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The Limits of Judicializing Transnational Welfare

European integration, notably the single market, has much profited from case law of the European Court of Justice, relying on the Treaty's many policy goals under its supremacy and direct effect. After the introduction of EU citizenship rights in the Treaty of Maastricht, case law of the Court pushed European integration towards opening national entitlements of Member states' heterogeneous welfare states for individual free movement. Case law based on free movement rights, the prohibition to discriminate along national lines, and citizenship has incrementally sought building social Europe by granting access to each other's welfare systems. In the light of rising political contention, the Court has halted its extensive case-law development in recent years, resulting in pronounced criticism from the community of EU law scholars. In this paper, I challenge the expectation that judicialization can be an avenue for building social Europe. This is not only because of expectations of 'a tragedy of the commons', where the opening of national welfare may risk undermining its financial basis. Given heterogeneous national welfare regimes, I argue that non-discrimination is a poor guide for the Court to further transnational welfare. Rather, new inequalities result. Integration through law that was so successful in building the single market faces much higher, and particularly normative problems when individual citizens are concerned. The extent of legal uncertainty accompanying policymaking by the Court could imply that individuals are better off with clearly defined rights.

Introduction[1]

EU citizenship was introduced with the Treaty of Maastricht. The new Article 8a of the Treaty establishing the European Community (TEC) gave citizens 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' With the explicit referral to the subsequent specification in secondary law, member states held EU citizenship to have a more symbolic character (Aziz 2009). But for the EU law community, for the European Court of Justice, and later for the European Commission, the insertion of EU citizenship held the promise to expand the privileges that the Treaty of Rome includes for workers to all EU citizens.

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The free movement of workers was a late addition to the Treaty of Rome, alongside the other freedoms of goods, services, establishment and capital (Romero 1993). Until today, the EU is unique among regional organisations in granting unconditional free movement rights for workers. Already in 1958 regulations no. 3 & 4 set out rules for the coordination of social security for migrant workers, as the Treaty of Rome left the responsibility for social security in the hands of the member states. Labour migration in the EU could be given the necessary social protection by allowing the accumulation of entitlements in different member states and by setting up mechanisms of coordination among the national systems. At the same time, social assistance was left out of the scope of the regulation. The rules on the coordination of social security have been reformed multiple times in the 60 years of their existence. For many legislative reforms, the case law of the European Court of Justice was instrumental. Ever so often, member states were seen to introduce welfare benefits but attempted to exclude EU workers, despite their obligation to non-discriminatory treatment.

Integration through law has been a steady supporter of European integration. Based on the establishment of direct effect and supremacy in the 1960s, the Court could shape European integration, given the over-constitutionalisation of the EU polity, where the Treaty includes many policy goals that are subject to ordinary law in the member states (Grimm 2017). A broad definition of workers established by case law gives equal treatment with nationals to those working few hours. Applying the principle of non-discrimination on the basis of nationality from Article 18 TFEU to national welfare systems could open these to EU citizens.

Extending rights of EU citizens to nationally financed welfare has been a court-driven process. In this paper, I challenge the expectation that judicialization, i.e. shifting decisions to courts and judicial means (Hirschl 2008), is suited to serve as a major pillar for building social Europe. Essentially, the prohibition to discriminate along national lines allows the ECJ to open social entitlements that are financed at the national level. A dominant concern of the literature has been that this opening risks undermining the financial basis of national welfare, akin to a 'tragedy of the commons'. While this concern has been often refuted, it may hold under adverse conditions, as I show. The judicialization of welfare entitlement, however, faces further problems that are hardly discussed. Given heterogeneous national welfare regimes, non-discrimination is a poor guide to the Court to bring about equality, I argue. Building social Europe on case law leads to new inequalities: inequalities among the heterogeneous national welfare systems that cope differently well, and inequalities among individuals seeking rights in other member states. It is striking that different to the situation in the US, EU lawyers have hardly engaged in a critical discussion of how judicial review can further social rights (Somek 2012). This is despite the origins of the 'integration through law' project that lie in the comparison with the US system (Cappelletti/Seccombe/Weiler 1986).

In the following, I start by elucidating the background of the promise of EU citizenship and summarize how case law has helped to expand social rights of EU citizens, the scope of which has remained contested, however. This process of judicialization has slowed down markedly with the judgments of the Court since late 2014 starting with C-333/13 *Dano*, a judicial backlash that is related to the political backlash to integration that culminated in Brexit (Blauberger, et al. 2018; Davies 2018). Following, the problems of judicialization shall be discussed, starting with the most well-known fear of an overuse of welfare. On this basis, less obvious disadvantages shall be discussed, particularly with view to the individual level.

Judicializing social rights: from theory to practice

Just as welfare, EU citizenship is tied to member states. It is here that social belonging, redistribution, and solidarity are primarily rooted (Bellamy/Lacey 2018). Not being based on a political community that would allow the forming of such republican values, the EU faces the problem of how it can construct legitimacy only on the basis of individual rights (Scharpf 2009). In the following, this question is discussed theoretically, and then it is asked which rights are being allocated at the European level.

