The Effect of the Judiciary-Induced Policy Development: Collective Order versus Individual Rights in EU Social and Employment Policy

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Abstract

As in other policy areas, one of the significant characteristics of EU social policy is the critical role played by the ECJ in its policy development. This paper analyses the effect of the leading role of the judiciary in the EU.

The ECJ intervention is usually discussed using the dichotomy as “neo-liberalism” against “Social Europe”, or Community responsibility versus Member-states autonomy (F. Scharpf). Building on the argument proposed by Menedez (2010), which contrasts individualistic rights put forward by the ECJ with solidarity, this paper offers a new perspective to understand the political tension inherent in the EU social policy.

The paper illuminates two elements of EU social policy. One is the “collective order” element. This element characterizes the “form” of EU social policy, most prominent in the Articles 153 – 155 of the TFEU. The other is the “individual rights” or citizenship element, which is prominent in the “content” of EU social and employment policy. This element is further enhanced by the ECJ-induced policy development.

These two elements are potentially in conflict. This inherent contradiction is manifest in recent labour cases, namely Laval, Viking, Rüffert and Luxemburg cases. Through the examination of the cases and responses of various political and social actors, this paper contends that it is not the question of whether liberal or social Europe. Rather, the conflict is between the individual and the collective element of the social and employment policy.

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1.Introduction

As in other policy areas, one of the significant characteristics of EU social policy is the critical role played by the ECJ in its policy development. This paper analyses the effect of the leading role of the judiciary in the EU. Theoretically, the paper contends that the judiciary-induced policy making affects the “content” of the policy. Substantially, the paper introduces a new perspective of “individual versus collective” element in the analysis of EU social and employment policy and demonstrates its relevance.

The ECJ intervention is usually discussed within the dichotomy as “neo-liberalism” against “Social Europe”, or Community responsibility versus Member-states autonomy (F. Scharpf). Building on the argument proposed by Menedez (2010), which contrasts individualistic rights put forward by the ECJ with solidarity, this paper offers a new perspective to understand the political tension inherent in the EU social policy.

The paper illuminates two elements of EU social policy. One is the “collective order” element. This aspect of social and employment policy making is shared by the many, if not all, of the Member States. This element constitutes the “form” or the procedural characteristic of EU social policy, most prominent in the Articles 153 - 155 of the TFEU.

The other is the “individual rights” or citizenship element, which is prominent in the “content” of EU social and employment policy. This is necessary for the well functioning of the Internal Market. This element is further enhanced by the ECJ-induced policy development. But it is potentially in contradiction with the “collective order” element in that the protection of the individual right may sometimes erode the solidarity foundation of the collective order,

This inherent contradiction is manifest in recent labour cases, namely Laval, Viking, Rüffert and Luxembourg cases. Through the examination of the cases and responses of various political and social actors, this paper contends that it is not the question of whether liberal or social Europe. Rather, the conflict is between the individual and the collective element of the social and employment policy.

Here, the role of the ECJ is critical. The ECJ cannot, as supranational judiciary, rely on a specific understanding of “collective order”, unlike the Member State court like the German Federal Constitutional Court. It also needs to secure the Four Freedoms and protect the individual rights enhanced by the ECJ itself through expansive interpretation of the European Citizenship clauses. As a result, the ECJ has in-built tendency to give priority to the individual elements. This means that a specific configuration of policy-process, namely the leading role of the judiciary, affects the content of the policy, which is the theoretical point of the paper.

In the next section, the paper highlights the "collectivist" element in EU social policy in the

spread of corporatist policy-making. The third section illuminates the individualistic aspect and the reach of the Union Citizenship.

2.Elements of Collectivism in the EU Social Policy Domain

In this section, we will make an overview of the collectivist elements in the EU social policy domain. We first review the development of the "Corporatist policy community" (Falkner 1998) at the EU level and its application to the civil society involvement. Then we show a dynamic up- and downloading of this inclusion strategy between the EU and the national level.

