Special Issue
EU Citizenship: Twenty Years On

European Citizenship and Social Rights in Times of Crisis

By Stefano Giubboni[*]

A. Introduction

European citizenship celebrated its twentieth anniversary during the most difficult and uncertain moment of the Union's crisis. The real economy has now been fully saturated by the financial crisis far beyond the borders of the Euro-Mediterranean area, with devastating social effects in those countries most affected. The prolonged vertical drop of the gross domestic product in Greece—the epicenter of the crisis—has been intertwined with a dramatic and unprecedented growth of levels of unemployment and social suffering in a vortex destructive to the point of validating the perception, now widespread not only within the bewildered public opinion of that unfortunate country, that the "rescue" of the Union has been based on a cure that is worse than the disease.[1] The recent general elections in Italy, a country key for the stability and indeed the survival of the Euro-zone, have produced a situation of fragmentation and political instability that is both unprecedented and disquieting. Among the few elements of certainty in Italy can be found a widespread Euro-skepticism, if not an openly anti-European mood, that is also unprecedented in the history of the country's public opinion, which historically is among the most favorable towards a strengthening of the integration process. With the worsening of the economic and social crisis, the very tenacious confidence in Europe as a positive "external constraint" which has supported Italy's efforts towards reforms, commencing with its admission into the Euro-zone in the latter 1990s[2] until the most recent experience of the technocratic government headed by Mario Monti,[3] seems to have declined. Everywhere in Europe, a sense of frustration and distrust in recent years has grown against the Union and its frantically sought capacity to respond to the crisis without finding truly effective outcomes.

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* University of Perugia. This article was first presented as a paper during a guest lecture held at the Law Faculty of the Antwerp University on 6 March 2013 and then in Uppsala at the international conference European Citizenship–Twenty Years On (20–22 March 2013). I am grateful to all the participants to both events, and in particular to Marc Riguax, HerwigVerschueren, Patricia Mindus, and Floris De Witte for their insightful comments on an earlier draft of the paper. The usual disclaimer applies.

[1] *See* Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* (LEQS Paper No. 35, 2011).

[2] *See* MAURIZIO FERRERA & ELISABETTAGUALMINI, SALVATIDALL'EUROPA? (1999).

[3] *See* SYLVIE GOULARD & MARIO MONTI, LA DEMOCRAZIA IN EUROPA. GUARDARE LONTANO (2012).

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In such a scenario—as one keen observer of the European scene elegantly noted—the idea of European citizenship as a *statut d'integration sociale*[4] seems to take on the *savour* of a counter-intuitive paradox that is if anything capable of illuminating by contrast the miserable state reached by the integration process more than twenty years after the entry into force of the Maastricht Treaty. But like any apparent paradox, such a representation also contains an essential core of truth. This paper commences in order to place the relationship between European citizenship, labor law, and social rights in a perspective broader than the one prompted by a resigned look at the current crisis of the Union. That is what will be accomplished in the following pages. First through the apparently contradictory lines along which the case law of the Court of Justice of the European Union (CJEU) has built the relationship between European citizenship, labor law, and access to social rights.

Moreover, this relationship—which has been structured by the Court primarily around the transnational dimension of European citizenship—is today part of a political-institutional framework. In some respects this framework is much more complex and articulated than the one established by the Maastricht Treaty, which nonetheless had foreshadowed scenarios of differentiated integration into the inner core of a project for an ever closer union among the European peoples. On one hand, this relationship is in fact destined to be affected by the new constraints arising from the complex architecture of the European economic and monetary governance, which has been redesigned—most recently with the entry into force of the *Fiscal Compact*[5]—to counteract the effects of the financial crisis. On the other hand, such an architecture widely entrusted to unprecedented intergovernmental mechanisms lying outside the institutional framework of the Union opens up new scenarios for prospects of differentiated integration to resume effect, with potential consequences on the "social dimension" of European citizenship. These scenarios will have to be carefully explored, along with the new framework of the reformed economic constitution of the Union, before attempting to submit any concluding remarks on the relationship between European citizenship, labor law, and social rights in times of crisis.

This article proceeds as follows: First, the potential of European citizenship as a transnational form of social integration is outlined, taking as a comparison Marshall's classical analysis of the historical development of social rights in the context of the national Welfare State. From this perspective, Union citizenship may arguably play a potential role as a transnational guarantee for the basic social and labor rights underpinning the

[4] Loïc Azoulai, *La citoyennetéeuropéenne, unstatutd'intégrationsociale*, *in* CHEMINS D'EUROPE: MELANGES EN L'HONNEUR DE JEAN PAUL JACQUE, 1–28 (2010).

[5] Treaty on Stability, Coordination and Governance of the Economic and Monetary Union, Dec. 2, 2012, EC PRES/12/551 (The treaty was signed on 2 March 2012 by all the member countries of the Union except United Kingdom and Czech Republic.).

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European project. Though, this potential is currently frustrated by the prevailing negative integration dimension as the interplay between Union citizenship and national systems of Welfare State. This negative dimension pervades the entire CJEU case law on Union citizenship, even becoming dominant—after the famous *Viking* and *Laval* judgments[6]—by the ways in which the justices in Luxembourg have built and set limits. In Marshall's terms this might be called the European collective dimension of "industrial citizenship." The new architecture of the economic and monetary governance of the Union—based as it is on an unprecedented effort towards a creeping constitutionalization of a neo-liberal politics of austerity and welfare retrenchment[7]—is destined to strengthen the de-structuring pressures on the industrial relation and the social protection systems of the Member States. The conclusion sums-up the main critical arguments and offers some suggestions for an alternative path for re-politicizing the social question in Europe.

B. Union Citizenship as a Transnational Status for Social Integration

The idea of citizenship as a status for social integration is still owed to the seminal reconstruction done by Thomas H. Marshall in the early 1950s.[8] When Marshall first described the notion of social citizenship in the aftermath of the Second World War "in the context of the great transformation of organized labor rights and systems of protection of individuals against the typical risks of the proletarian condition,"[9] it bore the promise of integration and recognition of the majority of the population living from its work. Further, the European Constitutions of the time founded the revival of the State as a democratic and social "Welfare State."[10]

In Marshall's reconstruction, the full embodiment of social rights in the citizenship status, with the recognition of "a universal right to real income which is not proportionate to the

[6] *See* International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, CJEU Case C-438/05 (Dec. 11 2007), http://curia.europa.eu/; Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, CJEU Case C-341/05 (Dec. 18, 2007), http://curia.europa.eu/.

[7] *See* EMILIANO BRANCACCIO & MARCO PASSARELLA, L'AUSTERITÀ È DI DESTRA. E STA DISTRUGGENDO L'EUROPA 83 (2012); WOLFGANG STREECK, GEKAUFTE ZEIT. DIE VERTAGTE KRISE DES DEMOKRATISCHEN KAPITALISMUS 79 (2013).

[8] *See* THOMAS H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS (1992). The first edition of this work dates 1950.

[9] ETIENNE BALIBAR, CITTADINANZA 66 (Giovanni Grillenzoni trans., 2012).

[10] Think of the Italian Constitution of 1948 and the German one of 1949. *See* PIETRO COSTA, CIVITAS. STORIA DELLA CITTADINANZA IN EUROPA VOL. 4 - L'ETÀ DEI TOTALITARISMI E DELLA DEMOCRAZIA 369 (2001); ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (2000); TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE 1945 (2005).

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market value of the claimant,"[11] presupposes the full maturity of "a secondary system of industrial citizenship."[12] There the role performed by the trade union through collective bargaining is directly linked to the assertion of fundamental rights, and along with the role played by the State, it assumes "the guise of an action modifying the whole pattern of social inequality."[13] But before that, as recently emphasized by Maurizio Ferrera,[14] the making of a modern system of social citizenship presupposed, in that analysis, the accomplishment of a double process. On one hand, a "geographical fusion" of Welfare State structures within national borders, in which the action of equalization based precisely on the status of citizenship could operate, and on the other hand, a "functional separation," with the creation of administrative bodies responsible for the provision of social benefits and the parallel emergence of a system of industrial citizenship, based on the collective action of organized labor.

