

European Dialogue 2015

‘Legal Integration’ as a Problem for a Social and Democratic Europe

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I. Liberal and Republican Democracy & the European Court of Justice

Two ideal types of democracy

Liberal Democracy

- Primacy of individual liberty rights (as protection against the abuse of state power)
- Emphasis on freedom of contract

Republican Democracy

- Democratic participation needs material equality
- Prerogative of political interventions vis-à-vis markets and economic power
- Emphasis on collective (social) rights that restrict individual liberty rights

The liberal bias of European law

- Precedence of EU law over national (constitutional) law → ECJ de-facto highest Court in the EU
- European law: Four freedoms constitute individual economic freedom rights
- ECJ subordinates social rights under the primacy of individual economic freedom rights



In line with liberal democracy but undermining basis of republican (social) democracy

Structural Imbalance between Liberalisation and Social Regulation

Political problem solving
capacity at European
level severely limited

Restriction of political
problem solving
capacity at the national
level

II.

Example: ECJ case law and collective bargaining in Germany

ECJ case law and collective bargaining in Germany

Right to strike and autonomy of collective bargaining as prime examples for collective rights

[Protected by Art 153 (5) TFEU and Art Charter 28 of Fundamental Rights]

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Die Auswirkungen der EuGH-Rechtsprechung auf das Tarifvertragssystem in Deutschland**

Zusammenfassung – Spätestens seit den Urteilen des EuGH in den Fällen *Laval* (C-341/05), *Viking* (C-438/05), *Raffert* (C-346/06) und *Commission gegen Luxembourg* (C-319/06) ist deutlich geworden, dass die Rechtsprechung des Gerichtshofes erhebliche Auswirkungen auf die nationalen Systeme industrieller Beziehungen hat. Dieser Artikel untersucht aus politik- und rechtswissenschaftlicher Perspektive, welche Folgen die EuGH-Rechtsprechung auf das Tarifvertragssystem in Deutschland hat. Anhand von ausgewählten EuGH-Entscheidungen zeigen wir, dass die Rechtsprechung des Gerichtshofes häufig Rechte und Handlungsmöglichkeiten von Tarifpartnern einschränkt, angefangen beim Streikrecht bis hin zur Ausgestaltung und Geltung von Tarifverträgen. Während der EuGH im Bereich des individuellen Arbeitsrechts oft zugunsten der Arbeitnehmerinteressen entscheidet, gehen Urteile zum kollektiven Arbeitsrecht häufig zu Lasten der Tarifautonomie. Kollektive Selbstbestimmungsrechte werden dadurch geschwächt.

The impact of the case law of the European Court of Justice on the collective bargaining system in Germany

Abstract – The rulings of the ECJ in the cases of *Laval* (C-341/05), *Viking* (C-438/05), *Raffert* (C-346/06) and *Commission v Luxembourg* (C-319/06) have demonstrated that the Court's adjudication has substantial effects on national systems of industrial relations. This article examines the consequences of the case law of the ECJ on the collective bargaining system in Germany from a law and political science perspective. We examine selected ECJ rulings and show that the Court's adjudication restricts the rights and room for manoeuvre of social partners, affecting the right to strike as well as specific regulations in collective agreements. In the area of individual labour law, the ECJ regularly rules in favour of employees. However, when it comes to collective labour law, the ECJ often decides to the detriment of collective bargaining autonomy. This weakens collective social rights.

Key words: European Court of Justice, labour law, collective bargaining
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ECJ case law and collective bargaining in Germany

- **European Social Model:**

Collective bargaining as central mechanism for the regulation of the economy

- **Autonomy of collective bargaining:**

Prerogative of democratic political decisions of employers and trade unions about the regulation of working conditions by means of binding collective agreements

Positive ECJ rulings – individual labour law

Discrimination because of age, e.g.:

- ECJ, 22.11.2005 (“Mangold“) – Unfounded fixed term employment contract for older employees violation of EU law
- ECJ, 19.01.2010 (“Küczikdevici“) – Non-consideration of employment periods before the age of 25 for calculating period of notice as violation of EU law

Discrimination because of gender, e.g.:

- ECJ, 06.03.2014 (“Napoli“) – Women on maternity leave may not be excluded from education and training
- ECJ, 27.02.2014 (“Lyreco Belgium“) – Reduction of termination pay because of part-time work during parental leave violation of EU law

Discrimination of fixed-term contracts holders, e.g.:

- ECJ, 26.01.2012 (“Kücük“) – Restriction of the practice of repeated fixed term employment
- ECJ, 18.10.2012 (“Valenza“) – Fixed-term employment periods of civil servants have to be considered for calculation of length of service

Negative ECJ rulings – collective labour law

Restriction of the right to strike

- ECJ, 11.12.2007 (“Viking“) – Strike against re-flagging of finish ferry as unjustified violation of freedom of establishment
- ECJ, 18.12.2007 (“Laval“) – Industrial action against posting company Laval in order to enforce Swedish collective agreement as unjustified violation of the freedom to provide services

