

Lightening of Citizenship and Its Implication for Social Policy: 'Social Security Lite' in the Making?

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1. Introduction

'Citizenship' has frequently been a key concept of migration studies. It has also become commonplace to feature the concept in welfare state studies, especially in the past ten years (e.g. Ferrera 2005). A Marshallian linear evolutionary view of citizenship is, however, no longer of much help in analysing European policy development. What we are witnessing in Europe is the transformation of the meaning of 'citizenship', not only concerning a person's belonging to a certain political unit, but also regarding the benefits that person can expect from the state s/he resides in. This paper is an attempt to connect both aspects of this transformation.

Specifically, this paper builds on Christian Joppke's hypothesis on the 'lightening of citizenship' (Joppke 2010a; 2010b). Our initial hunch is that the lightening of citizenship has a substantial impact on internal aspects of citizenship, namely what a state expects from its citizenry and what it guarantees in return. Taking recent social policy developments in Europe as an example, this paper contends that the lightening of citizenship entails both the universalisation and lightening of social policy. In other words, the lightening of citizenship coincides with the lightening of social security.

As Joppke already suggests this point, this paper highlights the roles of EU institutions in this transformation. In particular, this paper features the EU judiciary's leading role in this process and contends that judiciary-induced policy-making affects the content of policy.

Substantially, we argue that the universalisation and lightening of social security corresponds to a functional requirement of the internal market, but it is also a plausible answer to the increasingly diversified and de-stylised career of EU

citizenry. In this regard, ‘lightening’ should be conceptually separated from mere ‘retrenchment’ of welfare or ‘neo-liberalization’. This direction has been augmented by the intervention of the European Court of Justice (ECJ), whose judgements have built on union citizenship and enhanced individual social-rights protections.

This trend may be called a European style ‘rights revolution’, but it has a price. Featuring citizenship as a universal status protects individual rights, but puts the collective ordering of social relations, which had been an important part of social rights, in the back seat. Therefore, the paper contends that a new perspective on ‘the individual versus the collective’ is relevant to the analysis of EU social and employment policy.

After briefly clarifying the concepts used in this paper, we examine the development of EU social policy with an emphasis on the role of the ECJ and union citizenship. This section illuminates the individualistic aspect and reach of union citizenship. Against this background, we analyse four ECJ rulings and contrast this development with the ‘collective ordering’ aspect of social rights in Member States, taking Germany as the main example. The final section summarises our argument and its implications.

2. Preliminary Consideration

(1) Conceptual Clarification of ‘Citizenship’

The concept of ‘citizenship’ has different connotations, depending on authors’ disciplines and theoretical standpoints. In this paper, we use the term in narrow sense, concentrating on its legal aspects. From this perspective, citizenship is the ‘right to have rights’, the fundamental status of a person to have a bundle of rights normally accorded to a full member of a given political community.

The reason for this definition is that we intend neither to advance theoretical arguments for a normative conception of a better society nor to give a *tour d’horizon*. Rather, our aim is to analyse concrete EU social policy developments in relation to the ‘citizenship of the union’ as defined in Article 20 of the Treaty on the Functioning of the European Union (TFEU). This means that we treat the concept in a positivist manner rather than as a theoretical conception.

Focus on the legal aspects of union citizenship is also justified by its nature. Considering the nature of the EU as a supranational polity, the nature of membership

in that entity can only be a narrow one. The broader meaning of citizenship and the rights and duties of each person differs in each Member State (cf. Pfeifer 2009). Therefore, in an analysis of the union citizenship, a narrow focus on its legal aspect is appropriate. Further, the development of union citizenship has owed much to ECJ judgements. Thus, it is natural to place its legal aspect at the centre. This point is further explored in the next subsection.

(2) Effect of ECJ Intervention

In the past twenty years, we have witnessed a growing field of interdisciplinary studies on EU norm/rule generation (for state of the art, see Conant 2007; Stone Sweet 2010; Vauchez 2008). Political researchers have begun to pay attention to the role of the judiciary in the European integration process, and some legal scholars have offered theoretical perspectives that touch on the central concerns of political studies, such as legitimacy and democracy (Stone Sweet 2004; Alter 2001; Weiler 1998).

Many of those works, especially those by political scholars, ask why and how the ECJ has played such a prominent role in norm/rule setting, in contrast with the national experience, where the legislative branch is the central stage of norm formulation (Stone Sweet 2004; Conant 2002; Cichowski 2007). Recently, the Americanisation of European legal systems has also been lively debated (e.g. European Political Science 2008).

The focus of this paper, although related to those issues, is different. We concentrate our focus on the effect of ECJ intervention on policy content¹. It is true that judiciary may have substantial policy impact, but this does not mean the judiciary is just another political actor. In this regard, studies on American judicial politics offer a useful perspective. Silverstein (2008) contends in general terms:

There are instances in which language, legal forms, and legal frames shape and constrain political behavior[.] The narrowing, formalizing, and hardening of the terms of debate add up to what might be called juridification[.] (p. 2)

In a concrete analysis of the US social policy, he adds, 'Although some Court rulings expanded access to welfare payments, the doctrinal frame in which these decisions were set limited their reach and scope' (p. 108) Abraham contrasts this point with the

German case (2005: 9, note 24), noting the policy effects of the ‘rights revolution’ in the United States as follows:

The individualistic and individualizing, apolitical side of rights and of the ‘rights revolution’ in the U.S. has been the subject of analysis by conservatives and radicals alike... The situation in Germany is still quite different, notwithstanding the enlargement of individual rights there over the past 30 years.