Even today these assumptions are clearly inapplicable to the notion of European citizenship because the CJEU has decisively reconfigured it as a privileged key for accessing national social spheres. The European integration process, in fact, has been historically founded on assumptions somewhat reversed compared to the dual process of geographical fusion and functional separation within the Nation State, described by Marshall in his historical analysis on the gradual building of social citizenship rights in Europe during the twentieth century.[15] This diversity of assumptions has preempted the scope of relevance of European citizenship, which today may accomplish the function of social integration—as effectively suggested by Loïc Azoulai—only in the specific and limited sense of defining a transnational status of access to social rights as guaranteed within the different solidarity-redistributive national systems in favor of Member States nationals moving within the Union.[16]

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[11] THOMAS H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS 28 (1992). Marshall then continues, "in this way, social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, and the replacement of the free bargain by the declaration of rights." *Id.* at 40.

[12] *Id.* at 26.

[13] *Id.* at 28.

[14] Maurizio Ferrera, *Modest Beginnings, Timid Progresses: What's Next for Social Europe?*, *in* SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY 17–40 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

[15] *See* MAURIZIO CINELLI & STEFANO GIUBBONI, CITTADINANZA, LAVORO, DIRITTI SOCIALI: PERCORSI NAZIONALI ED EUROPEI, 3 (2014); MAURIZIO FERRERA, THE BOUNDARIES OF WELFARE. EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION 111 (2005).

[16] *Compare* Azoulai, *supra* note 4, *with* STEFANO GIUBBONI, DIRITTI E SOLIDARIETÀ IN EUROPA. I MODELLI SOCIALI NAZIONALI NELLO SPAZIO GIURIDICO EUROPEO 177 (2012).

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The Rome Treaty of 1957 envisioned the integration process along a path of geographical fusion and functional separation in some ways specular (and complementary) to the one described by Marshall in relation to the building of a national social citizenship.[17] The unification process was limited to the construction of a common market geographically co-extended to the territory of the founding Member States of the Community and based on the free movement of factors of production. In particular, the freedom of movement of workers and enterprises, and the guarantee of competition not distorted by unfair practices of private economic actors or unlawful interference by public authorities.[18] The idea of the Rome Treaty was that the unification process, under the aegis of the fundamental principles of the Community economic constitution,[19] was to be limited to the market sphere, without the involvement of the social systems of the founding States, which were supposed to maintain their functional separation within the national borders.[20] Geographical fusion of the common market and functional separation of the national Welfare State systems constituted the European Economic Community (EEC) as a "dual" system.[21] Here the full effectiveness of the principles enshrined in the Community economic constitution should have been rooted in an equivalent guarantee of social rights at the national level without affecting social and redistribution policies democratically undertaken by the several Member States.[22]

Social systems autonomously structured according to the different preferences of the democratic processes taking place in single Member States were seen as a necessary prerequisite of legitimacy of the same Community economic constitution. Insofar as they allowed it to perform its function as a legal constriction of the common market without trespassing in areas characterized by the discretion lying in redistributive policies based on social justice. That could be accomplished according to criteria of efficient allocation of

[17] *See* STEFANO GIUBBONI, SOCIAL RIGHTS AND MARKET FREEDOMS IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 7–93 (2006).

[18] *See* MICHELLE EGAN, CONSTRUCTING A EUROPEAN MARKET (2002).

[19] In this context, the concept of economic constitution represented, on a supranational scale, the projection of the principles developed by German Ordoliberal theorists, who were very influential at the time the European integration process started, well beyond the borders of their country, also thanks to some prominent figures of Germany's political life in the 1950s and 1960s. *See* Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy," in* THE LISBON TREATY AND SOCIAL EUROPE 19, 21 (Niklas Bruun ed., 2012); Christian Joerges, *What Is Left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461 (2004); Florian Rödl, *The Labour Constitution*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 623 (Arnin von Bogdandy & Jürgen Bast eds., 2010).

[20] *See* MAURIZIO FERRERA, THE BOUNDARIES OF WELFARE. EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION 205 (2005).

[21] Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, J. OF COMMON MKT. STUD. 645, 646 (2002).

[22] *See* FERRERA, *supra* note 20, at 111.

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factors of production and guarantee of fair competition between economic agents.[23] The legal order of the common market was being embedded—and therefore legitimized—within the systems of national social protection able to absorb negative social effects deriving from the economic integration process. The main idea, expressed in the Ohlin Report and also in the one drawn by Paul Henri Spaak for the Messina Conference, was that if implemented with the necessary gradualism, economic integration would have automatically promoted a harmonization in the progress of national social systems (Art. 117 EEC Treaty).[24] In principle, such a spontaneous expansion of national social systems did not require supranational measures of social policy. These were only provided for in exceptional cases where social dumping (i.e., exceptionally low levels of labor and social security protection) had prevented the unfolding of the dynamics of convergence towards higher standards of protection.

The reasons, starting from the early 1990s and by decisive aspects, leading to the crisis of the model inspired by canons of classical *Ordoliberalism* are discussed below. The embryo of today's idea of European citizenship as a transnational status of social integration was already present *in nuce* in that model, and particularly in the provisions that the Rome Treaty delegated to the freedom of movement of workers in the terms specified by secondary Community legislation.[25] In fact, along with the right to access the labor market of the host country, the Community migrant worker has always benefited from a guarantee of full integration, or rather of assimilation,[26] within the social protection system of the host State.

The CJEU has always assured the highest *effet utile* to migrant workers' transnational entitlements to social integration within the host State. Such a guarantee of socio-economic integration served as a means for the full deployment of one of the fundamental freedoms of movement enshrined in the Treaty. At the same time, it was included in a model for the construction of an integrated market based on the full preservation of the autonomy of national social protection systems.[27] Equal access of migrant workers to the social rights laid down by the host Member State through the coordination of the social

[23] *See* GIUBBONI, *supra* note 17, at 29.

[24] Treaty Establishing the European Economic Community, Mar 25, 1957, 1957 O.J. (C 321E).

[25] In particular by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community repealed and replaced today by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[26] *See* Michael Dougan & Eleanor Spaventa, *"Wish You Weren't Here . . ." New Models of Social Solidarity in the European Union*, *in* SOCIAL WELFARE AND EU LAW 181–218, 189 (Michael Dougan & Eleanor Spaventa eds., 2005).

[27] *See* STEFANO GIUBBONI & GIOVANNI ORLANDINI, LA LIBERA CIRCOLAZIONE DEI LAVORATORI NELL'UNIONE EUROPEA 139 (2007).

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security systems of the countries involved (as provided for since Regulation 3/1958),[28] not only did not interfere with the "social sovereignty" of the Member States, but also helped to guarantee it by assuring full territorial application of national labor law and social welfare. This explains precisely why such a guarantee has been precociously and extensively interpreted by the case law of the Court of Justice since the early 1960s.

This well-known jurisprudence does not need to be analyzed in this context.[29] Here it is sufficient to recall how on one hand, and in the absence of an express legal definition, the Court adopted a very broad notion of "employee," encompassing all activities having any minimal effective economic consistency carried out under the direction of another person. On the other hand, the Court allowed holders of this fundamental freedom of movement, and their families, to access the whole panoply of social rights guaranteed to the citizens of the host State in conditions of full equality, even beyond situations and entitlements linked to the protection of the employment relationship. The Court was first able to extend the guarantee of equal treatment in the host State to atypical workers, particularly part-time (even minimal) and fixed-term workers, well in advance of the unstoppable expansion of non-standard types of employment in national labor markets during the last decade. Moreover, according to Art. 7 of Regulation 1612/68,[30] the notion of "social advantage" undoubtedly included social security benefits, such as the guarantee of a minimum income provided for on the basis of a universal principle of national solidarity. In this vein, as has been aptly said:

> Social integration into the host society is seen by the CJEU as an instrument of promoting participation in the EU internal market and its economic goals of free movement of factors of production, even if their productivity would be rather low. The rationale behind this case law has to do more with the internal market than with combating against social exclusion, even if this actually contributes to the latter.[31]

[28] The rules governing the coordination of national social security systems are now contained in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (text with relevance for the EEA and for Switzerland) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

[29] Within the vast literature on the subject, see CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU. THE FOUR FREEDOMS 263 (2010); GIUBBONI & ORLANDINI, *supra* note 27, at 11.

