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A Regulatory Approach to Global Constitutional Analysis*

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Abstract
This contribution draws attention to one of the challenges for contemporary public law thought: the emergence of 'problem-solving thinking' among public actors, alongside or in competition with, the more traditional 'competence-oriented' thinking. It is then proposed to supplement constitutional analysis with regulatory analysis so as to include 'alternative mechanisms' with the capacity to aid the *Rechtsstaat*. These mechanisms could be based on 'community' or 'competition' as alternative control modes.

Keywords
constitutionalism; regulation; competence

1. Introduction

Constitutional analysis is having a hard time fulfilling its traditional 'core business': answering questions of 'who may decide what, under what conditions?' Globalization means that actors responsible for public decision-making often transgress territorial and legal boundaries, causing the state not quite to disappear, but to disaggregate 'into its separate, functionally distinct parts'.[1] This is not only true for specialized public authorities, but also for those public actors with tasks defined in more general terms, such as Ombudsmen, audit institutions and even courts and parliaments. The culture within these institutions and the professional identity of the people working there is influenced by norms which transcend a national context.

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[1] Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 Foreign Affairs 183, 184.

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Although public law traditionally prefers to abstract from the fact that ‘public action’ is ‘human action’, acknowledgement of social and institutional practices as part of constitutional realities is now wide-spread. However, we still lack research strategies for *how* to capture these practices in a way that is still relevant to legal debates. As part of the scholarly quest to grasp the interaction between the changing social reality and the development of that part of the law aimed at delineating the exercise of public power, we use various headings and lenses, often zooming in on specific challenges. For instance, there is the waning of the principle of territoriality in public law as one such a challenge, as well as the increasing informality of relationships between public actors.

This contribution takes a related challenge for contemporary public law thought as one possible lens for gauging the effects of globalization on public law: the emergence of ‘problem-solving thinking’ among public actors, alongside or in competition with, the more traditional ‘competence-oriented’ thinking. The main problem here is a diminishing relevance of constitutional analysis: how can we meaningfully say something about the role of law in constraining the exercise of power if the latter – our research object – is a moving target we have no means of keeping up with? This contribution proposes a ‘regulatory approach’ as one way of incorporating ‘problem-driven’ actions that have objectives similar to the objectives of constitutional law in the analysis.

Theoretical efforts, aimed at addressing various challenges in our collective understanding of constitutional dynamics in a globalizing world, have come from constitutional pluralism and constitutional dialogue theory. The central idea of constitutional pluralism is to ‘stretch’ the idea of constitutional discourse to multiple polity settings and even non-polity settings. Thus, normative sites that could at most be qualified as ‘constitutional’ in an aspirational or relational sense, may be seen as ‘worthy of consideration in constitutional terms’.[2] This choice is made because the ‘continuous reflection on the legitimacy of authoritative decision-making’[3] is seen as an essential element of constitutionalism.

Constitutional dialogue theory shares this view of constitutionalism, but emphasizes the loss of a monopoly of constitutional interpretation on the part of the three classic branches and analyses a wide range of actors as

[2] Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 Modern Law Review 317, 341-342.

[3] ibid 358.

constitutional actors.[4] Although both theories are controversial, we can see their influence in terms of the emergence of more discourse-centered and actor-centered approaches in global constitutional analysis. This contribution builds on these approaches and suggests a complementary approach that is effect-centered and relies on the idea that constitutional law, too, can be usefully viewed as 'regulation'.

2. Two Types of Thinking among Public Law Actors

This section juxtaposes 'competence-oriented thinking' and 'problem-solving thinking' and illustrates the impact of these parallel ways of thinking on public law's capacity to exercise control over exercises of public power.

