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

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Paper prepared for delivery at the Fourteenth Biennial Conference of the EU Studies Association, March 5, 2015 in Boston.

Draft: Any comments are welcome

Abstract

This paper is an attempt to connect the internal and the external aspects in the transformation of citizenship, building on Christian Joppke's hypothesis on the 'lightening of citizenship'. Taking social policy developments in the EU as an example, the paper contends that lightening of citizenship entails universalization and lightening of social policy. It also highlights the leading role of the CJEU in this transformation.

Substantially, we argue that universalisation and lightening of social security corresponds to functional requirement of the internal market and the increasingly diversified life career of its citizenry. In this regard, 'lightening' should be conceptually separated from mere 'retrenchment'. This direction has been augmented by the intervention of the ECJ, whose judgements has built on the Union Citizenship and enhanced individual social rights protection. Featuring citizenship as a universal status, however, individual rights can be protected, but collective ordering of social relations would take a back seat.

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1. Introduction

'Citizenship' has frequently been used as a key concept in Migration Studies. It has also become commonplace to feature the concept in Welfare State Studies, especially in these ten years (e. g. Ferrera 2005). Marshallian linear evolutionary view of citizenship is, however, of little help in the analysis of current social policy development in Europe any more. 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 in regard to the benefit s/he would expect from the state s/he resides in. This paper is an attempt to connect both aspects of the transformation.

In concrete, this paper builds on Christian Joppke's hypothesis on the 'lightening of citizenship' (Joppke 2010a; 2010b). My initial hunch is that lightening of citizenship would have 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 lightening of citizenship entails universalisation and lightening of social policy. In other words, the lightening of citizenship coincides with the lightening of social security.

As this point is already suggested by Joppke, the paper highlights the roles of the EU institutions in this transformation. Especially, this paper features the effect of the leading role of the judiciary in the EU and contends that the judiciary-induced policy making affects the content of the policy.

Substantially, we argue that the universalisation and lightening of social security corresponds to functional requirement of the internal market in the first place, but it is also a plausible answer to the increasingly diversified and de-stylised life career of its 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 ECJ, whose judgements has built on the Union Citizenship and enhanced individual social rights protection.

This trend may be called 'rights revolution' European style, but not without price. Featuring citizenship as a universal status, individual rights are protected, but collective ordering of social relations, which has been an important part of the social rights, would take a back seat. Therefore, the paper contends that a new perspective of "the individual versus the collective" is relevant in the analysis of EU social and employment policy.

After making a brief clarification of the concepts used in the next section, we examine the development of the EU social policy with an emphasis on the role of the ECJ and the Union Citizenship. This section illuminates the individualistic aspect and the reach of Union Citizenship. Against this background, we analyse four ECJ rulings and contrast this development with the 'collective ordering' aspect

of social rights of the Member States, taking Germany as a main example. The final section summarises our argument and its implication.

2. Preliminary Consideration

(1) Conceptual Clarification of 'Citizenship'

The concept of 'citizenship' has been used in different connotations, depending on disciplines and theoretical standpoints of authors. In this paper, we use the term in rather narrow sense, in other words, concentrate ourselves on its legal aspect. In this understanding, 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 policy developments in the EU social policy, in relation to the 'Citizenship of the Union' now defined in the Treaty on the Functioning of the European Union (Article 20). It means that we treat the concept more in a positivist manner than as a theoretical conception.

Focus on the legal aspect of the Union Citizenship is also justified by its nature. Considering the nature of the EU as a supranational polity, the nature of membership to that entity can only be a thin one. Thicker meaning of citizenship concerning the rights and duties of a person differs in each Member States (cf. Pfeifer 2009). Therefore, in the analysis of the Union Citizenship, narrow focus on the legal aspect is relevant.

Further, the development of the Union Citizenship has owed much to the judgements of the ECJ. Thus, it is only natural to put the legal aspect into the centre. This point is further explored in the next subsection.