[30] Regulation EEC No. 1612/68 on Freedom of Movement for Workers Within the Community, Oct. 15, 1968, O.J. (L 257) 2–12.

[31] Herwig Verschueren, *Union Law and the Fight against Poverty: Which Legal Instruments?*, *in* SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY 205–31, 217 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

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A form of social integration in the host Member State is already firmly assured by the classic CJEU case law on the freedom of movement of workers. Moreover, it is extended to individuals whose contribution to the internal market was actually only potential or very indirect. This expansive tread of the CJEU's case law has been further expanded by secondary Community law, particularly by the rules on the coordination of the national social security systems. Ever since the 1970s, they have followed a line of further expansion of the sphere of application and inclusion *ratione personae* of the tools of transnational access to the welfare systems of the Member States.

Starting from the leading case *Martínez Sala* to the more recent *Zambrano* judgment,[32] the Court has extended the principle of equal treatment in the access to social rights recognized in the host country to all economically inactive European citizens. In the light of the historical evolution briefly presented here, it seems fair to say that this case law does nothing but generalize the status of social integration already widely acquired by EU law on the free movement of workers. By considering being a citizen of the Union as the fundamental status of a person in the supranational order,[33] this case law undoubtedly has the merit of universalizing[34] the social integration logic hitherto anchored to the functioning of the internal market. It also includes people who do not carry out an economic activity in its protective status, centered on the principle of equal treatment. In fact, the main innovation in this case law is the universal projection of the transnational model of social solidarity already foreshadowed by the Rome Treaty in favor of migrant workers within the Community in a way that, as such, was still related to the actual functioning of the common or internal market.

[32] *See* María Martínez Sala v. Freistaat Bayern, CJEU Case C-85/96, 1998 ECR I-02691; Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), CJEU Case C-34/09 (Mar. 08, 2011), http://curia.europa.eu/.

[33] According to the well-known formula consolidated by the judgment of the Court of Justice in Rudy Grzelczyk v. Centre public d'aide sociale Ottignies-Louvain-la-Neuve, CLEU Case C-184/99, 2001 ECR I-06193.

[34] In some cases, far beyond a literal interpretation of secondary law, and particularly of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC (Text with EEA relevance) would allow, but, obviously, still within the scope of the European membership, which requires the possession of the citizenship of a Member State of the Union (and, therefore, excludes citizens of third countries). This is a serious limitation that tends to exclude citizens of third countries from the social integration status entitled to by European citizenship, undermining its effectiveness as fundamental status of individuals in the Union. The matter cannot be dealt with here. For a recent analysis of the intermediate status guaranteed to long-term resident third countries' immigrants by Directive 2003/109/EC, see Maurizio Ferrera, *Free Movement, Immigration and Access to Welfare: Trends and Perspectives* (CENTRO EINAUDI—LABORATORY OF COMPARATIVE POLITICS AND PUBLIC PHILOSOPHY, Working Paper LPF No. 3, 2011), http://www.centroeinaudi.it/lpf/working-papers/wp-all/8287-free-movement-immigration-and-access-to-welfare-trends-and-perspectives.html.

In the evolution undergone by the CJEU case law—based on the constitutional recognition of the freedom of movement contained in Art. 21 TFEU as a pivot of the freedom of movement of persons within the Union—some commentators have recognized a change in the legal paradigm of European social solidarity.[35] If access to social protection systems in the Member States was initially functional to the effectiveness of the common labor market, according to this case law it now becomes a self-constitutive element of Union citizenship, as a status of social integration completely separate from a market rationale and the original idea of *homo oeconomicus*.[36] According to this analysis, a paradigm-shift has to be drawn from a selective and category-based model of "market solidarity"[37] to the recognition of "a transnational personal status."[38] This establishes a general claim of social integration in the Member State of the Union where European citizens freely decide to settle, not unlike what happens in federal found in federal states.

Even by sharing such an opinion, we cannot avoid highlighting the intrinsic limits of a model of solidarity that—being transnational and not supranational[39]—fails to ensure economically inactive European citizens an unconditional freedom of residence in the host country; nor, correspondingly, the right to access the social protection system of that State on the basis of complete equality of treatment with its citizens, at least until the person has acquired the status of long-term resident under Article 16 of Directive 2004/38/EC. In fact, on one hand, the right to reside in another Member State for a period exceeding three months is, at least in theory, conditional upon the "reverse means-test" of having a comprehensive health insurance and, more importantly, sufficient economic resources to ensure that the economically inactive citizen does not become a burden on the welfare system of the host State (Article 7 of Directive 2004/38/EC).[40] On the other hand, transnational access to the systems of social solidarity in the Member States under equal treatment follows an incremental criterion, also in the Court's case law, according to which, whenever the Union citizen does not carry out an activity that is useful for the

[35] *See, e.g.*, OXANA GOLYNKER, UBIQUITOUS CITIZENS OF EUROPE: THE PARADIGM OF PARTIAL MIGRATION (2006).

[36] *See* Cesare Pinelli, *Cittadinanza Europea, in* ENCICLOPEDIA DEL DIRITTO - ANNALI, I 181, 186 (2007).

[37] Floris De Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18:5 EUR. L.J. 694 (2012).

[38] Azoulai, *supra* note 4, at 8.

[39] Pinelli, *supra* note 36, at 190.

[40] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC. This implies the right of the host State to expel those who become an unreasonable burden for its social assistance system (although such a power cannot be exercised in the guise of an automatic punitive reaction against the needy European citizen and must be yielded in accordance with the principle of proportionality according to Article 14.3 of the Directive).

internal market, according to the specific context, he or she shall prove a sufficient degree of integration in the society of the host country (or, for those seeking employment, the existence of a real link with the labor market of that country).

These limits have a precise rationale. We are not dealing with a supranational form of social solidarity based on the partial pooling of the resources deriving from the different national social protection systems, but rather with the creation of a certain degree of financial solidarity towards needy migrant citizens of another Member State.[41] The host State may legitimately require that access to its welfare system be based on a minimum substrate of social integration already legitimately acquired by the individual—in order to prevent an opportunistic use of the freedom of movement for the mere sake of benefit tourism. This does not turn into an unreasonable burden for the national social assistance system. In this perspective, the genuine link of integration within the society of the host country becomes a sort of "counter-limit applied by the Court against the limits that Member States can legitimately be opposing to their financial solidarity obligations towards Union citizens."[42]

Therefore, the exclusively transnational dimension of social solidarity connected to European citizenship must deal with an inherent tension that inevitably reappears every time that the freedom of movement, not functional to the internal market, ends up impinging on the public finances of the national welfare system. This tension cannot be resolved from the perspective of a status of social integration (and, thus, of a solidarity system) that is truly supranational (e.g., regulated and at least partly financed directly at the Union level). It must be dealt with by using similar techniques to those characterizing the balance between fundamental freedoms and limits founded on overriding reasons of general interest legitimately raised by the Member State concerned. The peculiarity in this case is that public interest—in light of which the States are authorized to limit the freedom of movement and the subsequent claim to equal social treatment of economically inactive European citizens—is based on the need to ensure the sustainability of their social protection systems, or rather to preserve the redistributive capacity of their national systems of social solidarity. In this perspective, it can be said that the active or expansive use of the principle of European transnational solidarity becomes tense, and therefore needs to be balanced with the defensive use of the principle of national social solidarity[43] in a similar way to that happening in the context of the internal market.[44] Not surprisingly,

[41] *Grzelczyk*, CLEU Case C-184/99 at para. 44.

[42] Azoulai, *supra* note 4, at 18.

[43] *See* Catherine Barnard, *EU Citizenship and the Principle of Solidarity, in* Social Welfare and EU Law 157–80 (Michael Dougan & Eleanor Spaventa eds., 2005).