EU constitutional theory and citizenship

The unsolved legitimation of European integration is one of the warhorses of European Union research. As long as decisions on integration were taken by member-state governments unanimously, legitimation could be constructed via the democratic political systems of member states. The switch to qualified majority voting with the Single European Act, effective from 1987 onwards, broke this chain of legitimation to the member states, requiring an independent source of legitimacy of the European level. But this legitimation problem existed also before, given the role of the Court in building Europe. The unanimity requirement among member states had blocked the decision-making process, allowing the Court to foster integration through law uninhibited from political interference, as judicial decisions could hardly be overruled (Weiler 1981; Weiler 1991).

The long-drawn and multi-faceted discussion on the legitimation deficit of European integration cannot be summarized. But for our topic, the importance of the missing demos of the EU is crucial (Weiler 1995), because the introduction of EU citizenship rights under Maastricht was linked to furthering such a European demos. Granting rights to EU citizens as citizens and not only market participants would foster allegiance to the EU polity. However, the rights to welfare that became part of EU citizenship are those that are financed by the member states, implying that EU rights to national welfare simultaneously loosen the nexus of allegiance of national citizenship and welfare. The legitimation function of the national welfare state for the national polity explains the reluctance of member states to cede control over the financing and services of their welfare states to the EU.

Because of the two-level character of the EU polity, therefore, welfare rights for EU citizens are particularly challenging. This raises the question of how the granting of these rights is discussed in EU constitutional theory. ‘Broadly speaking, normative constitutionalism remains centrally concerned with the problem of how to reconcile constitutionalism (the protection of minority and individual rights and particular substantive political values) and democracy (a mode of government that places ultimate political authority in popular majorities)’ (Whittington 2008: 284). Constitutions differ in the extent to which they grant positive rights, with newer constitutions typically including social rights, whereas classical constitutions, like the one of the US, rather focus on individual liberties that are being guaranteed against the state. Already in the 1920s, Kelsen pointed to the problem that judicial review puts a constitutional court into a similar position to that of the legislator, however a negative legislator drawing out limits (Bornemann 2007). In this view, if constitutional courts have the power of judicial review over legislative acts, broad constitutional rights bring courts into direct competition with the legislator, spelling out entitlements. But because positive social rights are conferred by a community to its members, they need to be shaped politically. Redistributive measures are much more closely tied to the power of the purse of parliaments so that these positive rights require a different legitimation than negative rights that constrain the state towards the individual.

Following the new deal legislation and the civil rights movement, US constitutional theory has seen quite a lively debate on welfare rights (Liu 2010; Forbath 2001). Part of it has been the consideration whether strong social rights can only be paired with weak judicial review as one way to limit interference of the judiciary with the prerogative of the legislature (Tushnet 2003). Adjudicating welfare rights brings the judiciary into potential conflict with the legislature having the power of the purse. This conflict also figures prominently in the seminal writing of Frank Michelman (1979) on the topic. Without further summarizing this literature here, suffice it to say that welfare rights can only be adjudicated to the extent that there is an indirect legitimation through the legislature.

In the EU, a comparable discussion has at least not been prominent. This may be justified by the differences compared to the national level. Whereas in the national context, the extent or scope of rights may be subject to judicial review, in the European context the Court cannot engage with these. It is the political and judicial process of member states that determines social rights, i.e. whether social assistance is sufficiently high or pensions need reflect child rearing. The ECJ can only decide on eligibility to these rights, by broadening the access to include EU citizens by applying the prohibition to discriminate along national lines. Courts are well-legitimated to adjudicate non-discrimination rights, so that there may be less need than in the US context to theorize this emergence of welfare rights. When adjudicating non-discrimination, courts set limits to the executive and legislature to treat individuals differently. In the EU, the evolution of rights is about broadening access to rights established by national legislatures, not about the foundation of these rights as such. However, one could also argue that the problematique of judicializing social rights is heightened in the multi-level context of the EU. Here, the development of social rights through the ECJ not only constrains the EU legislator but also the legislator at the member-state level. The Court is engaged in a dialogue with the European, and with the member-state legislators. However,demands of non-discrimination on the basis of nationality impact member states differently depending on their design of social benefits given heterogeneous social systems. Thus, it is not convincing a priori to take the judicialization of EU social rights as not requiring further constitutional debate.

Bellamy has been a long-term critic of judicializing social rights, arguing for the need of parliamentary legitimation (Bellamy 2008; Bellamy 2015). Drawing on the idea of demoicracy, he has recently argued together with Joseph Lacey that European social rights require attention to stakeholdership in order to balance the sustainability of member states' welfare systems with individual entitlements (Bellamy/Lacey 2018). In this perspective, there cannot be a 'duty-free citizenship' as advocated by some (Kochenov 2014), because welfare rights have to be financed and therefore depend on solidarity and a sense of belonging.

EU law scholars, in contrast, it seems fair to say, have generally supported the development of social rights through the ECJ, without much regard to needed legislative support. Judicially broadened acces to national social rights is seen as a way of shifting the integration process from market integration towards social rights, supporting the emergence of a European demos, while fostering the teleological process of the 'ever closer union'. This positive support became particularly apparent in the very negative reactions of law scholars, when the ECJ changed track from late 2014 onwards and, to the surprise of the EU law community, allowed member states greater leeway in closing off their welfare states to economically inactive EU-citizens. For instance, it was said that the 'ECJ

sacrifices EU citizenship' (O'Brien 2017).[2] On the whole, law scholars of EU citizenship accompanied the development of social rights through the Court as having positive effects, with little regard to potential drawbacks given the multi-level character of its foundation. There has been much attention to individual rights as a way to strengthen the Union, but little regard to their national foundation and to the question, how judicialized rights can be sufficiently legitimated by the legislator.