(1) Construction of Collectivist Policy-Making Structure

One of the remarkable characteristics of the policy process in the EU social policy-making is the framework of corporatist involvement of employer and employee organizations. Its origin can be traced back to an initiative of Jaques Delors in the 1980s, so-called "Val Duchesse Social Dialogue". During the 1991 treaty reform resulting in the Maastricht Traty, enhancement of social policy competence was on the agenda. Due to refusal of the United Kingdom under the reign of the Conservatives, the "Social Protocol attached to the Treaty was signed by the Member States except Britain. In the article three of this "Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland", the "task of promoting the consultation of management and labour at Community level" was assigned to the Commission and it was tipulated that the Commission shall consult management and labour on the possible direction of Community action before submitting proposals in the social policy field. In the article four, the conclusion of agreement between management and labour and its implementation through a Council decision. As the British Government switched the course after the victory of the Labour in 1997, the Protocol was integrated into the Treaty by the Amsterdam Treaty. These clauses form the basis of current legislative initiatives in the social policy domain.

Under this framework, a certain number of policy decisions have been made[1]. Ten agreements have been resulted in the Council decision, most famously examplified by the Parental Leave Directive, the Part-time Work Directive and the Fixed-term Work Directive. Further, eight autonomus agreements have been concluded. As we have examples of legislation without negotiation of the Social Partners (eight cases) or after failed negotiation (two cases), it is impossible to say that the Social Dialogue lies at the centre of social policy-making. Sill, there are much larger number of non-binding agreements including code of conduct (ten cases), joint declaration (87 cases) and joint opinion (343 cases).

The Commission has been trying to expand the scope of this involvement strategy beyond the traditional social partners (Amiya-Nakada 2004). It is shown in the text of the failed Constitutional Treaty. In the Part One of the Treaty, the Title Six was named "the Democratic Life of the Union", which In the current Lisbon Treaty, the clause is inherited without change.

This clause is not a new invention but an attempt to consolidate administrative practices carried out since 1990s. The "Civil Dialogue" is a phrase dedicated to a policy dialogue mechanism established between the Commission and civil society organizations, besides the "Social Dialogue" between the social partners. In contrast to the social partners, which can be more or less clearly defined, "civil society" is more diffuse and ambiguous word. But the Commission has not intended to establish a pluralist-type relationship with this sector. Rather, they sought to build up a more targeted ann structured relationship to the sector. For that purpose, the Commission helped the sector to form an umbrella organization with financial help and policy incentive. The most prominent example here is the "Social Platform" which reagard themselves as the leading voice of the civil society sector. In the EU documents, those priviledged policy actor is referred to as "Organized Civil Society", which is called on in the targeted policy dialogue, in different from more open ones.

As shown above, the Commission, especially the Directorate-General of Social and Employment Affairs, has been pursueing the strategy of corporatist involvement of societal actors. The aim is to bypass and wealen the resistance of the Member States against social policy proposals, and to give more sense of legitimacy to the EU social policy.

(2) "Uploading" and "Downloading" of Policy-Making Structure

It is quite obvious that this corporatist policy making mechanism is far from original as it has been widespread practice in meny member states. But where did it concretly come from? This question is relevant as there are far smaller number of countries which have formally codified and legitimised that practice. Sweden, for example, does not have any constitutional basis for the corporatist policy-making even in the era of the "Swedish model". In the case of Austria, the codification of the *Sozialpartnerschaft* was attempted in the 1950s, which was deemed unconstitutional by the Federal Constitutional Court of Austria. Thereafter, the "Parity Commission" had been developed and institutionalised wthout formal structure.

Falkner (1998: 84-96) has already made clear that the introduction of those Treaty clauses was triggered by the initiative by the Belgian delegation with their "labour Committee" plan, although the Commission was making efforts for their adoption. It should be pointed out here that the Beligian initiative was effective not only in the formal, procedural sense, but also in substance. In Belgium, the bipartite National Cooperation Committe set up in 1944 had continued its work after the end of war [2]. This committee was given formal status in 1952 as the *Nationale Arbeidsraad/ Conseil National du Travail*. The mere exsistence of those consultative organs was not remarkable in the postwar west european context, like the Economic Council (1946 Constitution) and the Economic and Social Council (1958 Constituionn) of France, or the Social and Economic Council of the Netherlands (1950). What is remarkable in Belgium is its competence. The National Council of labour is exceptional in its formal legislative function. The 1968 amendment of the law (*Loi du 5 decembre 1968 sur les conventions collectives de travail et les commissions paritaires*) expanded

the power of the National Council. It was now possible to make a nation-wide collective agreement between the social partners legally binding, by an application of either the management or the labour. Based on this competence, 101 binding collective agreements have been concluded as of the end of 2010 [3]. Judging from the roles during the negotiation process and the realised structure, the corporatist policy community at the EU level can be said to be "uploaded" from Belgium.