[44] *See* Ségolène Barbou des Places, *Solidarité et Mobilité des Personnes en droit de l'Union Européenne: Des Affinités Sélectives?*, *In* LA SOLIDARITÉDANS L'UNION EUROPÉENNE, 217–44 (Chahira Boutayeb ed., 2011).

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similar to this context, the core of these balancing attempts is represented by the graduation in the principle of proportionality in relation to concrete facts of individual cases. Similar to the context of the free provision of services in the internal market, such attempts of balancing the interests at stake are systematically biased by virtue of a strict application of the principle of proportionality,[45] in favor of the individual freedom of movement of the (economically inactive) European citizen.

Thus, the individualistic root of the status of social integration conferred on the individual through European citizenship comes into conflict with the collective foundation of the solidarity systems operating within the Nation State.[46] The result becomes that, even on behalf of social integration for European citizens in light of the principle of equal treatment, the constitutional social freedom entrusted to the European mobile citizen is likely to exert additional pressure on the heavily burdened welfare systems of the Member States, fostering the social-levelling-down dynamics going on within these systems. While there is little evidence of the emergence of a supranational dimension of Union citizenship,[47] the de-bounding logic of openness dominant in its transnational dimension is likely to become an additional destabilizing factor for the national Welfare State systems. These systems are already burdened by the consequences of the economic and financial crisis and by the measures that the Union itself demands to adopt in order to cope with them. Lacking the socio-political requirements for the emergence of an even minimal pan-European solidarity system at the Union level, "the paradox of the *civis europaeus* status, which has not reached a complete legal consistency yet, and which could already summarize the crisis of the whole European project, is no surprise."[48]

C. Free Movement of Services, Labor Law, and Collective Social Rights in the Internal Market

The fragility of the status of social integration guaranteed by the Union citizenship in a merely transnational dimension emerges in a conspicuous way when its important

[45] *See, e.g.*, Déborah Prete v. Office national de l'emploi, CJEU Case C-367/11 (Oct. 25, 2012), http://curia.europa.eu/.

[46] *See* ANDREW WILLIAMS, THE ETHOS OF EUROPE: VALUES, LAW AND JUSTICE IN THE EU 132 (2010); Alexander Somek, *The Social Question in a Transnational Context*, 14 (LEQS PAPER NO. 39, 2011).

[47] Attempts to strengthen the supranational dimension of Union citizenship by applying the rights connected to this status in situations lacking any degree of trans-nationality and cross-border elements were ambiguously made in the *Zambrano* judgment. The potential scenarios envisioned by that ruling, immediately downsized by *McCharty*, Case C-434/09 (May 5, 2011), were nonetheless further limited by subsequent rulings of the Court of Justice. *See* Murat Dereci v. BundesministeriumfürInneres, CJEU Case C-256/11 (Nov. 15, 2011), http://curia.europa.eu/; O., S. v. Maahanmuttovirasto and Maahanmuttovirasto v. L. Cf. Spinaci, CJEU Cases C-356/11, C-357/11 (Dec. 6, 2012), http://curia.europa.eu/.

[48] Pinelli, *supra* note 36, at 198.

"external" limits of application are taken into account. The example of posting workers under a cross-border provision of services within the internal market is paradigmatic of those limits, and illustrates better than any other case study the contradictory outcomes of a notion of European social citizenship that is framed within the individualistic conceptual landscape of the freedom of movement.

The four well-known judgments, *Viking Line*, *Laval*, *Rüffert*, and *Commission vs. Luxembourg* became famous for having altered, probably irreversibly, the relationship between national social systems and internal market law, as originally configured by the Rome Treaty with the system-decision of "de-coupling"[49] the two spheres by maintaining a strict functional separation between them. That case law—which brings to completion the transformation of the constitutional doctrines of the internal market implemented by the Court at the beginning of the 1990s with leading cases, such as *Rush Portuguesa* and *Säger*—has inverted the original constitutional balance between market unification and the preservation of the autonomy of the national systems of labor law, with a paradigm-shift "from ordoliberal to neoclassical conceptions of the market in EU law."[50]

As originally conceived, the autonomy of the social systems of the Member States is a prerequisite for the establishment of the common market, as it is capable of providing the necessary social counterbalance to the phenomena of economic dislocation induced by the European market integration at national levels. In this context, accepted in the Treaty of 1957 on the basis of the theoretical-political infrastructure contained in the Ohlin and Spaak Reports, a European labor code is neither necessary nor desirable,[51] because the diversity of the national regulatory models in itself is not a factor of distortion of competition and of free movement of resources of production within the common market. Within this concept, a Community selective harmonizing intervention—in an upward logic of harmonization of national systems—may be rather appropriate in exceptional cases in which the different labor law standards of protection do not reflect a real difference in the levels of work productivity nor can they be neutralized by adjusting the exchange rates, therefore being able to determine an actual distortion of competition in the form of social dumping.

This idea is simply overturned by the neo-liberal or neoclassical judicial turn undertaken by the Court of Justice: "The common idea underpinning *Viking*, *Laval* and the subsequent case law in the same line is that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, must be justified by

[49] Scharpf, *supra* note 21.

[50] Deakin, *supra* note 19, at 21.

[51] *See* Luca Nogler, *Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?*, 14:4 EUR. L.J. 483 (2010).

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reference to a strict test of proportionality."[52] In particular, the strict application of the "market access test" to the obstacles to free provision of services deriving from the higher standards of labor protection in force in the country in which the service is supposed to be carried out[53] puts the system of labor law of that State under a justified pressure which is completely inconceivable in the constitutional design originally taken up by the Rome Treaty. In the system laid down by the EEC Treaty, as promptly implemented by Regulation no. 1612/68,[54] no exception was made to the full territorial application of national labor law of the host country according to the principle of equal treatment on grounds of nationality in cases of temporary mobility of posted workers within a transnational provision of services. On the contrary, the new *Laval* ideology not only bars the full application of the whole labor law (legal and collective) rules of the host country to the worker temporarily posted within a provision of services, but, according to the Court's interpretation of Article 3.7 of Directive 96/71/EC,[55] it even prohibits raising the standard of protection above the threshold set by the rules on minimum protection of that State. These rules, therefore, also determine the maximum level of protection within the very broad context of a transnational posting of workers as defined by Article 3.1 of the Directive. In this way, "in *Laval* and in its later judgment *Rüffert*, the Court overturned the presumption in favour of the territorial effect of labour legislation, at least in the context of freedom to provide services."[56] Therefore, with the only exception of the core of mandatory rules of minimum protection, labor law was attracted within the regulatory competition in the internal market of services at the time when, with the great EU enlargement, the Eastern countries with weaker standards of protection and industrial relation systems entered the Union. The possibility, at least partially, of applying to posted workers the less protective rules of labor law and the lower collective standards of the service provider's country of origin has been considered essential to a proper functioning of the enlarged internal market, as a legitimate option of exploitation of the competitive advantage gained by eastern European companies.

[52] Deakin, *supra* note 19, at 24.

[53] *See* Gareth Davies, *Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law*, 11 GERMAN L.J. 671 (2010).

[54] Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services, Jan. 1, 1997, 1997 O.J. (L 18).

[55] *See* Laval un Partneri Ltd v, Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, CJEU Case C-341/05 (Dec. 18, 2007), http://curia.europa.eu/; Dirk Rüffert v. Land Niedersacksen, CJEU Case C-346/06 (Apr. 3, 2008), http://curia.europa.eu/.

[56] Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 252–69 (Marie-Ange Moreau ed., 2011).

The overturning of the original idea of the founding Treaties produced by the affirmation of this neoclassical—or "ultra-liberal"[57]—conception of internal market law has important and only apparently indirect consequences on the idea of a European citizenship as a status of social integration. The first obvious consequence is the rupture of the universalistic and unifying claims of that idea which actually requires the founding character of a European *status civitatis* in the new constitutional order of the Union, according to the same fundamental rights language of the Court's case law. With the sole exception of the minimum rules of mandatory protection in the host State, a worker posted within a transnational provision of services is not entitled to benefit from this fundamental status entrusted to him or her by European Union law, but is attracted towards the protective status of the economic freedom of the enterprise that is employing him or her in the cross-border provision of the service. We are in the presence of a subtle attempt of re-commodification of the posted worker, whose labor force tends to be assimilated to the other productive factors organized by the employer provider of the service, and indeed, considered an important element of the competitive advantage enjoyed by the company in the internal market for its lower cost.