In the following, I will start by summarizing how the coordination of social security has developed between case law and legislative reform widening rights of migrant workers, and then increasingly extending the non-discriminatory access to economically inactive EU citizens. In theory, this process raises several normative and positive issues: How is the dialogue between the EU legislature and the judiciary structured? How well is the process legitimized and how much is it subject to politicization? How do rights that are established in this way work on the ground, given the unusual multi-level character? In this paper, I will focus on the latter, the practical problems of the chosen avenue to establish welfare rights in the EU, largely leaving aside the normative dimension of constitutional considerations as well as its politicization brought to the fore by the Brexit decision. Behind this choice is the consideration that it is only meaningful to engage in ideas of bolstering the input legitimation of this judicialization of social rights, if the rights the ECJ establishes do have a positive outcome for individuals. But before we discuss the effects of these rights at the level of member states and individual citizens, it is necessary to analyze how case law shapes social rights in the EU.

The judicial shaping of social coordination and citizenship rights

As mentioned, in order to back the free movement of labour although welfare remained under member-state prerogative, already in 1958 the coordination regulations No. 3 and 4 were agreed upon. They detail the responsible country for the social security of EU citizens. Social assistance is not covered by the regulation, but left under exclusive national purview (Martinsen/Falkner 2011: 138). The regulations stipulate the responsible member state for social security by the principle firstly of lex loci laboris, the place of work, and secondly by the place of residence. The regulations were later revised into regulation 1408/71 (now 883/2004) and regulation 1612/68 (now 492/2011).

Case law of the Court has constantly shaped these regulations, repeatedly leading to revisions (Martinsen 2005; Martinsen/Falkner 2011). Thereby the Court could draw on the support over-constitutionalisation gives to the judicialization of rights (Grimm 2017). The rights enshrined in the regulations on the coordination of national social security systems and in the citizenship directive (2004/38/EC), have been shaped back and forth between the EU's judiciary and its legislature, with the latter not being able to overrule the former's constitutionalized rulings (Schmidt 2018). The following citation of the Commission exemplifies the importance of the Court's case law in developing the social protection of free movement rights.

'The rules are now 30 years old, however. Over this period, the Court of Justice has repeatedly ruled on the texts and interpreted them. As a result, a whole corpus of case-law to interpret the wording of the legislation has been created. To strengthen the security and transparency of the law on behalf of the citizen, it is now time to bring the texts (i.e. the regulation, SKS) into line with existing case-law.' (COM 98/394, p. 4)

[2] Other scholars have similarly criticised the restrictive stance of the ECJ (Heindlmaier/Blauberger 2017; O'Brien 2017; Reynolds 2017; Seubert 2017; Strumia 2017; Kostakopoulou 2018).

In the late 1990s, the reform of regulations 1408/71 and 1612/68 targeted to include all citizens covered by social security (and not only workers), and the Commission pointed to the crucial support of the Court: 'The Commission intends to ensure that these proposals succeed in their aim of improving conditions for freedom of movement to reflect the spirit expressed by case-law. The latter is a basic step forward for the European citizen and the Commission will ensure that discussions in the Council do not lead to the loss of the headway made by case-law.' (COM 98/394, p.6; (see alsoHofmann 2013: 240))

The case law is very complex, as are the two regulations. Indeed, when commenting on the attempted revision of social security regulations (COM(2016)815) in 2017, the German Bundesrat alluded to the 'better regulation' programme of the Commission, and urged to tackle the complexity of social coordination that is challenging to understand for EU citizens and member-state administrations alike.[3] Therefore, I will only focus on two related questions, concerning the opening of the so called SNCBs, special non-contributory benefits for citizens of other member states, and the inclusion of economically inactive EU-citizens. In discussing this case law, it is important to emphasize the character of judicial legislative dialogue that the Court engages in. Whether the Court is addressed by national courts via the preliminary procedure or via the Commission in infringement procedures, typically, it is national legislation that is being seen to violate principles of European law, such as the free movement provisions, and the prohibition to discriminate on the basis of nationality. In this process, national law may lose its exclusionary character towards EU citizens. As we saw with the Commission quotations above, once case law has accumulated, it is often followed by a reform of legislation at the EU level, in order not to lose the 'headway'. It is very rare that the Court is called upon to adjudicate the legality of EU law, and it typically allows the EU legislator a wider margin of discretion than it does towards the national legislator (Sørensen 2011).