Further, interesting examples of "downloading" of coporatist structure can be found in recent years. In France, a practice of intersectoral national agrement between management and labour had already been in place for a long time. In the new millenium, however, new elements have been added. In the parliamentary debate of the 2004 law on life-long learning and social dialogue, the Minister made his intention clear that legislative proposals on labour laws sould be first negotiated between the social partners. This proposal was given a concrete foundation by the 2007 law on the modernization of the Social Dialogue, which obliges the government to consult the social partners.

In Austria, architypical corporatist country without formal delegation, the 2008 constitutional amendmend (BGBl I 2008/2) finally made corporatism formal. This "Social Partner Clause" is clearly influenced bu the EU treaties. Not only the wording of the Treaties and the Austrian Constitution is quite similar, but also an expert drafting the amendment cofirmed that this resemblance is intentional and the new competence falls within already conferred powet by the EU law (Öhlinger 2008).

As is shown above, collectivist policy-making structure is widespread throughout Europe. It is established by the dynamic uploading and downloading processes between the Member States and the EU. Thus we may say that collectivism is at least a part of the emerging European order.

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

In contrast to the tendency described above, we can also find the elements of individualism/ individualization in the EU social policy. Below, we will substantiate this argument with several examples. The role of the ECJ is instrumental in this regard, as the "right" protection of individual is suited to transnational adjudication especially after the "Union Citizenship" acquire the status of quasi-fundamental rights.

(1) Centrality of the "Four Freedoms"

In comparison with the political process in the Member States, the EU policy process is characterised by the autonomy of each policy domain. This is due to step-by-step progress of integration and the patch-work like distribution of competence between the EU and the Member States (cf. "five policy modes" by Wallace (2010)). Further, a political commanding height of co-ordination like party government or president is lacking. Still, it is without doubt that construction of the Common Market has been the central policy concern throughout integration process. In this area, the competence given to the EU is comparatively wide and the rule-enforcing power is rather

strong. Especially, the realization of the Four Freedoms, the free movement of goods, capital, services, and people, is quite powerful a leverage against the Member States.

It is this "four freedoms" that is instrumental in the expansion of the ECJ influence. The supremacy and the direct effect of EC law has been made possible with these freedoms as the telos of integration. EU law has to be prioritised because imported goods and service can be directly or indirectly disadvantaged without uniform interpretation of EU-wide rules.

To the contrary, social policy may have been the least integrated policy domain except foreign policy. The Amsterdam Treaty is the most recent major expansion of the EU competence. In the Treaty after Nice revision, the Article three enlisting the community activities only indirectly touches upon social policy. In the Chapter 11 "Social Policy", the Article 137 stipulates the Community competence but with strict reservation 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 lock-outs are explicitly excluded from the Community competence.

In short, the core of the Member States social security system is the least integrated policy area. This is because economic disparity between the Member States is directly reflected in this policy area and the historically accumulated "Welfare Regimes" are hard to integrate due to the difference in ordering principle and methods.

(2) Union Citizenship and the Role of the ECJ

In contrast, EU-level social policy initiative is more prominent in the problems related to the free movement of the person and anti-discrimination. As the former is in close connection with the "four freedoms", EU legislation began rather early, already 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 in the Maastricht Treaty, few had 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 the Union Citizenship was deemed "supplementary" to that of the Member States.

Unexpected influence of the Union Citizenship has been created by the ECJ. The landmark case is *Grzelczyk* (Case C-184/99 Grzelczyk [2001] ECR I-6193). In this judgement, the ECJ teats the Union Citizenship as a fundamental status which can be directed against European or national regulations circumscribing foreign nationals' rights. In the subsequent cases, the ECJ has widened the scope of application of the EU anti-discrimination norm from "workers" in narrow sense to legally residing Member States nationals and thereby recognised the rights for social benefits. Further, the reach of the norm has been deepened. While non-contributory social benefits are explicitly excluded in the text of EU social security co-ordination laws, the ECJ declared that what amounted to the "social benefit" was decided by the ECJ itself, not by the Member States. In effect,

the ECJ has recognised recipients' claim for some non-contributory benefits beyond the Member States' original intention. These decisions has been justified in relation to the "four freedoms", as the wide recognition of social benefits claim is said to facilitate the movement of the workers or the people.