These authors suggest that ‘judicialisation’ in the United States entails a specific policy effect². In our case, too, it can be hypothesized that intervention by the ECJ tends to favour a specific policy direction— protection of individual rights— because the ECJ is a *judicial* and *supranational* actor, in comparison with *political* and *national* actors. As a judicial body, the primary task of the ECJ is to protect the rights of a person in a concrete case rather than to forge a collective compromise or decide future policy directions. Further, rights may be argued to be more universal and common in the Member States (cf. Krebber 2006). In addition, the ECJ needs to secure the ‘four freedoms’ and protect the individual rights it has enhanced through its expansive interpretation of European citizenship clauses.

‘Citizenship’ plays an important role here. As is shown below, the ECJ has used the union citizenship introduced by the Maastricht Treaty as powerful conceptual leverage to pursue a transnational answer. For that purpose, the meaning of union citizenship should be universal and abstract. Thus the rights conferred on this status become *individualist* and *universal*. Then, if individual rights’ protections cover social rights, does this suffice to realise a social Europe? In the next subsection, we elaborate on that topic.

(3) Liberal versus Social and Individual versus Collective Dichotomies

The social dimension of the EU has been repeatedly discussed in the past twenty years. It is usually discussed within the dichotomy of ‘neo-liberalism’ and ‘social Europe’ or community responsibility and Member State autonomy. These dichotomies capture an aspect of the issues confronting the European Union. However, they provide little guidance on several important cases. For example, the EU introduced the issue of anti-discrimination in many Member States (cf. Amiya-Nakada 2007). Caporaso and Tarrow (2009) emphasise this point. How can we

understand this 'social' face of the EU and its 'liberal' face, such as the consistent denial of national subvention or the ban on national non-tariff barriers?

Building on the argument proposed by Menedéz (2010), which contrasts individualistic rights with solidarity, this paper offers a new perspective from which to understand the political tension inherent in EU social policy. We propose to differentiate two elements of social rights. One is the 'collective order' element. This aspect of social and employment policymaking is shared by many, if not all, Member States. This element also constitutes the 'form' or the procedural characteristic of EU social policy most prominent in the Treaty on the Functioning of the European Union Articles 153–155. There is, however, an inherent limit in this regard. In Member States, courts can rely on a historically constructed, shared understanding of the desired social order. To the contrary, as a supranational actor, the ECJ cannot rely on a specific understanding of 'collective order', as there are different traditions among the Member States. The other element is 'individual rights' or citizenship, which is prominent in the content of EU social and employment policy and necessary for a well-functioning internal market. This element is further enhanced by the ECJ-induced policy development. As a result, the ECJ has a built-in tendency to give priority to the individual rights element.

But the citizenship element potentially conflicts with the collective order element, in that the protection of individual rights may sometimes erode the foundation for solidarity of the collective order. For example, concerning the Swedish welfare state, Trägarth and Svedberg (2013) pointed out 'the extraordinary breadth of social rights' and 'the equally stunning [...] lack of individual rights' (223) and assert that 'social rights in Sweden have primarily taken the form of what we call 'collective social rights'—that is, 'rights' that are in a strictly juridical sense (individual, claimable, enforceable in a court of law) not rights at all' (229). This means that a specific configuration of policy process, namely the leading role of the judiciary, affects the content of the policy. This is the theoretical point of this paper.

This inherent contradiction is manifest in recent labour cases, namely the *Laval*, *Viking*, *Rüffert* and *Luxembourg* cases. Through an examination of these cases and the responses of various political and social actors, this paper contends that the question is not whether Europe is liberal or social. Rather, the conflict is between the individual and the collective elements of social and employment policy. In the next section, we examine individualist policy developments in more detail.

3. The Effect of ECJ Judgements and the ‘Citizenship Turn’ of the EU Social Policy

We can find the elements of individualism and individualisation in EU social policy. Below, we will substantiate this argument with several examples. The role of the ECJ is instrumental in this regard, as individual ‘rights’ protection is suited to transnational adjudication, especially after union citizenship acquired the status of quasi-fundamental rights.

(1) Centrality of the ‘Four Freedoms’

Unlike the political processes of Member States, the EU policy process is characterised by the autonomy of each policy domain. This is due to the step-by-step integration process and patchwork distribution of competence between the EU and Member States (cf. ‘Five Policy Modes’, Wallace 2010). Further, executive coordination, such as by a party government or president, is lacking. Still, without a doubt the construction of the common market has been the central policy concern throughout the integration process. In this area, the EU’s competence is comparatively wide, and its rule-enforcing power is strong. In particular, the realisation of the ‘four freedoms’—the free movement of goods, capital, services and people—is powerful leverage against Member States.

These four freedoms were instrumental in the expansion of ECJ influence. The supremacy and the direct effect of EC law were made possible by these freedoms as the telos of integration. EU law must be prioritised because imported goods and services can be directly or indirectly disadvantaged without uniform interpretation of EU-wide rules.