(2) Effect of the ECJ Intervention

The second point concerns the political role of the ECJ. In the past twenty years, we have witnessed the growing field of interdisciplinary study on the 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 been offering theoretical perspectives that touch on the central concerns of political studies, like legitimacy, democracy and so on (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 the norm/rule setting, in contrast to the national experiences 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 is, although related to those issues, different. We concentrate our focus on the effect of the ECJ intervention on policy content[1]. It is true that judiciary may have substantial policy impact,

[1] As a related argument, Mabbett (2011), who partially builds on the "rights revolution" framework of American judicial politics, is insightful and thought-provoking.

but it does not mean 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 an 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)

This point is contrasted with the German case by Abraham (2005: 9, note 24) which notes the policy effects of the 'Rights Revolution' in the US 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 US entails a specific policy effect[2]. In our case, too, it can be hypothesized that the 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 for the ECJ would be more to protect the rights of a person in a concrete case than to forge a collective compromise or decide on future policy direction. Further, rights may be argued to be more universal and common to the Member States (cf. Krebber 2006). In addition, it needs to secure the "four freedoms" and protect individual rights enhanced by the ECJ itself through expansive interpretation of the European citizenship clauses.

'Citizenship' plays a great role here. As is shown below, the Union Citizenship introduced by the Maastricht Treaty has become a powerful conceptual leverage for the ECJ to pursue a transnational answer. For that purpose, the meaning of the Union Citizenship should be universal and abstract. Thus the rights conferred on this status become *individualist* and *universal*. Then, if the individual rights protection covers social rights, does it suffice to the realisation of the Social Europe? In the next subsection, we elaborate on that topic.

(3) Liberal vs. Social and Individual vs. Collective Dichotomies

[2] Tushnet (2008) argues that so-called strong-form judicial review may be less suited to the effective implementation of social rights than week-form review. Schiller (1999: 4-5) traces the development of American labour law and and argues that the 'rights revolution' helped to undermine the strength of the labour movement.

The social dimension of the EU has been repeatedly discussed in these twenty years. It is usually discussed within the dichotomy of "neo-liberalism" against "social Europe", or community responsibility versus Member States' autonomy. These dichotomies surely capture an aspect of the issues that confront the European Union.

However, they give us little guidance on several important cases. For example, it is the EU which introduced the anti-discrimination issue in many of the 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 like denial of national subvention or the ban on national non-tariff barriers consistently?

Building on the argument proposed by Menedéz (2010), which contrasts individualistic rights with solidarity, this paper offers a new perspective 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 policy making is shared by many, if not all, of the Member States. This element also constitutes the "form" or the procedural characteristic of EU social policy, most prominent in the Articles 153–155 of the Treaty on the Functioning of the European Union (TFEU). There is, however, an inherent limit in this regard. In the Member States, courts can rely on historically constructed shared understanding on the desirable social order. To the contrary, the ECJ as a supranational actor cannot rely on a specific understanding of "collective order", as there are different traditions among the Member States.

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. As a result, the ECJ has a built-in tendency to give priority to the individual elements.

But it is potentially in contradiction with the "collective order" element in that the protection of individual rights may sometimes erode the solidarity foundation of the collective order. For example, concerning the Swedish welfare state, Trägarth and Svedberg (2013) point out "the extraordinary breadth of social rights" and "the equally stunning [...] lack of individual rights (p. 223)" and assert that "social rights in Sweden have primarilly 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 lawa) not rights at all (p.229)".

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.

This inherent contradiction is manifest in recent labour cases, namely the 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 Europe is liberal or social. Rather, the conflict is between the individual and the collective element of the social and employment policy. In the next section, we first examine the individualist policy development in more detail.

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

We can find the elements of individualism and individualisation 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 the individual is suited to transnational adjudication, especially after the "Union Citizenship" acquired 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 coordination, 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 the integration process. In this area, the competence given to the EU is comparatively wide and the rule-enforcing power is rather strong. In particular, the realisation of the "four freedoms"—the free movement of goods, capital, services and people—is quite powerful leverage against the Member States.

It is these four freedoms that are 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 services 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. After the Nice revision, Article 3 of the treaty enlisting the community activities only indirectly touches upon social policy. In Chapter 11, "Social Policy", 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 initiatives are 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 clause 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 treats Union citizenship as a fundamental status that can be directed against European or national regulations circumscribing foreign nationals' rights. In subsequent cases, the ECJ has 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 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 have been justified in relation to the four freedoms, as the wide recognition of the social benefits claim is said to facilitate the movement of workers or 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), were adopted in 2000. 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 for many countries. Further, the directives instruct Member States to set up National Equality Bodies or to enable 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 the twin fundamental motors of EU legislation, the four freedoms and Union citizenship. For example, this policy direction is clearly stated in the explanation of proposal for a regulation 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."

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.

As for minimum income, the starting point is the 1992 recommendation of the council (92/441/EEC, 24.6.1992) recommends the Member States "to 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

the 'rights' is rather declaratory, in which the emphasis is not on giving concrete subjective rights to a person but on the obligation of the Member States to give due consideration to that aspect.