In anti-discrimination policy, the impact of the 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) was adopted in 2000. These directives are sometimes 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 for many countries. Further, the directives instruct the Member States to set up National Equality Bodies or to enable the some associations to intervene in the litigations on behalf of the plaintiff.

It is to be noted here that these examples, social benefit rights for the foreign Member State nationals or anti-discrimination policy, show that EU social policy is active and visible in those policy areas where minimum protection of the individual's rights is at stake. Recent (soft) policy initiatives on social exclusion (Silver 2003) or the introduction of minimum scheme (Francesco, Haux, Matsaganis and Sutherland 2009) can be read in this light . This trend is resulting from twin fundamental motor of EU legislation, the Four Freedoms and the Union Citizenship. In other words, by securing common social minimum for the European citizen regardless of nationality, religion and other attributes, freedom of movement and "Social Europe" is made compatible. This policy direction in clearly stated in the explanation of proposal for a regulation of on 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"

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

(1) Citizenship versus Collective Order

Universalised minimum protection based on the Union Citizenship might potentially be a breakthrough for the reconstruction of the "Social" at the EU level. In reality, the relationship with the existing social security system of the Member States is more of clash rather than complementarity or mutual reinforcement. This is in stark contrast to the corporatist policy-making framework analysed in the second section of the paper, where the dynamic compatibility between the EU and the Member States level comes to the fore.

A 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, in which not just the

Treaty itself but also then discussed infamous "Bolkenstein" service directive (Directive 2006/123/EC) was criticised as "unsocial".

Still, there are examples in which the EU has played a role of an innovator or a promulgator of social policy innovation, as in the cases of anti-discrimination or social exclusion. Even in these cases, the 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 the supplementary pension, 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 supplementary pension scheme in Germany. It is to be noted that he has been the functionary of the Unon of the Chemical Workers (IG Chemie, Papier, Keramik) which has most developed system of supplementary pension negotiated with the management.

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

The "rights based" nature of EU social policy is strengthened by the leading role of the ECJ in policy development. The Judiciary in a given Member State may find a specific type of social order as "their own" order and make due consideration to it even in relation to individual's fundamental rights. In the growing diversity of social systems and norms, the ECJ cannot afford this type of consideration. As the task of the ECJ is to find out common framework for *all* the Member States, they cannot rely on a specific understanding of public order. In this regard, individual's "fundamental rights" are quite useful and powerful instrument. It is common to the Member States and can be used against ordinary (Member States) laws because fundamental rights are supposed to be superior (Höpner 2008). In the next subsection, we will sketch concrete examples of this kind of clash.

(2) Four ECJ judgements in Focus

In this subsection, we analyse four recent ECJ judgements (*Viking*, *Laval*, *Rüffert*, *Luxemburg*) and political reactions to them. These judgements have been perceived as a severe blow to the existing Member States social system and invite criticism from different angles. By the

analysis of the judgements and reactions to them, we try to illuminate the importance of clash between individualistic social policy and collective order.

The background of the conflict is the Posting Directive (Directive 96/71/EC). As a matter of principle, free movement of persons and services makes a company possible to send workers to other countries under the working condition which only fulfil the minimum standard of the sending country, not that 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 such "core" of working condition as maximum work periods, minimum rates of pay or provisions on non-discrimination is concerned. The minimum condition 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 is easily conceivable, which Member States rules fall within "the terms and conditions of employment" of this directive is the 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, trade union's right to strike and the prevention of social dumping as justifiable ground for the 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 concrete judgement of the relevant action.

In *Laval* (C-341/05, Laval un Partneri Ltd vs. Svenska Byggnadsarbetareforbundet and Others [2007] ECR I-5751), the point was whether Swedish law implementing the directive is valid or not. The Swedish implementing law allowed the social partners to define the level of minimum wage, as is common to 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 striking action of Swedish trade unions based on this understanding was deemed illegal.

In *Rüffert* (C-346/06, Dirk Rüffert v. Land Niedersachsen [2008] ECR I-1989), the governments action as a party of contract was contested. German *Land* government of *Niedersachsen* made the application of collecive agreement in that land mandatory to the company accepting a public construction order. As a company did not apply this to its subcontractor from Poland, the *Niedersachsen* sued the company. Referred by German court, the ECJ answered that securing of minimum working condition through public contract was not acceptable as a means setting minimum standard defined by the directive and therefore illegal.