In contrast, social policy may be the least integrated policy domain besides foreign policy. The Amsterdam Treaty is the most recent, major expansion of the EU competence. After the Nice revision, Article 3 of the treaty listing community activities only indirectly touches on social policy. In Chapter 11 on ‘Social Policy’, Article 137 stipulates community competence but with strict reservations, saying that the ‘provisions adopted pursuant to this article shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof’. Further, pay, the right of association, the right to strike or the right to impose lockouts are explicitly excluded

from community competence.

In short, the core of the Member States' social security system is the least integrated policy area. This is because the economic disparities between the Member States are directly reflected in this policy area and the historically accumulated 'welfare regimes' are hard to integrate due to their differences in ordering principles and methods.

(2) Union Citizenship and the Role of the ECJ

EU-level social policy initiatives are more prominent regarding problems related to the free movement of person and anti-discrimination. As the former is closely connected with the four freedoms, EU legislation on this topic began in 1958. The latter came to the fore in the 1990s. In both policy areas, the role of the ECJ has been decisive.

When the union citizenship clause was introduced into the Maastricht Treaty, few expected that it would bring about far-reaching change. It was even disappointing to some, as the original Commission idea of an autonomous status was rejected, and union citizenship was deemed 'supplementary' to Member State citizenship.

The unexpected influence of the union citizenship clause was created by the ECJ in the landmark case of *Grzelczyk* (Case C-184/99 *Grzelczyk* [2001] ECR I-6193). In this judgement, the ECJ treated union citizenship as a fundamental status that can be directed against European or national regulations circumscribing foreign nationals' rights. In subsequent cases, the ECJ widened the scope of application of the EU anti-discrimination norm from 'workers' in a narrow sense, to legally residing Member State nationals, and thereby recognised the right of social benefits. Further, the reach of the norm has deepened. While non-contributory social benefits are explicitly excluded in the text of EU social security coordination laws, the ECJ declared that what amounted to 'social benefits' would be decided by the ECJ itself, not by Member States. In effect, the ECJ has recognised recipients' claims for non-contributory benefits beyond Member States' original intentions. These decisions have been justified in relation to the four freedoms, as the wide recognition of social benefits claims are said to facilitate the movement of workers or people.

In anti-discrimination policy, the impact of EU legislation is more direct. Soon after the Amsterdam Treaty took effect in May 1995, two directives, namely the

Racial Equality Directive (2000/43/EC) and the Equal Treatment Directive (2000/78/EC), were adopted. These directives have been referred to as ‘one of the most significant pieces of social legislation recently adopted by the European Union’ (Bell 2002, 384). They are the first specific anti-discrimination legislation of many countries. Further, the directives instruct Member States to set up National Equality Bodies or to enable some association to intervene in litigation on behalf of plaintiffs.

It should be noted here that these examples—social benefit rights for foreign Member State nationals and the anti-discrimination policy—show that EU social policy is active and visible in those policy areas where minimum protection of individual rights is at stake. Recent (soft) policy initiatives on social exclusion (Silver 2003) or the introduction of minimum income schemes (Francesco, Haux, Matsaganis and Sutherland 2009) can be read in this light.

This trend results from the twin fundamental motors of EU legislation: the four freedoms and union citizenship. This policy direction is clearly stated in the explanation of a proposal for a regulation on the coordination of social security systems (COM (2003) 596 final):

Coordination rules are not just intended to ensure free movement for employed persons; they are also increasingly about protecting the social security rights of all persons moving within the European Union. Coordination must therefore be seen from the perspective of European citizenship and the building of a Social Europe.

In other words, by securing a common social minimum for European citizen regardless of nationality, religion and other attributes, freedom of movement and a ‘Social Europe’ become compatible.

As for minimum income, the starting point is the 1992 recommendation of the Council (92/441/EEC, 24.6.1992) that Member States ‘recognize the basic right of a person to sufficient resources and social assistance to live in a manner compatible human dignity.’ In this recommendation, reference to ‘rights’ is declaratory, with the emphasis placed not on giving people concrete subjective rights but on Member States’ obligation to give due consideration to that aspect.

More substantive input was provided in the late 1990s and early 2000s. Spurred by the electoral success of social democratic parties across Europe, a new policy

paradigm emerged. It is often called the 'social investment' approach. This approach is distinguished from 'the social protection logic of post-1945 welfare regimes as well as the safety-net stance of neoliberals' (Jensen 2010). The Lisbon Strategy launched in 2000 is a part of this approach and is also visible in the composition of the policy community surrounding the European Commission (Amiya-Nakada 2012).

After initial optimism in the Lisbon Strategy had faded, the future viability of the 'European social model' was discussed and a more job-oriented second cycle began. For fear of the 'backlash', Social Platform, the umbrella organization of the social policy NGOs, advocated for a strengthened EU role. Headlines in its newsletter read, 'Focus on fundamental rights, not on models,' and 'It's all about fundamental values,' reflecting its strategy to use 'rights' as leverage.