The Court's main argument for that purpose is that a worker posted within a temporary provision of services does not belong to the labor market of the host Member State, but rather to the one of the country of origin. It is a weak argument, at least in relation to all the cases in which the work carried out under the posting, although temporary when considered in the very broad and quite indeterminate sense endorsed by the Court's case law, lasts for a long time, years even, in the territory of the host country. The key point is that the mobility of the worker posted within the employment relationship formally established in the country of origin is no longer qualified under the aegis of the free movement of workers protected by Article 45 TFEU, as originally conceived, but according instead to the freedom to provide services under Article 56 TFEU.[58] In the Court's reasoning, this justifies an otherwise clear rupture of the principle of equal treatment, on which the idea of European citizenship as a transnational status of social integration for the person moving within the Union is based, even when such free movement takes place for reasons unrelated to market integration. The worker posted in the Member State in which the service is carried out is not to be treated the same way as workers belonging to the labor market of that country (and with whom, in fact, he carries out his work). The full extension of labor law of the host country would determine an illegitimate, disproportionate obstacle to the economic freedom of the provider of the service. But this

[57] Alain Supiot, *Conclusion: Europe's Awakening*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 292–309, 292 (Marie-Ange Moreau ed., 2011).

[58] *See* Antonio Lo Faro, *Diritto al Conflitto e Conflitto di Diritti nel Mercato Unico: Lo Sciopero al Tempo della Libera Circolazione*, *in* 1 RASSEGNA DI DIRITTO PUBBLICO EUROPEO 45 (2010).

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"gross violation of the principle of equality,"[59] in eroding the territoriality of national labor law,[60] excludes workers posted under the different elusive modes of a transnational provision of services from the status of social integration, to which Union citizenship would otherwise give access.

A second and no less important implication of the Court of Justice's new course of law—returning to the historical analysis by Marshall—can be found in what we might call the fundamental conceptual aversion of the Luxembourg justices to the idea of "industrial citizenship" as an essential element of the gradual affirmation of social rights in Europe within the framework of a national Welfare State. In *Viking* and *Laval* the innovative affirmation of direct horizontal enforceability of the freedom of establishment and the freedom to provide services deprived of meaning the concomitant statement for which strike must be guaranteed as an EU fundamental right, also in relation to the ways in which the Court carried out the alleged "balancing" between conflicting interests. Indeed, it is difficult to find traces of a true constitutional balancing of rights that are at least equally important at the EU level in the Court's reasoning. In evaluating the Court's reasoning in *Viking* and *Laval* in light of the balancing of rights notion that is prevalent within highly developed national constitutional cultures[61] and the most reliable European theoretical thinking,[62] we cannot find any proper kind of balancing exercise in the two judgments. There is no balancing exercise because the Court's *modus operandi* did not deviate from the classical logical framework of fundamental economic freedom in any of the situations in which the national measure—that is obstructing its exercise—is properly related to any interests worthy of protection within the legal order of the Member State. The Court, as always, will acknowledge these interests insofar as they comply with the principles of adequacy, necessity, and strict proportionality. In spite of the declared reallocation of the rights to strike and take collective action within the circle of EU fundamental rights, "what the Court has accomplished is not a balancing-act between two equally-footed rights, but a much more traditional scrutiny of compatibility between national rules and Community law."[63] And in this logic, the aim is not to balance between equally standing rights, but

[59] Supiot, *supra* note 57, at 301; Antonio Lo Faro, *Toward a De-fundamentalisation of Collective Labour Rights in European Social Law?*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 203, 207 (Marie-Ange Moreau ed., 2011).

[60] Barnard & Deakin, *supra* note 56, at 252, 260; GIUBBONI, *supra* note 16, at 91.

[61] For the Italian constitutional culture, see A. Morrone, *Bilanciamento (giustizia cost.)*, *in* ENCICLOPEDIA DEL DIRITTO - ANNALI, II, VOL. II 185 (2008).

[62] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 100 (2010).

[63] Lo Faro, *supra* note 58, at 54.

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rather to reaffirm a principle of hierarchy among legal systems according to the classical view of the primacy of Union law as affirmed by the Court of Justice.[64]

Thus, the recognition of the right to strike as an EU fundamental right is concretely, and paradoxically, resolved in its "de-fundamentalization."[65] If compared to economic freedom, the right to take collective action—through which the constitutional systems of Finland and Sweden protect strike-actions according to a logic that essentially relies on the self-regulation of the collective actors themselves—loses its constitutional or fundamental nature. It is evaluated "the same way as any other national legal provision."[66] In the Court's approach, the only fundamental right is economic freedom, while strike actions—considered for their concrete effects as a national measure restricting access to the internal market—are basically downgraded to an exception to the exercise of the freedom of establishment or the freedom to provide services. This exception is only allowed under very limited circumstances due to a strict proportionality test.

This actual de-fundamentalization of the right to strike reveals a very simplistic proto-liberal, rather than neoclassical,[67] view of the function of industrial conflict and more generally of the action of organized labor within the dynamics of the internal market. Obviously, if the right to take collective action is not abruptly denied by the Court—as in the classical proto-liberal model of post-revolutionary France symbolized throughout Europe by the *Le Chapelier* law[68]—then certainly the idea of that right sterilizing its potential effects is accepted. Such acceptance significantly reduces its margins of feasibility. Moreover, it discourages—or at least makes it very difficult to pursue—the construction of a social counter-power at a transnational level that is able to effectively counteract the increased market power of enterprises,[69] which are strategically advantaged by the new options opened up by regulatory and fiscal competition in the

[64] *Id. See also* Nikitas Aliprantis, *What Remedies for Social Derivatives and Expansionism of the Court of Justice of the European Union?*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 89–98 (Marie-Ange Moreau ed., 2011).

[65] Lo Faro, *supra* note 59, at 203–16.

[66] Lo Faro, *supra* note 58, at 45.

[67] In criticizing this case law, Christian Joerges has provocatively evoked the "authoritarian liberalism" formula coined by Hermann Heller at the beginning of the 1930s. *See* Christian Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 9 COMPARATIVE SOC. 65, 75 (2010).

[68] *See* Vittorio Angiolini, *Laval, Viking, Rüffert e lo spettro di Le Chapelier*, *in* LIBERTÀ ECONOMICHE E DIRITTI SOCIALI NELL'UNIONE EUROPEA 51 (Amos Andreoni & Bruno Veneziani eds., 2009). Vittorio Angiolini provocatively makes such a reference in this work.

[69] *See* MARC RIGAUX, LABOUR LAW OR SOCIAL COMPETITION LAW? ON LABOUR LAW IN ITS RELATION WITH CAPITAL THROUGH LAW 47 (2009).

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internal market.[70] In particular, the extension of the strict proportionality test to union collective action—which is already conceived as limiting the intrusiveness of the State public powers—threatens to undermine the effectiveness of the recourse when industrial conflict vigorously favors the employer's interests. In fact, such a test quite naturally leads to a tendentious and paradoxical assessment of the illegitimacy of the strike action at hand and how effective it is in pursuing the trade unions' or workers' collective strategies.[71]

The de-fundamentalization of collective rights entails an inevitable weakening of the collective dimension in the construction of strong systems of social rights. Marshall effectively summarized this effect with the "secondary industrial citizenship" formula in his historical analysis of the national Welfare State. But even in the different European and transnational contexts, the construction of new forms of solidarity among strangers—which respond to the demands of the economic crisis and the challenges of global markets—would still require the acknowledgement of strong collective rights[72] to an extent that the Court of Justice does not yet seem ready to accept. In this restrictive approach taken by the Court on the rights to collective action in the internal market, we can grasp a thin, but strong, *fil rouge* with the case law on access to welfare benefits in favor of economically inactive EU citizens. This case law is entirely framed and enclosed within the individualistic paradigm of the freedom of movement. Furthermore, even when the Court opens the doors of transnational social justice to migrant EU citizens, it always does so in the name of the underlying preeminence of individual actors' life chances rather than in the name of the reciprocity bonds of collective solidarity on which national welfare systems are based. Even when the Court favors opportunities of social integration in the solidarity welfare communities of the Member States,[73] the right to move within the European legal space—imagined as a "springboard" to overcome the limitations imposed by national decision-making processes[74]—ends up depreciating the essential collective dimension of the solidarity systems in the different countries. The depreciation implies bonds and constraints of reciprocity between rights and corresponding duties as well as

[70] *See* Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 252, 252–69 (Marie-Ange Moreau ed., 2011); *see also* Ulrich Mückenberger, *Towards a Post-Viking/Laval Manifesto for Social Europe*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 239, 245 (Marie-Ange Moreau ed., 2011).