2.1. Competence-oriented thinking

If there would be one term to distinguish the legal approach from any other disciplinary approach, it would be 'competence'. As expressed in this fairly typical quote: '[c]ontrary to other disciplines (...) law is less interested in how decisions are made in practice, but rather poses the question of whether the relevant actors were competent, taking into account the legal (...) basis of the decision'.[5] In many public law courses in law school curricula, competence is presented as the main trigger and limit for intervention by actors exercising and supervising public power. However, a focus on 'competence' in answering questions regarding task allocation among public actors or the bindingness of decisions and measures, can amount to the exclusion of *de facto* exercise of public power. This is for instance the case when commercially sold private standards are consistently being excluded from public law controls by the courts, even if they are elevated to a privileged position through references in public law rules.[6]

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[4] Bradley M Bakker, 'Blogs as Constitutional Dialogue: Rekindling the Dialogic Promise?' (2008) 63 NYU Annual Survey of American Law 215; Christine Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 Brooklyn Law Review 1109.

[5] Ramses A Wessel, 'A Legal Approach to EU Studies' in Knud Erik Jørgensen, Mark A Pollack and Ben Rosamond (eds), *Handbook of European Union Politics* (Sage Publications 2006) 109.

[6] HR 22 June 2012, LJN: BW0393.

The limits of this type of thinking are also apparent when clear instances of public exercise of power are the object of analysis. Public law research often focuses on 'official' norms (e.g. 'public actors shall not impede free speech' or 'the minister bears responsibility for actions taken in the policy area assigned to him') and the legal enforcement thereof. However, when these norms fail to achieve their intended effect – as certainly happens in the case of the examples provided – we often lack the scholarly tools to creatively look for a diagnosis and a solution.

2.2. *Problem-solving thinking*

One possible consequence of the globalization of relations between public law actors is the contestation or marginalization of 'competence' as a trigger for actions under public law.[7] Increased transnational interaction among peers and ensuing socialization are likely to foster a more instrumental attitude among various public law actors. Public tasks and norms become driven by problems and the will to solve them, rather than by competences as such. This is not the place to delve into empirical accuracy or normative implications of this claim. These matters are part of a larger research agenda. In any case, 'competence-oriented thinking' and 'problem-solving thinking' are not necessarily mutually exclusive as drivers for actions under public law. For instance, whereas it is clear that parliaments still operate mainly within the former framework, they are also characterized as 'watchdogs',[8] which should work with 'assessments', 'benchmarks' etc.

'Problem-solving thinking' can easily be linked to changes in the nature of regulatory governance, not only in the narrow sense of the rise of agencies and the broad delegation of powers to them, but also in the broader sense of 'a new culture of control over regulators'.[9] One concrete example concerns the rise of audit as 'meta-regulation'.[10] Traditionally, courts of auditors mainly possess competences to appraise the regularities of public

[7] Andrea Hamann and Hélène Ruiz Fabri, 'Transnational Networks and Constitutionalism' [2008] International Journal of Constitutional Law 481; Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004).

[8] Ian Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 Journal of Common Market Studies 281.

[9] Terence Daintith and Alan C Page, *The Executive in the Constitution, Structure, Autonomy and Internal Control* (Oxford University Press 1999).

[10] Sasha Courville, Christine Parker and Helen Watchirs, 'Introduction: Auditing in Regulatory Perspective' (2003) 25 Law & Policy 179.

finance. Increasingly, they carry out 'performance audits' on concrete projects, using strictly defined methodologies. However, arguably, as the result of increased networking among national and supranational audit institutions, the idea that '[q]uality and results of regulatory management shall be subject for public audit'[11] has become popular.

The telling aspect of this example is the reasoning – presented as self-evident – that *because* legislative and regulatory activity generally are important, they *should* be subject to the kind of control audit that institutions are good at delivering. The European Court of Auditors did in fact carry out such a concrete audit,[12] stretching the 'audit' format to the maximum when arriving at what were essentially normative statements about the proper institutional relations within the European Commission and between the EU co-legislators. Especially among non-judicial review institutions, constitutional 'competence creep' appears often not too experienced as such by the institution in question – possibly because the institution is in 'problem-solving thinking' mode.