This tendency to use 'rights' as the main argumentative pillar continues. In response to the so-called social investment package published by the Commission in 2013 (COM (2013) 83 final, 20.2.2013), European social policy NGOs again stress the point. For example, Social Platform said, '[A] fundamental rights approach is a precondition of such policies' (2013). The European Anti-Poverty Network, a leading European social NGO, also emphasised, 'The SIP must confirm a rights-based approach and a commitment to universalism' (2013, 7).

In this argumentation, references to the 'rights' are not declaratory but substantive, in the sense that they aim to establish the individual rights as justiciable, as is shown below:

People should be able to enforce the right to an adequate minimum income. Consideration should be given to the introduction of a chapter on remedies and enforcement, that guarantees the defense of rights to all persons [...] and that allows organizations [...] to help these persons in judicial and administrative procedures (EAPN 2010).

From this development, we can clearly see a typical pattern of judicialisation: once the judiciary is active in a specific policy domain, societal actors begin to use judicial avenues as an effective bypass of the stagnant political route to realise their own agendas. Throughout this process, argumentation, strategy and the objective of the societal actor will also transform to a certain degree.

(3) Limits of the Union Social Citizenship

Universalised minimum protection based on the union citizenship clause might be a potentially breakthrough for the reconstruction of the 'social' at the EU level. In reality, the relationship with Member States' existing social security systems has led to more of a clash than complementary or mutual reinforcement. Part of the reason is the liberalizing tendency inherent in EU policies. The failure of the constitutional treaty referendum in France is the most prominent example, during which not just the treaty, but also the infamous 'Bolkestein' service directive (Directive 2006/123/EC) were criticised as 'unsocial'.

Still, there are examples where the EU has played the role of innovator or promulgator of social policy innovation as in cases of anti-discrimination or social exclusion. Even in these cases, EU policy initiatives are sometimes faced with reluctance or outright opposition from the trade unions or the centre-left parties. For example, in the discussion of the portability of supplementary pensions, Gerd Andras (SPD), then the parliamentary state secretary for the German Federal Ministry of Employment and Social Affairs, publicly criticised the planned directive as undermining the supplementary pension scheme in Germany. It is to be noted that he had been a functionary of the Union of the Chemical Workers (IG Chemie, Papier, Keramik), which negotiated with management the most developed system of supplementary pensions.

We contend that this kind of clash is due to the logical difference between EU social policy and Member States' existing systems of social and employment policy. In other words, the clash is not just between the 'liberal' EU and 'social' Member States, but also between different conceptions of the 'social'. As suggested above, EU social policy has a tendency to grant a right to minimum social protection to every individual. In that sense, it has the characteristic of social 'citizenship' regardless of nationality (cf. Giubboni 2008: 3)³. To the contrary, the social and employment protection system of each Member State is more than a collection of individual rights and entitlements. It is the result of historical compromise between societal groups and political parties. This aspect is highlighted in Esping-Andersen's seminal book, *Three Worlds of Welfare Capitalism*, in which welfare regimes are classified according to leading political groups and their inherent logic. In short, national systems are a kind of public order.

The rights-based nature of EU social policy (cf. Mabbett 2005) is strengthened

by the leading role of the ECJ in policy development. The judiciary of a given Member State may find a specific type of social order to be 'their own' order and make due consideration to it even in relation to an individual's fundamental rights. Among the growing diversity of social systems and norms, the ECJ cannot afford this type of consideration. As the task of the ECJ is to determine a common framework for all Member States, it cannot rely on a specific understanding of public order. In this regard, individuals' fundamental rights are useful and powerful instruments. They are common to Member States and can be used against ordinary (Member State) laws because fundamental rights are supposed to be superior (Höpner 2008). In the next section, we will sketch concrete examples of this kind of clash.

4. Clash of Individualised Policy and Collectivist Order: Examples of the ECJ Judgements

(1) Four ECJ Judgements in Focus

In this subsection, we analyse four recent ECJ judgements (*Viking*, *Laval*, *Rüffert* and *Luxembourg*) and the political reactions to them. These judgements have been perceived as a severe blow to existing Member States' social systems and invited criticism from different angles. Through an analysis of the judgements and the reactions to them, we try to illuminate the importance of the clash between individualistic social policy and collective order.

The background of the conflict is the Posting of Workers Directive (Directive 96/71/EC). As a matter of principle, the free movement of persons and services makes it possible for a company to send workers to other EU countries under working conditions that fulfil only the minimum standards of the sending country, not those of the receiving country. As an exemption from this principle, this directive stipulates that the receiving country 'shall ensure that ... the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment ... in the Member State where the work is carried out', as far as core aspects such as maximum work periods, minimum rates of pay or provisions on non-discrimination. The minimum conditions shall be laid down 'by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8'. As can be imagined, which Member State rules fall within 'the terms and conditions

of employment' of this directive has been a source of conflict.

In *Viking* (C-438/05, International Transport Workers' Union Federation et al. v. Vikingline ABP et al. [2007] ECR I-7779), the ECJ recognised, on the one hand, the trade union's right to strike and the prevention of social dumping as justifiable grounds for restriction of the four freedoms. On the other hand, the Court did not affirm the relevant action of the Finnish Trade Union and asked the referring (British) court to apply the proportionality principle in a concrete judgement on the relevant action.