Much conflict between member states and the Court have concerned the so-called SNCBs, i.e. tax financed social security falling under the responsibility of the country of residence. As mentioned the coordination regulations do not apply to social assistance, without however defining the term (Martinsen/Falkner 2011: 138). Case law concerning these tax-financed, supplementary benefits typically concerned restrictions that member states imposed on the exportability of these benefits, due to their tax-financed nature. After much haggling between member states and the Court, where the latter repeatedly lifted national restrictions on the exportability of SNCBs, council regulation 1247/92 allocated the responsibility for SNCBs to the country of residence, declaring these benefits at the same time as non-exportable to other member states (Cornelissen 2013: 92). Martinsen and Falkner take this regulation as an instance of overrule, where the Council took back control over the expansive case-law development (Martinsen/Falkner 2011: 138). Subsequently, the Court initially deferred to the legislator, and the list of SNCBs in the annex of the regulation grew. In 2001, the Court opposed this development and ruled in C-215/99 *Jauch* and C-43/99 *Leclerc* that the Austrian long-term care and the maternity allowance of Luxembourg were wrongly included in the annex, and had to be exportable (Martinsen/Falkner 2011: 139). SNCBs are now regulated in Article 70 of regulation 883/2004 and detailed in its annex X – and have remained conflictual. Access to these social benefits depends on factual residence, which was defined by the Court in the case C-90/97 *Swaddling* as relating to the place someone 'habitually resides' (No. 29f) and where the person's centre of interest lies (Cornelissen 2013: 93).

[3] Bundesrat 761/1/16 Empfehlungen, 27.2.2017, p.3. *https://www.bundesrat.de/drs.html?id=761-1-16*

SNCBs are important in the long-term contested question of the access of economically inactive EU citizens to social support in member states. The citizenship directive (2004/38/EC) was adopted at the same time as regulation 883/2004 but the relationship of both sets of rules remained unclear for a long time. The directive details the rights of EU citizens by establishing a gradual system of rights. For the first three months, EU citizens are free to settle anywhere in the Union, but they have no right to access social benefits in the host member state. After five years of legal residence, EU citizens have equal rights to nationals. Between three months and five years of stay, member states can require EU citizens to have sufficient financial resources and a comprehensive sickness insurance. However, if they do require financial assistance, this may not automatically end their right of residence (Article 14 III). This qualification directly reflects the 2002 ruling in *Grzelczyk* (C-184/99) (No. 43). Grzelczyk was a French student in Belgium, and even though the student directive at the time required financial self-sufficiency for students, the Court argued that member states have to show a 'certain degree of financial solidarity with nationals of other Member States' (C-184/99, *Grzelczyk*, No. 44). Indeed, that the directive leaves largely open, which rights are enjoyed between three months and five years, reflects that *Grzelczyk* received assistance already after three years (Wasserfallen 2010). Neither were member states willing to grant equal rights before five years of legal residence, nor could they require these five years because in *Grzelczyk* the Court had demanded some solidarity already after three years, as long as this is not 'an unreasonable burden on the public finances of the host Member State' (No 6). This inability of the legislature to overrule the judiciary reflects over-constitutionalisation. Consequently, in an important aspect the directive could not settle the rights of EU citizens. It was also in *Grzelczyk* that the Court argued 'Union citizenship is destined to be the fundamental status of nationals of the Member States' (No 31).

The unclear relationship between the directive and regulation 883/2004 led to the question of whether economically inactive EU citizens could rely on social security of the host state to cover the financial self-sufficiency that is needed for legal residence following the directive. Until different Court rulings (*Brey*, *Dano*, *Alimanovic*, and *Garcia Nieto*) settled the relationship of both pieces of legislation from late 2013 onwards, allowing member states to restrict access to social benefits for economically inactive citizens that had settled recently, it had widely been assumed that the social security regulations had to be regarded as lex specialis to the directive (Coucheir, et al. 2008: 28). In this light access to benefits depends on the habitual residence of EU-citizens that opens social security under annex X. These social benefits could then cover the directive's requirement of sufficient financial resources. 'Any other conclusion would make this special coordination system meaningless. If a person first had to prove that her or his residence in the host State is in line with the subsistence requirement under Directive 2004/38/EC before s/he could even claim a minimum subsistence benefit under Regulation 1408/71, it would never be possible for him/her to do so. Indeed when applying for a minimum subsistence benefit s/he would demonstrate that s/he is no longer fulfilling the condition concerning sufficiency of resources under Directive 2004/38/EC' (Coucheir, et al. 2008: 32). These arguments can be similarly found in an explanatory note of the Commission on the social security coordination from January 2011 (European Commission 2011). It is also interesting that this assessment overlooked that the regulations do not cover social assistance.

To summarize, until its recent about-turn, the Court has repeatedly opened up national social protection to EU citizens. 'The boundaries of membership to the communities of solidarity-based redistribution defined by national welfare schemes have – thanks to ECJ case law – become more open and permeable, and hence more inclusive, at least for European citizens' (Coucheir, et al. 2008:

35). Having given some background to this development, I shall now turn to question how this judicialized system works, starting with the most often-voiced concern of a possible undermining of national welfare through the supranational opening.

Shortcomings of judicializing welfare

Integration through law has allowed many advances of European integration that would have been difficult or impossible relying on political agreement. Yet, as judicialization builds on individual rights, embodied in the four freedoms and citizenship, it has a bias where only certain, liberal values and liberalization can be pushed while public policy goals and republican values depend on political agreement, and are undermined by extensive individual rights (Scharpf 2009). Scharpf sees a double asymmetry, where some redistributive schemes at the national level come under pressure through European equal access requirements, while it is not possible to agree on common policies in the European legislative process (Scharpf 2010). This risk of an under-provision of welfare, reminiscent of a tragedy of the commons, relates to the member-state level. Moreover, judicializing welfare results in problems at the individual level. These are often overlooked but have more immediate relevance. They relate to the difficulty that the Court faces to construct social Europe via non-discrimination, when conditions in the member states are heterogeneous. From this, new inequalities arise, as I will show. Advancing rights via case law, furthermore, implies significant legal uncertainty for the individuals (Hoevenaars 2015). If rules are in flux, and subject to case-law development, again individuals will likely be treated very differently, depending on the authorities they face. This legal uncertainty could make individuals better off with certain, even if more restrictive rules.