3. Developing a Regulatory Approach to Constitutional Analysis

This section explores a different way of reacting to the phenomenon that actors (public and private ones) involved in shaping the control over the exercise of public power define their role in instrumental terms. Different, that is, from the typical public law scholar's reflex to try to bring constitutional problem-solving behaviour in line with competence-oriented thinking, or, - if that is not possible - declare it unconstitutional. The main reason for this is not so much that this reflex is 'wrong' *per se*, but rather that a lot of 'controlling of public actors' escapes constitutional analysis – and therefore possibly the test of constitutional values – altogether.

A regulatory approach to constitutional analysis may be one useful strategy to cast the net wider so as to include *de facto* exercises of public power. The 'regulatory perspective on law' has been reasonably successful in the past.[13] In general it emphasizes the objective of shaping socially valued

[11] Speaking notes by Dr Tuomas Pöysti, Auditor General European Court of Auditors' Seminar on 'The Future of Public Auditing and Accountability in the European Union', Luxembourg, 18 October 2007.

[12] European Court of Auditors, 'Impact Assessments in the EU institutions: Do they support decision-making?' Special Report No 3/2010 (Publications Office of the European Union 2010).

[13] Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004).

behaviour through standard setting and monitoring and the analytical separation of 'problem definitions', 'objectives' and 'instruments'.[14] Following Scott, locating stable, but not necessarily codified limitations on the exercise of legislative and executive power implies identifying examples where institutionalized solutions have been developed.[15]

Challenging the assumption that all constitutional norms and institutions emanate from an authoritative constitutional text frees up conceptual space for alternative norms and institutions which are contributing to the control of public power.[16] Applying this approach to the constitutional realm implies a revival of the 'regulation inside government' literature,[17] which initiated the application of insights from regulation theory to non-sectoral governance.

An important additional step is to extend to the possibility that private actors perform regulatory functions and engage in generic control of exercises of public power.[18] In the regulatory approach a 'constitutional framework' is defined as the social structures and institutions that allocate and restrain power at the macro-political level. Scott has put forward a definition of constitutionalism reflecting this approach, which is inspired by the discipline of 'regulation': 'the commitment to effectively limit the exercise of legislative and executive power'.[19] Institutionalization of regulatory mechanisms can occur through law, through social mechanisms or through both simultaneously. For instance, not only classical constitutional instruments such as review powers can help political principals keep tabs on agents, 'disclosure' can also have an equivalent effect.[20]

Regulation studies may also go a long way not just in analyzing but also in accounting for the rise of 'problem-solving' actions that are functionally equivalent to public law controls, when it postulates that regulation is a

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[14] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007).

[15] Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism', in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010).

[16] Colin Scott, 'Regulating Constitutions', in Parker (n 13).

[17] Christopher Hood and others (eds), *Regulation inside Government. Waste-Watchers, Quality Police and Sleaze-Busters* (Oxford University Press 1999).

[18] Jody Freeman, 'The Private Role in Public Governance' (2000) 75 New York University Law Review 543.

[19] Scott (n 15).

[20] Mathew McCubbins, Roger G Noll and Barry R Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies' (1989) 75 Virginia Law Review 431.

substitute for social trust. In the words of Levi-Faur and Jordana, '[i]t might well be that the Regulatory State and the demand for more transparency and accountability are both outcomes of the shift in the balance of trust between different professions and social groups'.[21] Indeed, governments start regulating when they do not trust citizens. Why should it not work the other way around in times when trust among citizens in their governments is in decline? One example is the emergence of NGOs such as OMB Watch in the US, which review the actions of a certain part of government across the board and 'name and shame' it when falling short of its own standards.