In *Laval* (C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others [2007] ECR I-5751), the point was whether Swedish law implementing the directive was valid or not. The Swedish implementing law allowed social partners to define the minimum wage level, as is common with other rules regulating the labour market. In other words, one of the central elements of Swedish industrial relations was at stake. The judgement denied such implementation, and the striking actions of Swedish trade unions based on this understanding were deemed illegal.

In *Rüffert* (C-346/06, Dirk Rüffert v. Land Niedersachsen [2008] ECR I-1989), the government's action as a contracting party was contested. German *Land* government of *Niedersachsen* made the application for collective agreement mandatory to the company accepting a public construction order. As the company did not apply this to its Polish subcontractor, the *Niedersachsen* sued the company. Referred by the German court, the ECJ determined that securing minimum working conditions through public contract was not an acceptable means defined by the directive and was therefore illegal.

Finally, in *Luxembourg* (C-319/06, Commission v. Grand Duchy of Luxembourg [2008] ECR I-4323), the Commission sued the government of Luxembourg for improperly implementing the directive by putting unnecessary restrictions on the freedom of movement by applying a wage slide to the minimum wage or requiring a contact person for monitoring. The ECJ sided with the Commission, saying that compliance with the directive can be sufficiently monitored by the sending country and that only the minimum conditions had to be clearly defined.

Through these four cases, the limits of defensive actions by labour or the government against service provision by low-paid workers has been more precisely defined. The ECJ recognised trade union's fundamental right to strike and accepted governments' justifications of restrictions on the risk of social dumping, at least

as a matter of principle. Nevertheless, the legality of all the protective measures were denied because the minimum standard had to be literally *minimum* and clearly defined by law or a declaration of universal applicability, according to the ECJ.

(2) Political Reactions at the European Level

Of course, the trade unions and the left parties criticised these judgements. The European Trade Union Congress (ETUC) issued a declaration criticizing the judgements and advocating for the adoption of a 'Social Progress Protocol' to be attached to the Lisbon Treaty. The European Parliament showed its concern in the resolution 'Challenges to Collective Agreements in the EU' (2008/2085[INI]). The European Council issued the 'Solemn Declaration on Workers' Rights, Social Policy and Other Issues' in June 2009, but did not provide the impetus for further action.

The Commission did not take concrete action until a political initiative by President Barosso suddenly opened the prospect for changing the legal texts. One day before the investiture vote in the European Parliament on his second term, he held a three-hour plenary session to answer the Members of the European Parliament (MEP) in Strasbourg. It was said that he had secured roughly 350 seats out of 736 and tried to reach out to the 184 members of the Socialist and Democrats (S & D) group (Simon Taylor, 'Barosso makes last pitch to Parliament', *European Voice*, 15.9.2009). In that effort, he promised revision of the Posting of Workers Directive:

I have clearly stated my attachment to the respect of fundamental social rights and to the principle of free movement of workers. The interpretation and the implementation of the posted workers Directive falls short in both respects.... And let me be clear: I am committed to fighting social dumping in Europe, whatever form it takes. ('Passion and Responsibility: Strengthening Europe in a Time of Change', SPEECH/09/391, 15.9.2009)

Still, the Directorate-General for Social and Employment Affairs was reluctant, given the controversial and delicate nature of the directive. In the roadmap submitted for impact assessment (Legislative Initiative on Posting of Workers, available at <ec.europa.eu/governance/impact/planned_ia/docs/2011_empl_001_posting_of_workers_en.pdf>), it was suggested that a new regulation, Barosso's political priority, was almost impossible to pass. In its place, Monti Report suggested to

‘[c]larify the implementation of the Posting of Workers Directive and strengthen dissemination of information’ and ‘introduce a provision to guarantee the right to strike modelled on Art. 2 of Council Regulation (EC) No 2679/98 and a mechanism for the informal solutions’, namely minimum legislative action with informal coordination and information sharing (Monti 2010, 68–70). Currently, a solution along these lines is being pursued.

(3) Reactions of Member States: Case of Germany

The reaction of the German public opinion had already been intense before the Rüffert judgement. The Federal Ministry of Labour and Social Affairs organised a symposium in June 2008 entitled ‘The Influence of the Judgements of the European Court of Justice on the Labour Law of the Member States’ (BMAS 2008), inviting experts including an ECJ judge. More influential in the public discussion was the intervention of prominent public figures. Fritz W. Scharpf, a famous German researcher on the EU, published an essay with the provocative title ‘The Only Way Is Not to Follow the ECJ’ (Scharpf 2008) in a German Trade Union Federation magazine. In the article, he suggested a possible rejection of the doctrine of the supremacy of EU law. It was consonant with a similarly anti-ECJ essay, ‘Stop the ECJ!’, by former president Roman Herzog, although this was made in a different context. In this way, the role of the ECJ was highlighted.