Finally in *Luxemburg* (C-319/06, Commission v. Grand Duchy of Luxemburg [2008] ECR I-4323), the Commission sued the government of Luxemburg for her impropoer implementation of the directive in putting unnecessary restriction on the freedom of movement by applying the wage slide to the minimum wage or requiring a contact person for monitoring. The ECJ sided with the Commission, saying that compliance to the directive can be sufficiently monitored by the sending

country and that only the minimum condition has to be clearly defined.

Through these four cases, the limit of the defensive action by the labour or the government against service provision with low-paid workers is more precisely defined. The ECJ recognised trade union's right as fundamental right and accept governments' justification of restriction on the risk of social dumping, at least as a matter of principle. Nevertheless, all those protective measures were denied their legality because minimum standard has to be literally "minimum" and clearly defined by law or declaration of universal applicability, according to the ECJ.

(3) 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 judgement and advocating for adoption of the "Social Progress Protocol" to be attached to the Lisbon Treaty. The European Parliament showed their concern in the resolution "Challenges to collective agreements in the EU" (2008/2085(INI)).

However, the Commission did not take concrete action. The relevant Commissioner Vladimír Špidla answered in the EP debate as follows:

> "The social partners are best placed to rise to the challenge and to propose possible improvements. Therefore, the Commission has invited the European social partners to examine the consequences of increased mobility in Europe and the judgements of the European Court of Justice. I am delighted that the European social partners have taken up the challenge".

They just organised a forum on "Protection of workers rights and economic freedoms: Problems, pitfalls and challenges" in October 2008 with the participation of the government representatives (Germany, Sweden, Luxembourg), officials of European interest groups and researchers. Based on this discussion, a joint report was issued in March 2010 (Report on Joint Work of the European Social Partners on the ECJ Rulings in the Viking, Laval, Ruffert and Luxemburg Cases, 19.03.2010). In spite of its title, differing view of management and labour is often juxtaposed in the report. The setting up of an expert commission was agreed by the Council in 2008 (C(2008)8604 final, Brussels, 19.12.2008), hitherto with no visible result.

The European Council issued the "Solemn Declaration on Workers' Rights, Social Policy and other issues" in June 2009, in view of the second referendum on the Lisbon Treaty in Ireland. In the declaration, it is stated that "the Union recognises and promotes the role of the social partners at the level of the European Union, and facilitates dialogue between them, taking account of the diversity of national systems and respecting the autonomy of social partners" (Presidency Conclusions, Brussels, 10.07.2009, 11225/2/09 rev 2). Further action is lacking.

(4) Reactions in the Member States: Case of Germany

Then, how was the reaction of the Member States who was denied her policy or policy-making method? The Swedish Government had been adaptive. In the Council on Employment, Social Policy, Health and Consumer Affairs in March 2009, the Swedish Minister of Employment expressed his dissatisfaction with the conclusions on the rulings by the ECJ but opposed to the amendment of the directive, as it might cause years and years of legal uncertainty and it would result in less flexibility (Council of the European Union, 13081/09, Brussels, 10.09.2010).

On the contrary, the reaction of the German public opinion had been intense, already before the Rüffert judgement. The Federal Ministry of labour and Social Affairs organised a symposium in June 2008 titled "the Influence of the Judgements of the European Court of Justice on the labour Law of the Member States" (BMAS 2008), inviting experts which include an ECJ judge. More influential in the public discussion was the intervention of prominet public figures. Fritz W. Sharpf, who is one of the most famous German reserachers on the EU, published an essay with a provocative title "the Only Way is not to Follow the ECJ" (Scharpf 2008) in a magazin of the German Trade Union Federation. In that article, he suggested a possible rejection of the doctrin of supremacy of the EU law. It was consonant with a similary anti-ECJ essay "Stop the ECJ!" by the former President Roman Herzog, although this had been made in a different context. In this way, the role of the ECJ was highlighted.

On the occasion of the debate on the Lisbon Treaty in the German Federal Parliament, the Left Party made a vocal opposition to 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-comatible" and criticised the incumbent government saying:

> "[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 applicablity 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 the ratification by the parliament, however, the Social Democrats revised the course and issued a joint motion with the trade unions urging the addition of "social progress clause" to the Treaty (Für ein Europa des sozialen Fortschirtts: Gemeinsames Positionspapier von SPD und DGB; Deutscher Bundestag, 16. WP., 224. Sitzung, 28.5.2009, Plenarprotokolle, 16/224, 24712B-24717C).