[71] *See* Alexander Somek, *The Social Question in a Transnational Context* 37 (LEQS Discussion Paper Series, Working Paper No. 39, 2011).

[72] *See* SYLVANA SCIARRA, L'EUROPA E IL LAVORO. SOLIDARIETÀ E CONFLITTO IN TEMPI DI CRISI 64 (2013).

[73] *See* Loïc Azoulai, *La citoyenneté européenne, un statut d'intégration sociale*, *in* CHEMINS D'EUROPE 1, 16 (Mélanges Jean Paul Jacqué ed., 2010); *see also* Maurizio Ferrera, *Free Movement, Immigration and Access to Welfare: Trends and Perspectives* 3–4 (Centro Einaudi—Laboratory of Comparative Politics and Public Philosophy, Working Paper No. LPF 3/11, 2011).

[74] *See* Thorsten Kingreen, *Fundamental Freedoms*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515 (Amin von Bogdandy & Jürgen Bast eds., 2010).

inevitable compromises between the different interests at stake in the distributive conflicts mediated by the national Welfare State.

Fundamental freedoms, including the one protected under Article 21 of the TFEU, play a typical anti-majority role that is of crucial importance in correcting the "parochialism" of national decision making and forcing an internalization—in the name of the principle of non-discrimination—of the legitimate distributive interests of those who, although unrelated to national communities, are entitled to be socially integrated in those spheres of solidarity as members of the broader and more inclusive European polity.[75] As a project of transnational civilization, this is obviously a fundamental—or rather founding—function of EU law and European integration itself.[76]

Although, the Court's jurisprudence raises a distinct issue that is made more visible and acute today by the most serious social and economic crisis in Europe since World War II. The seemingly unstoppable spillover of the anti-majoritarian logic of transnational opening to outsiders—which is typical of the fundamental freedoms guaranteed by the Court's case law—in fact challenges the capability of the Member States to maintain adequate levels of social protection and distributive justice within their borders. This issue arises at the same time as the new economic and monetary constitution of the Union—in responding to the financial crisis—imposes increasingly severe and pervasive supranational constraints on the national democratic Welfare State systems. Union law deprives Member States of decisive levers of political-democratic control over their welfare systems and does not compensate for this partial loss by delivering distributive social justice at a supranational level. The asymmetry between negative and positive integration, classically analyzed by Fritz Scharpf,[77] has never been so evident in the history of the integration process. And with the deepening of this asymmetry, the social deficit of European integration is at risk of converting into a crisis for the Union's democratic legitimacy.

[75] *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998); Thorsten Kingreen, *Fundamental Freedoms*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515 (Amin von Bogdandy & Jürgen Bast eds., 2010); Floris De Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18 EUR. L.J. 694 (2012).

[76] *See* JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 324 (1999); Joseph H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7 (Joseph H.H. Weiler & Marlene Wind eds., 2003).

[77] *See* FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 10 (1999).

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D. National Social Citizenship and New Economic and Monetary Governance of the Union

We cannot analyze in detail the complex measures by which the Member States of the Union, particularly those that are part of the Euro-zone, have tried to come out of the financial crisis. These measures include efforts to reform the European economic and monetary governance and introduce instruments of financial aid for the most affected countries, especially those in risk of default. From the initial measures taken in 2010 in response to the Greek debt crisis up until the adoption of the Treaty on the European Stability Mechanism (ESM) and the entry into force of the *Fiscal Compact*, the Union has undoubtedly made a considerable effort to provide appropriate instruments to counter the unprecedented crisis that has put the survival of the single currency project at risk.[78] These reforms—both those implemented within the institutional framework of the Union and those adopted through the recourse of the intergovernmental method and the subtly revised instruments of international law—present a common trait that is important to highlight in this analysis. The common trait—critically stressed in many analyses, though carried out under different inspirations[79]—can be described as the radicalization of the already noted trend to compress the autonomy of the Member States. Especially those whose common currency is the Euro, with respect to the management of their social policies and in an almost complete overturn of the constitutional constellation originally designed by the Rome Treaty. This trend is intensified—particularly within the new rules of the Stability Pact and the *Fiscal Compact*—when it assumes the shape of a creeping de-politicization of the social and distributive justice issues that are central to the definition and very identity of the different welfare systems of the Member States.

It is well known that the single currency project—as conceived by the framers of the Maastricht Treaty—has been built on a model that is the exact opposite of the models with a solidarity nature *lato sensu* that generally characterize federal systems, although according to very different variations. The establishment of a European Central Bank totally independent from national governments and modeled on the German *Bundesbank* ensures the stability of the single currency. The single currency was not based on a partial centralization of competencies regarding fiscal and budget policies at the Union level—as in federal entities—nor on a federal budget as was suggested in the 1970s by the

[78] This has become an essential part of the political project of an ever-closer Union among the European people since the 1990s. *See* THE SINGLE CURRENCY AND EUROPEAN CITIZENSHIP: UNVEILING THE OTHER SIDE OF THE COIN (Giovanni Moro ed., 2013).

[79] *See*, *e.g.*, Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* (LEQS Discussion Paper Series, Working Paper No. 35, 2011); Alexander Somek, *The Social Question in a Transnational Context* (LEQS Discussion Paper Series, Working Paper No. 39, 2011); Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* (EUI Working Papers LAW, Paper No. 2012/28, 2012); Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

McDougall Report.[80] As dramatically demonstrated by the financial crisis still under way, without a common fiscal and economic policy or a federal budget, the Union is also completely devoid of the automatic stability mechanisms necessary to cope with asymmetric shocks. This is due to the fact that the introduction of the single currency was based on a concept "that is clearly alien to the idea of solidarity,"[81] particularly as demonstrated by the central bailout prohibition rule in the monetary union.[82] The reforms undertaken by the Union to tackle the financial crisis basically confirm this model, though with some important corrections and additions.

A first type of corrective measure, introduced as part of the *Stability Compact*,[83] is designed to support the instruments already outlined by the Maastricht Treaty. The purpose is to provide the Union with the ability to prevent systemic crises of the Euro-zone by strengthening the rules on budgetary constraints and fiscal austerity. The new legislation—partly of EU law nature, partly of international law character—introduces significant innovations, which are aimed firstly at placing limits on the deficit and public debt. In providing the legislation, the Maastricht Treaty and the Stability and Growth Pact allow for the effective liability to be sanctioned. On the one hand, the signatory States of the Fiscal Compact are bound to insert the new rigorous golden rule of budgetary balance into their respective legal orders, preferably through rules of constitutional status.[84] On the other hand, the procedure concerning excessive deficits—which can also be activated if the limits of public debt are exceeded—is decisively strengthened through the introduction of a reverse majority rule. By inverting the voting rule traditionally provided for by Union law and contemplated by the Stability Pact, a qualified majority in the Council becomes

[80] That in designing a possible path of monetary integration among EEC countries, had suggested a gradual construction of a federal budget in stages that should have been completed, in the final stage, with the allocation of 25% of the European GDP to the Community budget.

[81] *See* Jean-Victor Louis, *Solidarité budgétaire et financière dans l'Union européenne*, *in* LA SOLIDARITÉ DANS L'UNION EUROPÉENNE 107, 110 (Chahira Boutayeb ed., 2011).