A tragedy of the commons? Opening welfare and risking under-provision

'Build a wall around the welfare state, not around the country', the public choice theorist Niskanen advised, pointing out that access to welfare may change incentives of migrants, and result in very different cost-benefit analyses for the host society that is often interested in low-wage migrant work. Scharpf (2010) has argued that the negative integration via the Court's case law and the lifting of restrictions has very unequal repercussions among the member states of the EU with their differing capitalist and welfare institutions. Opening-up national welfare to EU citizens, or even beyond to third-country nationals, it is feared, could give incentives for cutting down on social benefits in general (Scharpf 2009; Wiesbrock 2012: 93). Similar concerns of a race to the bottom are known from mutual recognition in the single market, where market actors can settle in the member state with the least stringent requirements (Sun/Pelkmans 1995). In the realm of market regulation as in the realm of welfare state financing, it is often politically contentious whether there is pressure on high-standard regulation and social services, or whether this is only alleged in order to facilitate liberalisation.

Empirically, there does not seem to be much support for concerns of an under-provision. Dustmann and Frattini find positive effects of EU migration for Britain (different to non-EU migration and nationals) (Dustmann/Frattini 2014). Drawing on register data, Martinsen and Pons Rotger similarly show positive fiscal contributions for Denmark (Martinsen/Rotger 2017). People normally migrate in order to work. Being predominantly of working age, they contribute more than they cost to their host society. Benefits for the host accrue because they profit from the upbringing and education of the migrant's home society, and possibly of lower wages for the migrants' work. If the latter is the case, wage pressure contributes to rising inequalities (Borjas 2016). Yet, much depends on the skill

level, and the institutions in the host country. Costs accrue because of language and cultural adaptation. Often migrants take up work below their skill-level, leading to a de-skilling effect of migration (Okólski/Salt 2014). While Scharpf (2010: 235) expected that liberal market economies could accommodate far-reaching EU free movement rights more easily than social market economies, as the latter's institutions coordinating economic activities would be undermined, this expectation needs to be modified. Contrary to expectations, the Danish welfare state copes well. Conversely, the UK's flexible labour market attracts lower-skilled workers, and in-work benefits of an activating welfare state make this immigration more costly (Ruhs 2017). In the discussion about Brexit, the alleged cost for in-work benefits of EEA workers in Britain reined high, but with no register data even the government could only give estimates. Data for Germany shows a significant increase of in-work benefits for EU citizens, from 50.000 in 2007 to 125.000 in 2015, being a 80% increase in relative terms (Martinsen/Werner 2018). This does not mean that overall gain from labour migration is low. In fact, Eastern European home states are paying a price for brain drain (Atoyan, et al. 2016). But economic benefits from migration are very much mediated by member states' labour market and welfare institutions (Ruhs/Palme 2018).

Because of this significant mediating effect of institutions of labour markets and the welfare state, it may not be so surprising that there are few examples of an over-use in social welfare rooted in non-discrimination. One of the rare examples relates to the case of German medical students in Austria (Schenk/Schmidt 2018). In fact, in May 2017 following many years of controversy, the Commission allowed Austria to apply a quota to German students, effectively restricting free movement rights (IP/17/1282). The ECJ had established strict non-discrimination among the member states already in the mid-1980s, when member states were prohibited to ask tuition fees exclusively of students from other member states (193/83 *Gravier*). In contrast, it is fully accepted that out of state tuition is much higher in the US and in the Canadian university system (Maas 2017), so that someone from Colorado pays higher tuition in California, not having contributed taxes there.

Since joining the EU in 1995, Austria sharing the language with a much larger neighbour, is vulnerable from over-use through German students. This concerns particularly those subjects like medicine, where Germany imposes high entrance requirements, while the Austrian system is more open. Initially, Austria admitted only those German students to study medicine that could do so in Germany as well, in a sort of mutual-recognition principle (Hoogenboom 2013: 21). In C-147/03 the Court judged the Austrian rule to be discriminatory by treating Austrian school leavers more favourably, emphasizing that measures need be proportionate and non-discriminatory, building on objective considerations and clear evidence (Hoogenboom 2013: 23). As a result, the number of German students grew considerably, making up one quarter of all students in human medicine in the winter of 2016 – and even 42% in psychology, where Austria does not employ a quota (Schenk/Schmidt 2018: 1532). However in 2010, the ECJ had been more lenient in a ruling regarding Belgium (that is in a similar situation with view to French students), regarding permissible reasons for restrictions (C-73/08 *Bressol*). Empirical proof that more than two thirds of German medical students leave Austria with their exams to practice in their home country finally convinced the Commission to allow the Austrian quota system.