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

"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 fi rst sentence of this paragraph in order to safeguard and improve working and economic conditions"

The Federal Constitutional Court has interpreted this text as meaning the delegation of core domain of the collective agreement system itself to the social partners by the state (Löwisch 1989). In the seminal judgement the Federal Constitutional Court states "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 is 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, in which the autonomous conflict resolution did not function smoothly and the governments were often forced to resort to compulsory arbitration (cf. Nautz 1985). Due to this historical background, the (West) German indutrial relations is charcterised by the scarce use of governmental instruments as wage freeze. The declaration of general applicability, which may be invoked as substitute for governmental regulation, has been issued only sporadically. In short, the norm of government restraint in the regulation of industrial relations and autonomous rule-making by the social partners was established and took root so firmly as a kind of constitution in material sense.

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

(5) The Real Stake of the Conflict

Rogre Liddle, former advisor to Tony Blair, summarised Scharpf's argument as "warning that the European project represents a judicial entrenchment of neoliberalism 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-liberalization from the eastern enlargement after 2004, as the new Member States with generally lower social security standard and looser regulation have more to gain from the liberalization of the older Member States. Höpner proposed a framework to analyse political influence on the ECJ judgements and suggested that the nationality of the judges may influence the decision (Höpner 2009). In fact, in the cases shown

above, the judges from the new Member States occupied more than a half in some cases. In the EP debates, the nationality is clearly discernable 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"

In our view, the four judgements can be interpreted in line with the previous ones. In *Viking*, the Court states 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 reflagging of the Rosella were jeopardised or under serious threat (paragraph 83, emphasis added)". This means that what can be protected against four freedoms is a specific interest of individual workers (Kocher 2008). This corresponds to a series of anti-discrimination decisions which protected individual's social rights.

In *Laval*, *Rüffert* and *Luxembourg,* the issue is almost the same; "What constitutes an enforcable minimum standard?" In *Laval*, Swedish tradition of autonomous regulation of the social partners is denied. In *Rüffert,* an indirect way of the government procurement falls outside justifiable minimum. In *Luxembourg*, too, the blanket recognition of universally applicable collective agreements in the Luxembug Law is 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 for controversy? From the viewpoint of this paper, It is an individual-right orientation and relative disregard for the collective order aspects in those judgements. In the above mentioned symposium convened by the German government, the representative of the Swedish Trade Union expressed their 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 State 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 recoginition of the right to strike by the ECJ is limited for the purpose of the protection of the workers. In his view, trade unions should be given greater role than that.

In contrast, the ECJ prioritses 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 Référendaire in the Cabinet of General Advocate Poiares 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 interpretation of the relationship between the "public" and the "collective" is contested here.

5. Summary of the Argument and Implication

Let us summarise our arguments. First, the EU has a structure of corporatist policy-making involving the social partners and civil society organizations. It is an import from the Member States, but exceeds most of them in its semi-legislative function and wider coverage including civil society. In this regard, the EU and the Member States share a common element.

Second, EU social policy has a specific characteristic. It aims at universal protection of social minimum regardless of nationality, sex or race. For this purpose, the Union Citizenship has been quite instrumental.

Third, two elements shown above are in conflict. The real issue of 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.

As an extension of this argument, we may speculate that self-defeating logic is inherent in EU social policy. The more the EU tried to enhance the social aspects of integration with the help of the ECJ, the further individualization of social policy proceeds and the less stable collective rule-making system becomes. It can be a crucial problem for the EU, as the setting up of the corporatist

policy-community is intended to bypass Member States' resistance and to enhance democratic legitimacy of the EU. With weak legitimacy basis and high hurdle of political consensus building in the Council, the judiciary-induced development of EU social policy may fall victim to its own (partial) success.

Notes

[1] The number is based on the Social Dialogue Texts Database on the Commission website as of February 25, 2011 <ec.europa.eu/social/main.jsp?catId=521&langId=en>.

[2] The following overview of Belgian industrial relations is based on Humblet (2005, 31-36) and Mommen and Aldcroft (1994, 75-82).

[3] The data is taken from the National Council website as of February 25, 2011 <www.cnt-nar.be/FCCT-liste.htm>

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