[82] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

[83] *See* Council Regulation (EU) 1173/2011, 2011 O.J. (L 306) 1; Council Regulation (EU) 1174/2011, 2011 O.J. (L 306) 8; Council Regulation (EU) 1175/2011, 2011 O.J. (L 306) 12; Council Regulation (EU) 1176/2011, 2011 O.J. (L 306) 25; Council Regulation (EU) 1177/2011, 2011 O.J. (L 306) 33; Council Directive (EU) 2011/85, 2011 O.J. (L 306) 41 (comprising the "Six Pack"). *See also* Treaty on Stability, Coordination and Governance of the Economic and Monetary Union, Jan 1, 2013, 2013 O.J. (L 306) [hereinafter Treaty on Stability]. In November 2011, the European Commission submitted two further proposals for regulation in jargon known as the *Two-Pack*, see *Proposal for a Regulation of the European Parliament and of the Council*, COM (2011) 819, 821 final (Nov. 23, 2011); *see also* Catherine Barnard, *The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective*, 41 INDUS. L.J. 98, 102 (2012).

[84] *See* Treaty on Stability art. 3. Italy has proceeded to adapt by modifying Article 81 of the Constitution with the Constitutional Law no. 1/2012. Germany had introduced the *Schuldenbremse* already in 2009, by modifying Articles 109 and 115 of its Fundamental Law.

necessary to reject a proposal by the Commission. Thus, once initiated by the Commission, the sanctioning procedure assumes a semi-automatic course of action, making it much more difficult for the Member State concerned to form blocking minorities. In addition to the procedure referred to in Article 126 of the TFEU—on the basis of Article 121—the 2011 EU law reform also introduces a new procedure for the prevention and correction of macroeconomic imbalances. This procedure broadens the Commission's power to intervene far beyond the borders of fiscal policy by extending it to the whole range of national governments' economic policies. And even in this case, any failure to comply with the corrective actions planned by the Member State—according to the recommendations made by the Commission and the Council—is liable to be sanctioned by a procedure marked by a reverse majority voting.[85]

By the same token, the *Euro Plus Pact*,[86] although having the nature of a political intergovernmental agreement, essentially ends up integrating those new supranational constraints given its close bond with the new legislation on macroeconomic surveillance. The *Euro Plus Pact* intends *inter alia* to have a direct impact on the wage-setting systems operating at the Member States level, which are per se excluded from the sphere of the Union's legislative competencies in the field of social policy.[87] In the chapter on productivity—which is central to the general objective of increasing competitiveness and employment within the Union—the *Euro Plus Pact*, while promising to preserve the different national traditions in the social dialogue and industrial relations fields, indicates the precise measures that Member States should apply in relation to wage-setting arrangements, both in the public and private sectors. Particularly important is the recommendation to align wages with productivity by proceeding, if necessary, to a decentralization of the collective bargaining systems and, if appropriate, by reviewing the mechanisms for automatic indexation.

A second and more creative type of legal innovation—totally absent in the structure of the Maastricht Treaty and therefore subject to bitter controversy—concerns the introduction of suitable tools in order to provide the Union, and in particular the Euro-zone, with the effective ability to manage financial crises through various financial aid mechanisms for countries in difficulty. Unlike the first modest measures adopted in the *European Financial Stabilisation Mechanism* (EFSM)[88]—these instruments of financial assistance all operate

[85] *See* Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* 17 (EUI Working Papers Law, Paper No. 2012/28, 2012).

[86] *See* Catherine Barnard, *The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective*, 41 INDUS. L.J. 98, 103 (2012).

[87] *See* TFEU art. 153(5).

[88] *See* European Financial Stabilization Mechanism, COM (2010) 713 final (May 10, 2010). Established with Council Regulation no. 407/2010 according to Article 122 of the TFEU.

outside the institutional framework of the Union. The *European Financial Stability Facility* (EFSF), a precursor to the ESM, is outside the legal framework of the founding Treaties because it was actually established as a limited liability company registered in Luxembourg, according to a very inventive and uneven combination of contract and financial market law and public international law rules.[89] By providing Euro-zone States with a fairly strong permanent instrument of financial aid, the ESM was established as a body of public international law expressly not subjected to the application of EU law.

The highly debated *Pringle* judgment[90] was delivered by the Court of Justice after the German Constitutional Court, under specific conditions, authorized Germany's ratification of the ESM.[91] In this ruling the Luxembourg justices basically dismissed all of the objections raised by the plaintiff, an independent deputy of the Irish Parliament, regarding the compatibility of the ESM with EU law. The most problematic issue concerned the very suspicious compatibility of the ESM with the bailout prohibition laid down by Article 125 of the TFEU.[92] The Court of Justice excluded a violation of Article 125 thanks to an innovative and restrictive interpretation of the no bailout clause, stating that the not yet operational amendment of Article 136 of the TFEU[93] has a merely confirmatory value for the competencies of Member States in this field. According to the Court's interpretation, Article 125 is only intended to prevent Member States from relying on redemption of their public debt by other members of the Euro-zone. In this way, Member States are encouraged to maintain sound fiscal policies and, most importantly, moderate budget policies. The ESM's terms do not contradict the rationale and substance of this prohibition because the financial solidarity that the Member States ensure to fellow countries whose difficulties jeopardize the stability of the whole Euro-zone is subordinate to a strict conditionality requirement specified by the same reformulation of Article 136.[94] On the one hand, the ESM is fundamentally committed to guaranteeing the collective European

[89] *See* Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* 13–14 (EUI Working Papers Law, Paper No. 2012/28, 2012).

[90] *See* Pringle v. Ireland, CJEU Case C-370/12 (Nov. 27, 2012), http://curia.europa.eu/. The judgment delivered by the Court in plenary session, with critical comments by Tomkin (2013) and Van Malleghem (2013).

[91] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BVR 1390/12 (Sep. 12, 2012), http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html; Susanne K. Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, 14 GERMAN L.J. 1 (2013); Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 GERMAN L.J. 21 (2013).

[92] *See* TFEU art. 125.

[93] TFEU art. 136 was modified according to Decision 2011/99, not yet in force, using for the first time the simplified revision procedure introduced by the Amsterdam Treaty. The amendment was intended to clarify the competence of the Member States to adopt an instrument of the type of ESM.

[94] *See* TFEU art. 136.

interest of protecting the stability of the Euro-zone as a whole—without definitely burdening itself with the public debt of the subsidized Member States, which are to remain individually liable. On the other hand, the strict conditionality requirement for acceding to ESM financial aid provides adequate guarantees so that this does not result in a disincentive to pursuing sound fiscal and budget policies. Thus, the conditionality requirement circumvents the "moral hazard" temptation for the assisted countries.

From the brief review above, it is evident that the reforms introduced within and especially outside the structure of the founding Treaties to cope with the financial crisis of the Euro-zone in fact contribute to a significant compression of Member State autonomy in the field of social and labor law and policy. The new supranational constitutional constraints to the Member States' fiscal and budget policies limit the redistributive options available to the national democratic processes and have strong repercussions on the national Welfare State arrangements.[95] Overall, the new rigid neo-liberal structure of the European economic and monetary constitution can be characterized as a monumental exercise undertaken by "the economic" to rule "the political," which is unprecedented in the history of democracies, at least in the pervasiveness of its ramifications. Having pushed itself to this point, the Union—as has been critically remarked—is not far from the Hayekian ideal of a "limited democracy" based on dethroning politics in the name of market discipline as the supreme arbiter.[96]

The suspicion that such a design is resting on fragile assumptions of democratic legitimacy is dangerously powered by the dramatically ineffective measures adopted by the Union to overcome the economic and financial crisis. The austerity policies—adopted under the pervasive guise of the new European economic and fiscal governance[97]—have so far produced prolonged recession and mass unemployment, especially among young people, in the countries where they have been more or less mechanically adopted, starting with Greece. In other cases, such as Italy, the policies have made the ratio between gross domestic product and public debt even worse. In the words of one of the most lucid critics of this disquieting state of affairs, if compared to a fully-fledged federal State regime or even to the European Monetary System that was in force until the introduction of the single currency, "Member States in the reformed Monetary Union will indeed find themselves in the worst of these three worlds."[98] While the EMU does not have the ability

[95] See the first comparative analysis by ARNE HEISE & HANNA LIERSE, BUDGET CONSOLIDATION AND THE EUROPEAN SOCIAL MODEL: THE EFFECTS OF EUROPEAN AUSTERITY PROGRAMMES ON SOCIAL SECURITY SYSTEMS (2011) and LABOUR MARKET FLEXIBILITY AND PENSIONS REFORMS (Karl Hinrichs & Mattias Jessoula eds., 2012).