Students are a highly mobile group of the population, and as a small country neighbouring a large one with the same language, and not willing to renounce its university policy of unconditional access, Austria was extremely vulnerable to free-riding. There are not many situations, where the opening of a single welfare benefit would motivate EU citizens to move for its cause. Possibly, had the Court

required Austria in *Brey* (C-140/12) to open up its compensatory pension unconditionally to all EU pensioners moving to Austria (Davies 2018), similar dynamics could have resulted. It is interesting that in 2011 the Commission had been convinced that a situation like Brey would clearly lead to entitlements under regulation 883/2004 (European Commission 2011: section R5).

To conclude, while EU citizens moving to other member states typically result in positive fiscal effects, in extreme situations moving can be motivated by a specific benefit, risking under-provision in a 'tragedy of the commons' scenario. The example of German medical students in Austria shows that the Court interprets the non-discrimination requirement in a way discarding prior contributions as a basis to justify discriminatory treatment. The non-discrimination requirement of the Court is therefore biased: member states opting for market solutions and high tuition can use the market mechanism to discriminate selecting those able to pay. As has often been argued, building social rights on non-discrimination, results less in a 're-embedding' of markets than in neoliberal policies (Höpner/Schäfer 2012; Caporaso/Tarrow 2009).

New inequalities at the individual level

The example of German medical students has shown how non-discrimination on the basis of nationality has very different effects depending on the institutional setting of member states. Systems that rely on market solutions can more easily fulfil the non-discrimination requirement, while publicly provided services depend on the financing of these services from taxes. Non-discrimination, moreover, also leads to inequalities among individuals moving between systems.

Given the great heterogeneity of member states' welfare regimes, an approach of non-discrimination is a poor guide for the Court to further social equality. Why would that be the case? The example of student financial support can illustrate the problem (Schenk/Schmidt 2018: 1533). Schemes of member states show great variety, reflecting their different higher education policies, welfare states and economic development. Some member states do not have any scheme to support students financially, some have loans, some have means-tested support with different requirements of repayment. Denmark has the most generous system with a non-means tested, non-repayable benefit. Some of these national benefits are portable to be used for studies in other member states, others are not portable. In addition, there are different criteria of eligibility to student financial support in host member states. An own or derived (as family member) employment status grants non-discriminatory treatment to student benefits of the host state. As the free movement of workers encompasses those working few hours, as long as it is not 'marginal and ancillary' (*Levin* 53/81), eligibility starts, depending on the member state, at about 10h/week. With the ECJ ruling in C-46/12 *L. N.* vs *Styrelsen* in 2013 Denmark was forced to open its study benefit to EU students working 10-12h a week (Martinsen/Werner 2018). If they do not qualify for equal treatment under the free movement of workers, EU citizens living in other member states acquire equal rights after five years of legal residence according to the citizenship directive. However, when in need the Court often requires an individual assessment of their situation, as seen in the *Grzelczyk*-ruling. Consequently, students aiming to access financial support in host member states can find themselves in very different situations, due to the conditions of their home country (with portable loans, or not), those in the host country, and depending on the criteria of eligibility (as workers or EU citizens) on which they draw.

Why is the principle of non-discrimination a poor guide in a situation of such diversity? If we juxtapose the different situations that can result, depending on the system in the home and in the

host country of study, we see that combinations multiply. Crucial is the question whether a person's home state grants portable student support or not. Solely being guided by the non-discrimination principle, the Court cannot help new discriminations from arising. An illustration is a case from November 2015 at the Austrian Federal Administrative Court,[4] where a German medical student claimed eligibility to a student grant based on part-time employment in Austria (Schenk/Schmidt 2018: 1534). The Federal Administrative Court backed denying the application because of the risk of double eligibility in Austria and Germany. The student had only handed in proof of not having applied for a German grant, but could not bring proof that such application was not to follow later. The student argued that it was discriminatory that Italian, Polish, Slovakian, Romanian, and Czech students did not need to bring such proof – explained by the fact that their countries do not provide (portable) student grants (No. 2.3.11 of the ruling). In heterogeneous settings non-discrimination cannot by itself bring equality. It is for this reason that the world trade regime knows the most-favoured nations clause to compensate for inequalities arising from applying the non-discrimination rule.[5]

Given the complexity of national support schemes, it is notable how the legal principles that the Court goes by, related to the free movement of workers, EU citizenship, and non-discrimination on the basis of nationality, increases the possible eligibility criteria. Eligibility can relate to own or derived employment or length of residence and integration in the host state, or on the portability of grants in the home state. For the individuals concerned, it is all but easy to understand the conditions of case-law based eligibility. It is telling that the official Austrian website for student grants denies giving guidelines for EU citizens, speaking instead of the complexity and rapidly changing case law of the ECJ.[6] Evolving case law implies significant legal uncertainty for EU citizens' rights. This uncertainty also means that chance has more of a say in whether EU citizens are granted certain rights derived from ECJ case law in their local courts, or not. It is to this issue that I turn now.