More substantive input was made in the late 1990s and early 2000s. Spurred by the electoral success of the Social Democratic Parties across Europe, new policy paradigm has emerged. It is often called '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, which is also visible in the composition of the policy community surrounding the European Commission (Amiya-Nakada 2012).

After an initial optimism in the Lisbon Strategy had faded, future viability of the 'European Social Model' was discussed and more job-oriented second cycle has begun. In fear of the 'backlash', Social Platform, the umbrella organization of the social policy NGOs, had advocated for the strengthened role of the EU. Some of the headlines of its newsletter said, "[f]ocus on fundamental rights, not on models, " or "[i]t's all about fundamental value," which reflects their strategy to use 'rights' as leverage.

This tendency to use the 'rights' as the main argumentative pillar continues. In response to the so-called Social Investment Package published by the Commission this year (COM (2013) 83 final, 20.2.2013), European social policy NGOs stress the point again. For example, Social Platform said, "a fundamental rights approach is a precondition of such policies."(Social Platform 2013) The European Anti-Poverty Network, one of leading European Social NGOs, also reiterates: "The SIP must confirm a rights-based approach and a commitment to universalism" (EAPN 2013, 7).

In this argumentation, reference to the 'rights' is not declaratory but substantial in the sense that it aims to establish the individual's 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 found active in a specific policy domain, societal actors try to adapt to the constellation and begin to use the judicial avenue as an effective tool to bypass the stagnant political route and realise their own agendas. Throughout this process, argumentation, strategy and objective of that 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 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 a clash rather than complementary or mutual reinforcement.

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 the infamous "Bolkenstein" service directive (Directive 2006/123/EC) were 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 the supplementary pension scheme in Germany. It is to be noted that he has been the functionary of the Union of the Chemical Workers (IG Chemie, Papier, Keramik), which has the most developed system of supplementary pension negotiated with the management.

We contend 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 the "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)[3] . To the contrary, the social and employment protection system of each Member State 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 seminal book, *Three Worlds off Welfare Capitalism*, in which welfare regimes are classified according to leading political groups and their inherent logic. In short, it is 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 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, individuals' fundamental rights are quite useful and powerful instruments. They are common to the 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 political reactions to them. These judgements have been perceived as a severe blow to the existing

[3] Several authors have given different expressions on the specificity of the EU social policy, as 'rights-based' (Mabbett 2005), 'European Social Framework' (Micklitz 2010). My formulation here tries to illuminate other aspects of EU social policy than those, especially its emphasis on labour policy.

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 this 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 it possible for a company to send workers to other countries under the working condition that only fulfils 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 the core aspects of working conditions such as maximum work periods, minimum rates of pay or provisions on non-discrimination are 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 State 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, the trade union's right to strike and the prevention of social dumping as justifiable grounds 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 v. Svenska Byggnadsarbetareforbundet and Others [2007] ECR I-5751), the point was whether Swedish law implementing the directive was 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 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 party of contract was contested. German *Land* government of *Niedersachsen* made the application of collective agreement in that land mandatory to the company accepting a public construction order. As the company did not apply this to its subcontractor from Poland, the *Niedersachsen* sued the company. Referred by the German court, the ECJ answered that securing minimum working conditions through public contract was not acceptable as a means of setting minimum standards 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 its improper implementation of the directive in putting unnecessary restrictions 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 rights as fundamental rights and accepted 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 the minimum standard has to be literally *minimum* and clearly defined by law or 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 judgement and advocating for adoption of the "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]).

However, the Commission did not take concrete action initially. The European Council issued the "Solemn Declaration on Workers' Rights, Social Policy and Other Issues" in June 2009, but did not give an impetus for further action.

It was the political initiative taken by the Commission President Barosso that suddenly opened a prospect for the change in the legal texts. One day before the investiture in the European Parliament vote for his second term, he had 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 of the 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 DG Social and Employment Affairs has been rather reluctant, given the controversial and delicate nature of the current 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 is suggested that a new regulation, Barosso's political priority, is almost impossible. In its place, the suggestion given in the Monti Report is 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 co-ordination and information sharing (Monti 2010, 68-70). Currently, the solution along this line has been

pursued.