On the occasion of debate on the Lisbon Treaty in the German Federal Parliament, the Left Party vocally opposed the judgements and the Lisbon Treaty. In contrast, the Greens took a clear pro-European stance. Jürgen Trittin, past environment minister of the Red-Green Coalition, said, ‘We need to make Germany Europe-compatible’ and criticised the incumbent government, saying:

[The Rüffert Judgement] is not a bad judgement. Rather, it is the consequence of the failure of the Grand Coalition. This judgement comes because the declaration of universal applicability cannot be issued to the collective agreement. (Deutscher Bundestag, 16. WP., 157. Sitzung, 24.4.2008)

Social Democrats were on the defensive as a part of the government taking a ‘yes-to-the-treaty-but’ stance. After ratification by the parliament, however, the Social Democrats revised the course and issued a joint motion with the trade

unions urging the addition of a 'social progress clause' to the treaty (Für ein Europa des sozialen Fortschritts: Gemeinsames Positionspapier von SPD und DGB; Deutscher Bundestag, 16. WP., 224. Sitzung, 28.5.2009, Plenarprotokolle, 16/224, 24712B-24717C).

German sensitivity to the judgements can be partly explained by the quasi-constitutional notion of *Tarifautonomie*, or the autonomy of social partners. The Basic Law of the Federal Republic of Germany reads as follows in Article 9, Paragraph 3:

The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

The Federal Constitutional Court has interpreted this text to mean that the state delegates a core domain of the collective agreement system to social partners (Löwisch 1989). In its seminal judgement, the Federal Constitutional Court stated, 'The purpose of the collective agreements is to give an order to working life' (BVerfG vom 18.11.1954. BVerfGE 4, 96ff, hier 108).

This was not only a reaction to the state regulation of industrial relations in the Nazi period, but also an expression of critical reflection on the Weimar experience when autonomous conflict resolution did not function smoothly and governments were often forced to resort to compulsory arbitration (cf. Nautz 1985). Due to this historical background, (West) German industrial relations are characterised by the rare use of governmental instruments such as wage freezes. The declaration of general applicability, which may be invoked as substitute for governmental regulation, has been issued only sporadically. In short, the norm of governmental restraint in the regulation of industrial relations and autonomous rulemaking by social partners was established and firmly took root as a kind of constitution in a material sense.

As the ECJ judgements were seen as a frontal assault on this quasi-constitutional norm, it is no wonder that the German public reacted with such sensitivity. In addition, as far as the *Rüffert* judgement was concerned, a similar law in Berlin was already sanctioned by the Federal Constitutional Court, which added further fuel to the fire.

(4) The Real Stake of the Conflict

Roger Liddle, a former advisor to Tony Blair, said that Scharpf's 'warning that the European project represents a judicial entrenchment of neo-liberalism needs to be treated with the utmost seriousness' (Liddle 2008, 27). Although Scharpf's argument was more nuanced, the 'ECJ equals neo-liberalism' thesis can be seen elsewhere, and Scharpf himself talked of 'judicial deregulation' in a later article (Scharpf 2010).

Has the ECJ become neo-liberal? Theoretically, it is plausible to infer neo-liberalisation from the eastern enlargement after 2004, as the new Member States with generally lower social security standards and looser regulations have more to gain from the liberalisation of the older Member States. Höpner (2009) proposed a framework to analyse the political influence of the ECJ judgements and suggested that the nationality of the judges may influence the decisions (see also Kelemen 2011b). In fact, among the cases shown above, judges from the new Member States occupied more than half of the seats in *Luxembourg* (LV, MT, SL against AT, IT) and *Rüffert* (LT, PL, RO against FR, NE). *Viking* and *Laval* were judged by the Grand Chamber, which included only five judges from the new Member States after 2004 among 13 in total. If we suppose some 'older' Member States, such as those of southern Europe or the UK, are rather liberal, it might be the case that the liberalisers dominate in the Grand Chamber, too.

In the European Parliament debates, nationality is clearly discernible independent of the partisan left-right position (European Parliament Debates, 21.10.2010). On the one hand, an MEP from the German centre-right CDU said:

We need to say a clear 'no' to any kind of social dumping and a clear 'no' to attempts to create 'letterbox companies' intended to avoid minimum standards for pay and working conditions. Social principles must not be subordinated to economic freedoms.

On the other hand, a socialist MEP from Estonia supported the judgement, writing:

Unfortunately, the desire of several Western European trade union organisations to close markets to the new Member States once again will not help unite Europe.

This contrast surely lends plausibility to the 'liberalisation by enlargement' hypothesis. However, from our perspective, the four judgements can be interpreted in line with previous judgements, especially those expanding social rights. In *Viking*, the court stated that 'it is for the national court to determine whether the jobs or conditions of employment of that trade union's *members* who are liable to be affected by the re-flagging of the Rosella were jeopardised or under serious threat' (paragraph 83, emphasis added). This means that what can be protected against the four freedoms is the specific interest of individual workers (Kocher 2008). This corresponds to a series of anti-discrimination decisions that protected individuals' social rights.

In *Laval*, *Rüffert* and *Luxembourg*, the issue is almost the same: 'What constitutes an enforceable minimum standard?' In *Laval*, the Swedish tradition of autonomous regulation of social partners was denied. In *Rüffert*, an indirect method of government procurement fell outside justifiable minimum. In *Luxembourg*, too, the blanket recognition of universally applicable collective agreements in Luxembourgian Law was found incompatible with the directive (paragraphs 62–69). All these indicate that the minimum standard must be transparent and therefore defined by a statutory law or universally applicable collective agreements with specific content. It is not about the substance of the minimum standard but the way the norm was established.