Regulation of working conditions of posted workers

- ECJ, 03.04.2008 (“Rüffert“) – Obligation of posting companies carrying out public contracts to pay wages of local collective agreements as unjustified violation of the freedom to provide services
- ECJ, 19.06.2008 (“Luxembourg“) – National labour law may not be transferred to posted workers

ECJ case law and collective bargaining in Germany

ECJ case law as double-edged sword:

- *Strengthening employees' rights in the area of individual labour law [anti-discrimination]*
- *Weakening employees' rights in the area of collective labour law [right to strike, public procurement, continuity of collective agreements after change of ownership]*

Restriction of the autonomy of collective bargaining although explicitly protected by EU Treaty and Charter of Fundamental Rights

Destabilization of specific balance between social regulation and economic freedoms of the European Social model

III. Reform Options

Legal reform options

Strengthening of social rights

- Social Protocol: Social rights take precedence over economic rights
- Work and social protection as fundamental rights for every EU citizen
- European Court of Human Rights as institutional counterweight to the ECJ (better protection of social rights)

Control and correction of ECJ jurisprudence

- Correction of case law in secondary law
- Court of Competence
- National constitutional courts as guardians of a fair balance between social and economic rights
- Specialized chambers (e.g. for labour law) at the ECJ

Democracy has not only formal but also social requirements

Minimum standards

- Minimum replacement rates for pensions and unemployment benefits
- A coordinated European minimum wage policy paying respect to varying national collective bargaining systems

Investing in growth and sustainability

- A Marshall Plan for Europe (DGB): Investment and Development Fund for all 28 EU member states boosting public investment (complementing the Juncker Plan)

A Social and Democratic Europe and the role of Germany



Unger, Brigitte (Hrsg.), 2015: The German Model. Seen by its Neighbours. London: SE Publishing.

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www.socialeurope.eu/wp-content/uploads/2015/04/German-Model.pdf

Who could build up a Social Europe?

- Social Democratic Parties (Wilson 2013)?
- Self-regulating organizations (van Waarden 2013)?
Trade unions (Huber 2013, Bsirske 2013, Sommer 2013), at the national level and Europe-wide?
The national employers' associations coming to understand that poverty and increasing crime rates are bad for business? (Unger)
- Multinational corporations that realize that they will not be able to sell their products in revolting countries?
- Social protest movements such as Attac or Occupy Wall Street generating fear of revolution and a paradigm shift among the ruling elites?

Who could build up a Social Europe?

The EU?

- The reformed and enlightened European Council with its Heads of State thinking European rather than national?
- The Council of Europe, with its judges, suddenly declaring social well-being a fundamental human right?
- The European Parliament with successful Social Democratic European political parties?
- The European Commission drafting new EU social pacts?
- The European Court of Justice suddenly treating social issues as equally important as competitiveness?
- The European Court of Human Rights which declares labour and social legislation as human rights?
- The European Central Bank deciding to buy up all government bonds, so that it will no longer make a difference whether we have Eurobonds or national bonds?
- The financial markets which – as predicted by J. M. Keynes, a child of the Enlightenment – finally arrive at the insight that they want to return to contributing something useful to society and end up bringing about Keynes' "death of the rentier" themselves?

There is enough money for a Social Europe

- **Tax on financial transactions** (20-50 billion Euro till 2020)
- **Closing tax loopholes and increasing tax revenues**
(worldwide 32 trillion USD financial assets in offshore centers)
- **Confiscating tax evasion money** (D: 100 billion from CH, 3%-15% of GDP estimated tax evasion in Europe)
- **Annual money laundering in Europe is about 1000! billion** (Unger/Walker). (Money Laundering threat in UK 280 billion, in D108 billion, in IRE 55 billion Euro (EU Project ECOLEF Unger 2013))

A welfare state at a high level is financially affordable

- **Social expenditures (in EU) vary between 18% (Slovakia) and 32% (France) of GDP**
i.e. a European welfare state according to German and French standards costs approximately 20% - 30% of GDP.
- This welfare state could be funded exclusively by taxing financial markets and by collecting evaded taxes.

Conclusion

- 59% of the Germans, 69% of the British, 72% of the Spanish distrust the EU → the EU has lost the approval of 2/3 of its citizens! Time to collect the tax money!
- As the Austrian economist Kurt Rothschild once said: **“We are richer than we ever were, the GDP per capita is rising, and, yet we suddenly cannot afford the welfare state anymore?”**
- Europe has to fight **growing mass unemployment** – Europe’s public sector has to be strengthened
- Europe cannot afford a **democratic deficit** and **social inequality** any longer

Thank you!

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The German Model - Seen by its Neighbours, Unger, Apr.2015
www.amazon.de/German-Model-Seen-its-neighbours/dp/0992653746/ref=sr_1_12?ie=UTF8&qid=1428656496&sr=8-12&keywords=brigitte+unger

Roadmap to a Social Europe,

www.social-europe.eu

(Grozelier, Hacker, Kowalsky, Machnig, Meyer und Unger, Oct. 2013)

EU Project ECOLEF

www.ecolef.eu

The Economic and Legal Effectiveness of Anti Money Laundering Policy of the 27 EU Member States (Unger et al (2013)