Up against chance: unequal treatment and legal uncertainty

As summarized above, for quite some time it was unclear how regulation 883/2004 and the citizenship directive related to each other, leaving it open whether non-economically active EU citizens could access social benefits based on their habitual residence, helping them to cover the financial self-sufficiency requirement of the citizenship directive. In Germany, it was contentious whether the rule of §7 SGB II (social law book No. 2) that restricted access of non-Germans to the basic social support was compatible with the non-discrimination rule of the social coordination regulations. Germany took this basic assistance to be social assistance in the sense of Article 24 II of the citizenship directive, and as we saw basic social assistance is not included in the coordination regulations. In 2009, the Court had ruled in case C-22-23/08 *Vatsouras* that benefits aiming to facilitate access to employment had to be granted in a non-discriminatory way. But until case C-333/13 *Dano* decided that economically inactive EU citizens could be excluded from social benefits of SGB II, it was not clear whether the German exclusion could stand up to EU non-discrimination. In fact, it was widely doubted to be the case, and German social courts increasingly ruled in favour of

[4] Bundesverwaltungsgericht (26.11.2015) Entscheidung BVwG W129 2008055-2.
[5] Thanks to Fritz Scharpf for pointing this out.

[6] I thank Michael Blauberger for making me aware of this. Österreichische Studienbeihilfenbehörde.
https://www.stipendium.at/studienfoerderung/studienbeihilfe/wer-hat-anspruch /.

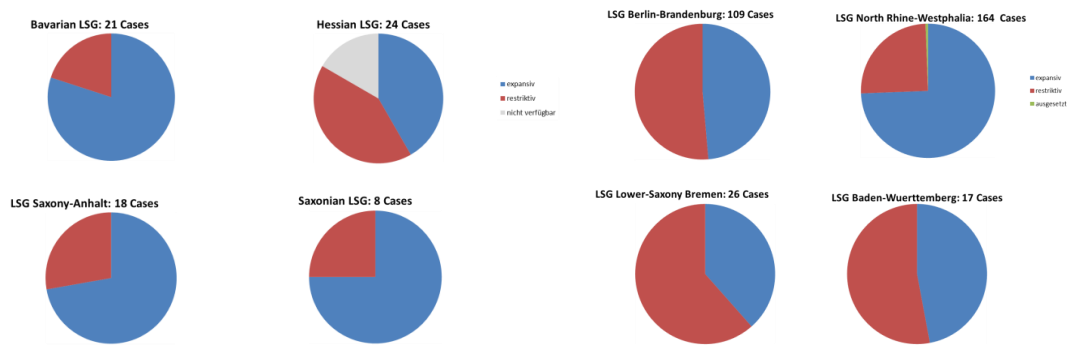
EU citizens, as the following table, based on an analysis of 543 cases dealing with access of EU citizens to SGB II support between 2006 and 2016 shows.[7]

Table 1 Expansive and restrictive verdicts and rulings on social benefits for EU citizens

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
expansive	3	11	9	8	10	11	30	20	22	39	33
restrictive	6	9	8	10	17	18	64	40	37	54	35

It is interesting to take a further look at regional differences in adjudication, focusing on the higher regional social courts. Here, the following graph shows significant differences, depending on where cases were decided.

Figure 1 Rulings according to region



Finally, we can look at those cases, verdicts and rulings that were positively decided for EU citizens until 2015, altogether 248 cases. Here it is striking that in an increasing number of cases the granting of benefits was justified by the complex legal situation. While in 2009, there were only 2 cases reasoning in this way, there were 20 cases in 2015, and 70 cases over the whole period.

Ongoing European case-law development about individual rights, to sum up, implies significant legal uncertainty for the individuals concerned. Because European legal entitlements are in flux, the resulting legal uncertainty and variance in court rulings is likely to be much higher, than when rules are more clearly fixed. I will argue in the next section that when individuals and their life chances are concerned, it is questionable whether they are better served with evolving entitlements though these may bring them further rights than with more restrictive but relatively fixed rules allowing greater legal certainty. After all, when rights are developed by the ECJ it may always be that case-law development halts (as happened, in fact, with *Dano* et al.).

[7] The cases were assembled via the website www.sozialgerichtsbarkeit.de, by choosing all cases that relate to SGB II benefits citing ECJ jurisprudence, and analysed in an excel sheet according to outcome, court, and until 2015 also according to legal justification for the outcome. I thank Laura Baade for her research assistance.

Being unaware of taking risks – the case of comprehensive sickness insurance

As mentioned, the relationship between the requirements of the citizenship directive and the coordination regulations was unsettled for long. This concerned not only the question whether social benefits of the regulation could contribute to the sufficient resources of economically inactive EU citizens, but also the requirement of comprehensive sickness insurance (CSI). Following the citizenship directive, EU citizens can settle anywhere when having sufficient financial resources and comprehensive sickness insurance in the first five years. Member states have different health systems, with some having national health systems and others having cover by health insurance. The UK government with its national health service (NHS) always held that health cover through the NHS could not meet the requirement of CSI, as this requirement was meant to protect the public finances of the host state. Domestic courts backed the position of the British government.[8] But in line with its approach to sufficient resources, the Commission regarded access to the NHS as following from residence under the coordination regulations (European Commission 2011: 5, fn 8). In 2012, the Commission sent a reasoned opinion as part of an infringement procedure, holding that all EU citizens have access to the NHS in the UK, thereby covering their requirement of CSI.[9] Access to health care in this view was part of the prohibition to discriminate along national lines (Strban, et al. 2017). The infringement procedure has not been handed to the Court, though the Commission noted in 2017 that it was still pending.[10]

With the decision of the UK to leave the EU, this question suddenly became very problematic for all EU citizens living in the UK but not falling under the free movement of workers. The lack of a CSI implied that the five years of legal residence under the directive would not be met – even by EU citizens that had spent many more years living in the UK (Herbeć 2017). As in practice EU citizens living in the UK could easily access the services of the NHS, it was only when wanting to clarify their long-term legal residence that many EU-citizens learned about their predicament. Under the ordinary residence of regulation 883/2004, access to the NHS had been possible for EU citizens. But this access hindered ever meeting the legal residence requirement of the directive.