Then, what is the source of the controversy? From our viewpoint, it is the individual-rights orientation and relative disregard for the collective-order aspects of those judgements. In the above-mentioned symposium convened by the German government, the representative of the Swedish Trade Union expressed his concern as follows, which illuminates our point:

[T]he ECJ did much more than necessary in the *Laval* case. Carefully developed balances in national industrial relations systems have been distorted. One should

keep in mind that EU has 27 different labour market models. They all reflect different balances of power between Capital and Labour. The ECJ will become largely unpopular as it moves delicately balanced power between the social partners in the Members States.

He added further:

This [is] in contrast with the so called continental models where the States have a more primary role in the regulation of the labour market. It appears as if the ECJ measures the Swedish (or Scandinavian) autonomous labour market models through a lens shaped by a continental view. (Speech by Claes-Mikael Jonsson, in BMAS 2008)

The criticisms made by Blanke (2008) resonate with this statement. One of his points is that the recognition of the right to strike by the ECJ is limited to the purpose of protecting the workers. In his view, trade unions should be given a larger role than that.

In contrast, the ECJ prioritises individual rights protection and sees the state as the standard setter. In the words of Loïc Azoulai, who spent three years in the ECJ as R f rendaire in the Cabinet of General Advocate Poiras Maduro:

What is at issue, in the eyes of the court is not so much the substance of social obligations ...; it is the way these obligations are fixed.... The State alone is habilitated to define the social model applicable to all businesses on its territory. This condemns autonomous collective actions undertaken to the same end. (Azoulai 2008)

In *Laval*, the Court characterised Swedish collective agreements as ‘not public in nature but ... designed to regulate, collectively, the provision of services’ (paragraph 98). Different interpretations of the relationship between the ‘public’ and the ‘collective’ are being contested here.

(5) Relevance of the ‘Individual Rights versus Collective Order’ Perspective

As Obermeier (2008) insists, we should not read too much in those landmark

cases, as a subsequent fine-tuning is necessary to reach a consensus between the ECJ and the Member State courts. Then, what happens after *Laval*?

It seems that the German Federal Constitutional Court (FCC) tried to avoid total confrontation and searched for compromise. On the one hand, the FCC sent warnings to the ECJ. In its Lisbon Ruling (BVerfG, 2 BvE 2/08 vom 30.6.2009), the FCC continued a circumspect argument presented in the Maastricht Ruling, in which the EU was characterised as *Staatsverbund* and a limit was set on European integration. In this ruling too, it was repeatedly suggested that the ultimate source of EU legitimacy lies in the Member States and the expansion of EU competence is allowed as far as the constitutional identity of Germany is preserved (Fischer-Lescano, Joerges and Wonka 2010).

On the other hand, the concrete criteria for judging the constitutionality of the Lisbon Treaty are rather lax. In fact, regarding the social dimensions of the EU, the FCC stance is rather conciliatory. With four judgements in mind, the FCC acknowledged the ECJ's efforts by stressing its recognition of trade union rights and ignoring the more the controversial aspects of its decisions:

The Court of Justice of the European Communities, in particular, has for some years now interpreted citizenship of the Union as the nucleus of European solidarity and has further developed it in its case law based on Article 18 in conjunction with Article 12 ECT. This line of case law represents the attempt to found a European social identity by promoting participation of the citizens of the Union in the respective social systems of the Member States. (paragraph 395)

Finally, the case law of the Court of Justice has to be taken into account, which, admittedly, has until most recently given rise to criticism of a 'one-sided market orientation' of the European Union but has at the same time shown a series of elements for a 'social Europe'. In its case law, the Court of Justice has developed principles which strengthen the social dimension of the European Union. (paragraph 398)

Thereafter, the FCC even takes the *Laval* case as an example of the 'protection against social dumping' and states: 'In its decision of 11 December 2007 [*Viking*],

the Court of Justice even established the existence of a European fundamental right to strike' (ibid.). Here, the ECJ looks like a guardian of social Europe.

In *Mangold*, where the German law on early retirement was deemed incompatible with the EU's anti-discrimination directives, this stance was further maintained (BVerfG, 2 BvR 2661/06 vom 6.7.2010). The FCC tolerated the ECJ ruling, saying, 'If the supranational integration principle is not to be endangered, *ultra vires* review must be exercised reservedly by the Federal Constitutional Court' (paragraph 66). It even said the following:

[T]he Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. (Ibid.)

It may be said that the FCC has been using the carrot-and-stick strategy with the ECJ. Still, the fact remains that the FCC has offered ground for compromise and encouraged the ECJ to recalibrate social and labour issues.

Then, will the ECJ make concessions by limiting the scope of its controversial judgements? Although any answer would be speculative at the moment, the ECJ might respond with comity⁴. In *Lufthansa v. Kumpun* (C-109/09), an age-discrimination case, the ECJ based the ruling on *Mangold* but refrained from precluding relevant German law, leaving discretion on substantial points to the national court with request for an EU-law conforming interpretation. Also in *Rosenblatt* (C-45/09), the ECJ did not preclude the German law that allows automatic termination of employment contracts under several conditions.

