side, Hugo Sinzheimer's belief in the transformative power of an anti-bourgeois constitutional project; on the other, Lore Agnes' distrust in legal formalization, believing that social and economic change could only be achieved through political struggle. Both views reappear today within the progressive camp and within the debate on whether or not to place "constitutional arguments at the core of LPE."

So far, this debate has primarily been conducted within the US, meaning within a very particular political and constitutional setting. With a conservative US Supreme Court as the final arbiter of constitutionality, promoting a version of popular constitutionalism based on an egalitarian economic vision, as, e.g., Joseph Fishkin and William E. Forbath do, can at best be called an "uphill battle" (Andrea Katz). Samuel Moyn has put it more bluntly in a terrific piece on the LPE blog: "In a place like America, the main and sole task for constitutionalists will probably have to be simply getting the constitution out of the way."

Which type of economic constitutionalism?

But is this also true and what happens when we move beyond the increasingly parochial context of US constitutional law? What do we find here in Germany, where we recently celebrated that, even at 75, our

Basic Law is still "in pretty good shape"? Could this be the beginning of a beautiful friendship: The LPE perspective offering a "creative critique of the dominant liberal constitutional paradigm", and constitutionalism allowing us "to explore the positive agenda and normative background of such a critique"?

In a way, certainly, yes. If we are only talking about using LPE as an analytical tool, why not. However, when we ask in *this* symposium whether LPE as a movement should specifically mobilize constitutional law, the US example shows us that we need to be careful. Simply adding rules we like to a constitution, without considering the methods of interpretation, the institutional setting, and the political context, is risky. Therefore, I want to refine the initial question and ask how different *types* of constitutionalism might help or hinder progressive economic politics. Using different phases of German constitutional law – starting with Weimar, moving to the early Federal Republic, and ending in the recent past – I distinguish three basic types of economic constitutionalism. Of course, there will be no definite answer which type is "best" for "all" of LPE. Progressive economic politics can mean very different things, and different progressives may have different expectations of a constitution. But at least one should know what one can realistically expect when one starts to talk the language of constitutional law.

Weimar's political economic constitutionalism

Key elements of section 5 of the WRV have already been mentioned: an economic order that protects human dignity and labor as a constitutional value. One should add: the democratization of companies and the vision of a "Gemeinwirtschaft" (Art. 156 WRV). If we focus on the structure of section 5, two aspects stand out: First, the section includes numerous goals and mandates for parliament. Second, it avoids creating individual rights. Breaking with German constitutional tradition, even property is not simply declared a protected right. Rather, its "guarantee" (Gewährleistung) *and* "regulation" are entrusted to *parliament*. There has been much debate on whether Weimar had a constitutional court. However, at least in section 5, the focus clearly was first and foremost on parliament, which even without judicial control is bound by the new economic constitution and acts as its "guardian" (Hüter).

This way of relying on democratic lawmaking to implement a progressive economic constitution, is not far from what is proposed today also in the LPE context under the terms of political or "anti-oligarchic constitutionalism." It involves a "constitutional culture [that] prompts political actors to argue for their preferred [economic] policies in constitutional terms, even when calling for legislative rather than judicial action." Can Weimar therefore serve as a model for a productive relationship between progressive economic policy-making and constitutional law?

Historically, however, what "Lore Agnes und Genossen" had predicted in 1919 came true: Ultimately, the "bourgeois worldview" prevailed. The noble dreams of section 5 remained "practically meaningless" (Gusy: 342 et seq.). Why? The very simple reason was that the Weimar coalition failed to convert their victories in the Constituent Assembly into victories in subsequent elections. This is, of course, a general weakness of political constitutionalism: no constitution can save progressive forces the trouble of winning. One might argue that the political constitutionalism of Weimar's section 5 would at least not have hampered a progressive Reichstag's majority. However, just because a constitution does not foresee judicial review, does not mean it will not emerge. And in Weimar, it did emerge in the realm of the economic policy! The *Reichsgericht* spectacularly asserted its power of judicial review in a series of cases that addressed *the* key economic problem of the time: inflation. I cannot delve into in the details of the so-called "revaluation dispute" (*Aufwertungsstreit*, see Gusy: 217-8), where the court's use of section 5 and its property clause is complex. Ultimately, however, the *Reichsgericht* severely limited parliament's policy options, e.g. for reducing public debts. Similarly, in other cases, the court constructed the concepts of property and expropriation very broadly, making it harder and harder for parliament to regulate the economy. Thus, what had started out as a genuine form of

"political constitutionalism" ended up in the case reports of the *Reichsgericht*.