A clarification is in order. First, developing a 'regulatory approach to constitutional analysis' undeniably has an instrumental ring to it. However, the instrumentality proposed here is different from the one employed in 'new constitutionalism' experimented with in the nineties. This deemed that constitutionalism should not only be concerned with the control of the exercise of public power, but also with institutional design so as to achieve economic efficiency.[22] The regulatory approach does put the 'traditional preoccupations' upfront, but uses 'smart mechanisms' to achieve them. Thus, the approach taken is not a purely instrumental one: these instruments are connected to normative discourses through which constitutions are 'justified, defended, criticized, denounced or otherwise engaged with'[23] and may have capacity for empowerment.

Considering law as regulation is already commonplace in many sector-specific legal fields, but is underdeveloped in constitutional law even though this field of law is explicitly aimed at regulating the behavior of public actors. Developing a regulatory approach to constitutional analysis includes attention for the fit between the mechanisms used in constitutional and administrative law on the one hand and insights from behavioral sciences on the other. For instance, if we observe a lack of interest in parliaments to scrutinize legislative bills for compatibility with the constitution, we may lament this and point to political constraints, but rarely do we ask how we can provide incentives to change this behavior.

Elaborating somewhat the idea of 'smart mechanisms' can illustrate what a regulatory approach to constitutional analysis might look like. One central premise of the approach is the existence of a plurality of control modes. An oft-used and classic typology of control mechanisms distinguishes

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[21] Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation in the Age of Governance* (Edward Elgar 2004).

[22] Stephen L Elkin and Karol E Soltan (eds), *A New Constitutionalism. Designing Political Institutions for a Good Society* (The University of Chicago Press 1993).

[23] Walker (n 2).

four types of underlying modalities of control: 'law', 'social norms', 'markets' and 'architecture'.[24] These have been relabeled 'hierarchy', 'community', 'competition' and 'design' in the regulation literature,[25] which has produced rich insights on the functioning of 'alternative instruments' that depend on control modalities other than law/hierarchy.[26]

Regulatory scholarship has produced rich insights on how 'alternative instruments' may use 'competition' and 'community' as control mechanisms. In the world of transnational governance these insights are being put to practice in functional solutions for disciplining national public actors. Examples are best practice exchange in horizontal transnational networks of public actors (e.g. courts of auditors), peer review (e.g. OECD peer reviews) and naming and shaming (e.g. World Bank rankings).

4. Concluding Remarks

Public law – or constitutional law as the law *for* government rather than the law *of* government – does not have a monopoly when it comes to regulating the exercise of public power. This is the case both within the nation and in processes of a global nature. This paper argues that instead of trying to reclaim that monopoly, for instance by emphasizing constitutionalization processes and the importance of 'competence', we are better off embracing the regulatory function of public law mechanisms as part of our research approach.

Much of the role-shifting that is going on among public actors – not to mention the public task poaching by private actors – will never enter the radar of public law *scholars* as long as they keep the same competence-oriented focus the public law *system* has. Infusing constitutional analysis with elements of regulation studies may help develop an effect-centered approach that can be complementary to discourse-centered and actor-centered approaches.

The regulatory approach replaces the famous paradox that constitutional law is deemed inadequate yet vital[27] with a new one. Although constitutionalism is primarily a commitment to restrain the exercise of public

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[24] Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

[25] Andrew Murray and Colin Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65 Modern Law Review 491.

[26] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press 1999).

[27] Walker (n 2) 327.

power, we must be prepared to abandon the archetypical form of restraint, namely hierarchical mechanisms, in favor of heterarchical mechanisms. In terms of a research agenda, this implies a systematic analysis of the conditions under which community-based and competition-based instruments are effective in solving constitutional problems. The extent to which mechanisms such as these, which escape the very concept of competence, are functionally similar to controls from administrative or constitutional law is a matter of empirical investigation.[28] This is not to say that all constitutional law scholars should take a regulatory approach and become empiricists; complementarity of research approaches and cooperation between researchers with different specializations and skills are an inescapable feature of the future of global constitutional analysis.

[28] See also Maurice Adams' contribution in this issue.