Nevertheless, our perspective illuminates one important issue for future developments: It is the '*Tarifautonomie*' *problematique*. The word had never been used in the ruling or the opinion of the Advocates General (AG) until recently. In 2008, AG Kokott from Germany used the expression for the first time, however quite peripherally. From 2010, AG Trstenjak (Slovenia) began to use the word more actively. In the opinion on *Commission v. Germany* (C-271/08), she tried to persuade the Court to recognize the notion of *Tarifautonomie* as a fundamental right, arguing, 'As I propose in this opinion, the right of collective bargaining and *Tarifautonomie*

are to be seen as parts of general principles of the EU law and therefore fundamental social rights (paragraph 4)'

In the ruling, the Court did not follow her argument and again prioritised the European public procurement rule over collective agreements. Indeed, it ignored the *problematique* totally, without touching on any point AG Trstenjak had made. Nor in *Rosenblatt* did the Court devote any discussion to AG Trstenjak's efforts to introduce the *Tarifautonomie* concept.

Nevertheless, she again raised the point in another recent case (C-155/10, *Williams and others*). Further, yet another AG, Pedro Cruz Villalón (Spain), took up the point in a recent opinion (C-447/09, *Prigge* u.a.).⁵

It is noteworthy that that these cases were sent from the German courts, which can be interpreted as an intentional move. The German Federal Labour Court sent three cases (C-297/10 *Hennings*, *Prigge* and *Williams*) to the ECJ and the Hamburg Labour Court sent one (*Rosenblatt*). Further, a judge in the Federal Labour Court, Karin Spelge, quite openly made this point in a German journal for labour lawyers:

[O]ur understanding of *Tarifautonomie* is totally foreign to the ECJ. (Spelge 2010, 222)

Only when the court in the last instance uses this procedure [preliminary reference] more intensively as before, we will make the ECJ more familiar with our view, especially the importance of *Tarifautonomie* for the wage setting in the German labour market. (Ibid., 223)

To summarise, the distance between the German FCC and the ECJ on social issues is not as great as has been emphasised in political discussions. One of the remaining issues is the 'collective order' dimension of social rights, most clearly exemplified in the *Tarifautonomie* *problematique*. The German courts are clearly aware of this point and send the relevant cases to the ECJ, where a few judges serve as their 'allies' for advancing this point. At the moment, the ECJ continues to disregard it altogether, which may indicate the relevance of our perspective.

5. Summary of the Argument and Implication

Let us summarise our arguments. First, EU social policy has a specific characteristic. It aims at universal protection of social minimum regardless of nationality, sex or race. For this purpose, union citizenship has been quite instrumental.

Second, in advancing this agenda, ‘creative’ ECJ judgements have played an important role. As a result of this judicial intervention, the emphasis on individual ‘rights’ has been strengthened. This is due to the nature of the ECJ as *judicial* and *supranational* body.

Third, the real conflict in recent ECJ judgements is not ‘liberal versus social’ or ‘integration versus autonomy’. The conflict is between two different aspects of social and employment policy: individual rights protection and collective public order. We have tried to demonstrate the relevance of this perspective through an analysis of four ECJ judgements and the subsequent political and judicial reactions. In particular, the *Tarifautonomie problematique* is a unique finding from this perspective.

As an extension of this argument, we may speculate that self-defeating logic is inherent in EU social policy. The more the EU tries to enhance the social aspects of integration with the help of the ECJ, the further the individualisation of social policy proceeds and the less stable the collective rule-making system becomes⁶. This can become a crucial problem for the EU, as the setting up of a corporatist-policy community is intended to bypass Member States’ resistance and to enhance the EU’s democratic legitimacy. With a weak basis of legitimacy and a high hurdle for political-consensus building in the Council, the judiciary-induced development of EU social policy may fall victim to its own (partial) success.

*Several different draft versions of the article had been presented at the Conference of the European Union Studies Association in Boston, March 2011, the General Conference of the European Consortium for Political Research in Reykjavik, August 2011, the International Conference of Europeanists in Boston, March 2012, the Annual Meeting of the Japanese Political Science Association, September 15-16, 2013 in Sapporo and the Conference of the European Union Studies Association in Boston, March 2015.

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Note

- 1 As a related argument, Mabbett (2011), who partially builds on the ‘rights revolution’ framework of American judicial politics, is insightful and thought provoking.
- 2 Tushnet (2008) argues that so-called strong-form judicial review may be less suited to the effective implementation of social rights than weak-form review. Schiller (1999: 4–5) traces the development of American labour law and argues that the ‘rights revolution’ helped to undermine the strength of the labour movement.
- 3 Other authors have expressed the specificity of the EU social policy as ‘rights-based’ (Mabbett 2005) or a ‘European Social Framework’ (Micklitz 2010). My formulation tries to illuminate other aspects of EU social policy, especially its emphasis on labour policy.
- 4 For an analysis of recent judicial dialogue between the ECJ and the German courts, see Mabbett (2010), especially pp. 4–11.
- 5 It is to be noted that these two AGs have studied law in German-speaking countries. AG Trstenjak earned her doctoral degree in Zurich and also studied in Vienna and Hamburg. AG Cruz Villalón spent two years in Freiburg for post-graduate research and was a fellow at *Wissenschaftskolleg zu Berlin* in 2001/02.
- 6 Magnussen and Nilssen (2013: 241) argue that an individual’s motivation to participate in collective action may suffer as a consequence of judicialisation.