The "neutrality" of the Grundgesetz in terms of economic policy

What lessons did the *Bundesrepublik* draw from this? As is well-known, the *Grundgesetz* contains no pronounced statements on the economy. The political parties wanted questions of economic policy answered by the political process, without the constitutional tinsel of Weimar's section 5. However, the framers also created a constitutional court to protect fundamental rights. Companies were among the first to use the new legal remedies and quickly started to challenge regulatory interventions in Karlsruhe. This led to the 1954 Investment Aid Decision, one of the court's most underrated decisions. The ruling's core statement is a bit opaque. The Court states that the framers deliberately "did not opt for a specific economic model", allowing parliament to pursue the economic policy it deems appropriate, "as long as it respects the Basic Law." This so-called "neutrality of the constitution in terms of economic policy", is maybe best understood as a canon of construction. It means that no Article of the constitution – in particular the property clause Art. 14 – must be interpreted in a way and to an extent that makes other articles of the economic constitution, including Art. 15, practically meaningless.

The relationship between the constitution and the economy – or, more specifically: between the constitutional court and Germany's coal and steel industry, which profited from the investment aid which gave the investment aid decision its name – differs from Weimar's political economic constitutionalism because an apex court is now part of the game. However, the young court did *not* take a substantive stance on economic policy, at least it did not do so overtly. Instead, it limited itself to controlling the "rules of the political game that dictate how [economic] lawmaking takes place". In a way, Karlsruhe appears here as a court, that just "calls balls and strikes" (Chief Justice John Roberts). From today's perspective, this method seems formalistic, even conservative; in any case, it is far from a transformative reading of the constitution, which progressives tend to advocate, e.g., when it comes to civil rights. However, could such a balls-and-strikes constitutionalism be acceptable for progressives when it comes to the regulation of big business? At least in 1954, it probably was. Anyway, the disadvantage of this type of constitutionalism is clear: Everything depends on the court's self-restraint.

Karlsruhe's monetary policy

This brings me to the series of decisions by Karlsruhe on the Euro rescue policy in the 2010s. This line of decisions clearly represents what Mark Tushnet has called substantive judicial constitutionalism, with the court showing a clear preference for a specific type of monetary policy. The point is not whether these decisions are convincing from a doctrinal point of view or if they, from an economic point of view, reinforce neoliberal orthodoxies. The point is that constitutionalization always carries the "risk" of ending with a comprehensive juridification of economic issues – with all its pros and cons for the way in which economic problems are framed, discussed and decided by courts (which often have limited expertise in these matters etc.). Obviously, this does not mean that judicial constitutionalism and a strong constitutional court are per se incompatible with a progressive and egalitarian economic agenda. On the contrary, take the climate protection decision (2021) or the so-called Hartz IV decision (2010), which gave teeth to the idea found already in Article 151 WRV, that we need to guarantee a dignified existence for everyone. However, the question is whether one can expect from courts a full economic transformation, which was intended by Sinzheimer and his comrades in 1919, – or just the protection of basic standards and minor corrections to the liberal model. Moreover, even more than with political or balls-and-strikes constitutionalism, everything ultimately depends on the court.

Ending up in Karlsruhe

We have seen a lot of variety: Three "types" of economic constitutionalism – very different economic issues: inflation, investment aid, the European monetary project, a dignified existence for everyone – and

outcomes which we may like or may not like from a progressive perspective. The puzzle is complex and we will not find a clear causal connection between a specific set of policies and a specific type of constitutionalism.

What follows from all of this for our initial question: Should LPE as a movement aim for constitutionalization? *My* answer is: Probably not, *if* this means, prioritizing constitutionalization over sharpening the ideas, winning majorities and building coalitions. But at the same time, why not, *if* it is part of such a broader project. However, what I really wanted to show is that LPE should not make the mistake of focusing only on the content of a progressive constitutional project. At least equally, probably more important are the variances and institutional dynamics of a constitution, in which such a project must inevitably be embedded. At least in Germany this means: No matter how careful you are with your wishes, you will always end up in Karlsruhe.

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