In the meantime, the UK government has agreed to lift this restriction (Department of Health United Kingdom 2016). But the saga of CSI, as well as the question of sufficient financial resources shows how the incremental extension of rights by the Court puts individuals into extremely vulnerable situations. A clear and transparent obligation to take out CSI would have probably been preferable.

Judicializing welfare in a multi-level system

Rights in the EU are provided in a multi-level system, where the Court at the European level has incrementally developed entitlements by opening the welfare systems shaped and financed at the member-state level. Over-constitutionalisation allows the ECJ much scope for the judicialization of social rights. It does this on the basis of cases dealing with EU citizens' access to national welfare,

[8] Ahmad v Secretary of State for the Home Department [2014] EWCA Civ 988. Thanks to Stéphanie Reynolds.
[9] 'Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law' (IP-12-417_EN).
[10] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2017-003659&language=MT [accessed April 2018]

thereby lifting restrictions of member states' legislation. Complex rules on entitlement result from this multi-level interaction between the ECJ, national legislatures, and the EU legislature, most notable in the different reforms of the coordination regulations.[11] It is rare that there is a direct dialogue between the ECJ and the EU legislature. The ECJ allows the EU legislature more leeway: 'However, this does not mean that a review of EU secondary legislation is undertaken in the same manner as a review of whether a national measure infringes the rights of free movement. The ECJ has stressed that there is a presumption that the measures of the EU institutions are lawful, and thus they have effect until such time as they are withdrawn, annulled or invalidated in a preliminary ruling' (Sørensen 2011: 347). In general, the Court is in a dialogue with national courts about the compliance of national rules with EU law. The results of this case law then feed into the EU legislative process. As we saw, in the light of the heterogeneity of different national systems, the ECJ has a very uneven, liberal bias on the member states. Under adverse conditions, like the Austrian students case, where the non-discriminatory opening of certain benefits is an incentive for mobility, there may be indeed under-provision, given that the ECJ does not honour rights of belonging or stakeholdership in the different contexts of solidarity of member states.

In general, mobility in the EU has been relatively low, and the opening of national social protection did not result in notable restrictions of national welfare. But the indirect dialogue between the EU level court and the EU legislature via the heterogeneous systems of member states hardly leads to a functioning system of rules. Relying on non-discrimination in a heterogeneous setting, the Court can further equal treatment only to some extent, but also establishes new inequalities. And the ongoing case-law development puts individuals under significant uncertainty concerning their rights and obligations, with the problem that contradictory rules and legal uncertainty also delegitimize a political system.

Conclusion

Different to single market policies, the ECJ has not succeeded in becoming an important motor of common social policies. Where case law may result in a regulatory race to the bottom in the single market, there is the analyzed risk of under-provision in the social realm. But compared to the regulatory policies of the single market, with recognized high standards in environment and consumer protection, it appears much more unlikely that case law could be an incentive for member states to agree on common social policies involving distribution.

Yet, the expectation had been for comparable integration dynamics in the social field. 'The ECJ's role in "social engineering" the status of Union citizen to replace entitlement based on market freedoms, is the engine of new forms of cross-border solidarity' (Coucheir, et al. 2008: 33). The ECJ, in this respect, is caught in a dilemma, resulting from the decision in the EU to leave welfare systems in national competence, while opting for unconstrained free movement rights. By applying its non-discrimination adjudication, it automatically opens up national systems of social protection to outsiders. But 'no taxation without representation' belongs to the core of liberal democracy. Courts, accordingly, are much better legitimated to enforce liberal individual rights against the state than to decide on spending decisions, which need be left to parliaments. Judicialized European rights to national welfare may also undermine transnational solidarity, as has been seen in the context of the Brexit-discussion.

[11] I thank Fritz Scharpf for pointing me to this.

EU constitutional theory has not sufficiently reflected on the difficult dialogue between the judiciary and the legislator in the multi-level system. Emphasizing the opportunities from EU citizenship, the precarious legitimation of judicialized rights to welfare, financed by the member states, has received too little attention. Increasing politicisation of intra-EU migration also reflects this missing link between judicialized rights and legislative legitimation. A currently positive fiscal balance under conditions of EU free movement is insufficient proof that non-discriminatory access to national welfare states can work as an approach in a Union where member states differ greatly as to the type and scope of their national social protection schemes. Intra-EU mobility has been low, and there has not been full opening as member states tread carefully to keep their welfare schemes under the relative openness forced by the ECJ. Determining discriminatory practices, of course, requires drawing a distinction – like situations are treated alike and unlike situations are treated differently. As we saw, the ECJ is very reluctant to take into account fiscal contributions for publicly financed welfare. Building transnational welfare merely on liberal, individual rights to access republican schemes, financed at the member-state level, however, cannot provide the social embedding of the EU's free movement regime. As the welfare state relies on redistribution, the parameters of its opening to those that have contributed little to none, have to be politically decided.

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