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

On the contrary, 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 titled "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, who is one of the most famous German researchers on the EU, published an essay with the provocative title "The Only Way is Not to Follow the ECJ" (Scharpf 2008) in a magazine of the German Trade Union Federation. In that article, he suggested a possible rejection of the doctrine of supremacy of the EU law. It was consonant with a similarly 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-compatible" 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 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 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 a "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 sensitivity 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 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 first 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 a core domain of the collective agreement system itself to the social partners by the state (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, 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 industrial relations are characterised by the scarce 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 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 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 is concerned, a similar law in the Berlin City was already sanctioned by the Federal Constitutional Court, which added further fuel to the fire.

(4) The Real Stake of the Conflict

Roger Liddle, former advisor to Tony Blair, summarised Scharpf's argument as "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 political influence on the ECJ judgements and suggested that the nationality of the judges may influence the decision (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, like 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 EP 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 the 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 a 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 the social partners was 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 Luxembourg 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 our viewpoint, 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 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 for the purpose of the protection of the workers. In his view, trade unions should be given a greater 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 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 interpretations of the relationship between the "public" and the "collective" are contested here.

(5) Relevance of "Individual Rights vs. Collective Order" Perspective

As Obermeier (2008) insists, we should not read too much in those *landmark* cases, as the 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 search for a 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 continues a rather watchful argument presented in the Maastricht Ruling, in which the EU was characterised as *Staatsverbund* and a limit was set to European integration. In this ruling too, it is repeatedly suggested that the ultimate source of legitimacy of the EU 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, concrete criteria for the judgement of constitutionality of the Lisbon Treaty are rather lax. In fact, regarding the social dimension of the EU, the FCC stands rather conciliatory. With four judgements in mind, the FCC appreciates efforts of the ECJ by stressing the recognition of the trade union rights by the ECJ and ignoring more controversial aspects, as follows:

> "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 the social Europe.

Further, in *Mangold*, where the German law on early retirement was deemed incompatible with the EU anti-discrimination directives, this stance was maintained (BVerfG, 2 BvR 2661/06 vom 6.7.2010). The FCC tolerated the ruling of the ECJ, 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). They even say:

"[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 toward the ECJ. Still, the fact remains that the FCC has offered ground for compromise and encouraged the ECJ to implement calibration in the social and labour issues.

Then, will the ECJ make concessions by limiting the scope of the controversial judgements? Although any answer would be a speculation at the moment, the ECJ might be responding with comity.[4] In *Lufthansa v. Kumpan* (C-109/09), an age-discrimination case, the ECJ based the ruling on *Mangold*, but refrained from precluding relevant German law, leaving the discretion on substantial points to the national court with request of EU-law conform interpretation. Also in *Rosenbladt* (C-45/09), the ECJ did not preclude the German law that admits automatic termination of employment contract under several conditions.

Nevertheless, our perspective illuminates one important issue in the future development. It is the "*Tarifautonomie*" *problematique.* The word had never been used in the ruling or the opinion of the 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:

[4] For an analysis of recent judicial dialogue between the ECJ and the German courts, see Mabbett (2010), especially pp. 4–11.

"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 European public procurement rule to the collective agreement. They even ignore the *problematique* totally, without touching on any point AG Trstenjak had made. Nor in *Rosenbladt* did the Court spend any words on AG Trstenjak's effort to introduce the *Tarifautonomie* concept.

However, she continued raising 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 one (*Rosenbladt*). 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 so great as is highlighted 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 relevance of our perspective.

5. Summary of the Argument and Implication

Let us summarise our arguments. First, the 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' judgements of the ECJ have played a great role. As a result of this judicial intervention, emphasis on individual 'rights' are strengthened. This is due to the nature of the ECJ as *judicial* and *supranational* body.

[5] It is to be noted that these two AGs have an experience of legal study 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.

Third, the real issue concerning 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 tried to demonstrate the relevance of this perspective through the analysis of the four ECJ judgements and 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 tried 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 becomes[6]. 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 a 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.

*This paper draws on my earlier paper, which was presented at the 12th Biennial Conference of the European Union Studies Association in Boston, March 2011, the 5th General Conference of the European Consortium for Political Research in Reykjavik, August 2011, and the 19th International Conference of Europeanists in Boston, March 2012. I am grateful for the comments from Jo Shaw, R. Daniel Kelemen, Fritz W. Scharpf, Gerda Falkner and Stijn Smismans at the sessions.

[6] Magnussen and Nilssen (2013: 241) argues that the individual's motivation to participate in collective action may suffer as a consequence of judicialisation.

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*An earlier version of the paper was presented at the Annual Meeting of the Japanese Political Science Association, September 15-16, 2013 in Sapporo.