[96] ALAIN SUPIOT, L'ESPRIT DE PHILADELPHIE: LA JUSTICE SOCIAL FACE AU MARCHÉ TOTAL 33 (2010).

[97] For an effective definition of the *Fiscal Compact* as a form of constitutionalization of austerity, see Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

[98] Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* 31 (LEQS Discussion Paper Series, Working Paper No. 35, 2011).

to undertake the economic and fiscal maneuvers that only a truly federal budget is allowed to draw unto, the Union does not even let its Member States autonomously use such residual macroeconomic levers—especially those in the Euro-zone—that have lost all competency related to monetary policy. And while the new instruments of economic governance accentuate its institutional fragmentation, the Union is faced with a double deficit of democratic legitimacy[99] as a direct consequence of the asymmetry between a poor ability to give political answers—positive integration—and strong constraints on the autonomy of the Member States in the name of the stability of the market's negative integration. The Union's already tenuous input-oriented legitimacy—utterly weakened by the marginalization of the European Parliament's role within the structure of the new economic governance—is further aggravated by a dramatic, and perhaps more serious, crisis of output-oriented democratic legitimacy, as demonstrated by the widespread anti-European resentment shown by the national public opinion of the countries most affected by the crisis.

E. Conclusion

The disheartening debate on the Union's new financial perspectives for 2014–2020—in regards to which the European Parliament has been called upon to decide on a proposal aimed at reducing the Union budget for the first time in the history of integration—shows that Europe is further than ever from a possible "Hamiltonian moment."[100] Although there are different theoretical approaches and perspectives, many political and intellectual circles have determined that a sharp turn in the direction of federalism is the only effective way out of the Union's systemic crisis. As Giuliano Amato has suggested, "[A] federal model to enjoy more freedom"[101] should create a different tradeoff between greater integration—with the transfer to the Union of additional shares of State sovereignty in the field of fiscal, economic, and social policies, and the creation of an adequate budget at the central level—and the reinforcement of European solidarity.[102] The model of "post-democratic executive federalism"[103] devised by the "reformed" European economic and monetary governance currently generates a dangerous and visibly precarious asymmetric

[99] *See* Fritz W. Scharpf, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy* (Max-Planck-Institut für Gesellschaftsforschung, MPIfG Working Paper No. 09/12, 2012), http://www.mpifg.de/pu/workpap/wp09-12.pdf.

[100] Barbara Spinelli, *Un programma per l'Europa*, 7 MICROMEGA 9 (2011).

[101] GIULIANO AMATO, EUROPA 61 (2012).

[102] See also the articulate proposal by Miguel Poiares Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice* (European University Institute—Robert Schuman Centre for Advanced Studies, RSCAS Policy Paper No. 2012/11, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180248.

[103] JÜRGEN HABERMAS, QUESTA EUROPA È IN CRISI 43 (C. Mainoldi trans., 2012).

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imbalance between integration and solidarity.[104] Though, a correction of these imbalances appears as necessary as it is difficult.

There is no point in undertaking a theoretical speculation on the effective perspectives on the construction of a European federal core as a culmination of a complete economic and monetary Union. At present, these perspectives are highly uncertain and, in any case, must atone for the almost certain unavailability of at least the United Kingdom. Therefore, however framed and conceptualized, a model of a federal political Union should most likely be imagined in a logic of differentiated integration with a central core—or a "cluster," as Amato would say—that is fully integrated and a series of larger political and economic spheres—including the internal market—that are open to participation from the other Member States of the Union. After all, the institutional devices employed to cope with the crisis—especially the crucial side of the financial aid mechanisms—are already decisively moving in the direction of a differentiated integration led by Euro-zone countries and guided by Germany and France.[105]

Concluding remarks on the idea of European citizenship as a status of social integration must be considered. On the one hand, the dominant transnational dimension constitutes a matter of both strength and weakness for Union citizenship because it limits the potential for integration into the national social spheres of the rights conferred to the European mobile citizen, who must balance these access rights with the need to protect the redistributive ability of the Member State welfare systems. This presupposes the maintenance of bounded worlds of social justice based on some criterion of territorial belonging. On the other hand, the trajectory imprinted on the European integration process by the Court of Justice's case law on the internal market and by the recent reforms of the Union's economic governance has created an unfriendly, if not openly hostile, regulatory environment for the national democratic Welfare State. If its survival is not questioned, as Joerges provocatively wondered,[106] then what is at stake here are rather the normative pre-conditions for what Maurizio Ferrera has called the "virtuous nesting scenario"[107] of the national Welfare State within the European integration.

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[104] The first proposals presented in the report written up by the President of the European Council in collaboration with the Presidents of the Commission, of the Euro-group, and of the European Central Bank do not seem to actually be able to change this balance and abandon the prevailing logic of "executive federalism." *See* Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union* (June 26, 2012), http://ec.europa.eu/economy_finance/crisis/documents/131201_en.pdf.

[105] *See* Matej Avbelj, *Differentiated Integration—Farewell to the EU-27?*, 14 GERMAN L.J. 191 (2013).

[106] *See* Christian Joerges, *"Mitbrennender Sorge": Può lo Stato sociale sopravvivere all'integrazione europea?*, *in* IL MODELLO SOCIALE EUROPEO DAVANTI ALLE SFIDE GLOBALI 29 (Luciano Gallino & Christian Joerges eds., 2012).

[107] Maurizio Ferrera, *From Neo-liberalism to Neo-welfarism? Ideologies and Social Reforms in Europe* (Centro Einaudi—Laboratory of Comparative Politics and Public Philosophy, Working Paper No. LPF 2/12, 2012).

According to keen observers, the reconstruction of a virtuous balance between national Welfare State systems and European integration requires a re-appropriation of the new European social question within the realm of politics and of the political democratic process at both supranational and national levels.[108] So far, national labor law and social security systems have shown a remarkable degree of "resilience" when facing de-regulative pressure judicially driven by the negative integration of the internal market.[109] For example, the remarkable adaptability demonstrated by the Nordic labor law and industrial relation systems in response to *Viking* and *Laval* is proof of this.[110] Except, during the worst economic crisis since the years after the Second World War, this resilience is currently being challenged again within the context of the reformed neo-liberal Union's economic and monetary governance.[111] The *Memoranda of Understanding* signed by Greece, Ireland, and Portugal that allows access to the Union's financial aid provides a vivid example of what "negotiating in the shadow of bankruptcy"[112] really means for the "nesting" of a national Welfare State within the EMU's reformed constitution. The wide-ranging reforms of the labor market approved in Italy and Spain between 2011 and 2012 are also an indirect but telling example of the new EU politics of conditionality.[113]

A re-politicization of the social issue capable of counterbalancing these new powerful external constraints to the benefit of Union's democratic legitimacy requires the rediscovery of the positive integration function of European labor law, beyond the open method of coordination. The recent European minimum pay proposal by the former Euro-Group President Jean Claude Juncker as well as the less recent proposal for guaranteed minimum income regulated at the EU level are very effective in demonstrating the acute

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[108] *See* Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

[109] Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy," in* THE LISBON TREATY AND SOCIAL EUROPE 19, 40 (Niklas Bruun et al. eds., 2012).

[110] *See* Jonas Malmberg, *Posting Post-Laval: Nordic Responses, in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 23 (Marie-Ange Moreau ed., 2011); Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 252, 263 (Marie-Ange Moreau ed., 2011).

[111] *See* Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy," in* THE LISBON TREATY AND SOCIAL EUROPE 19 (Niklas Bruun et al. eds., 2012).

[112] Niklas Bruun, *Economic Governance of the EU Crisis and its Social Policy Implications*, *in* THE LISBON TREATY AND SOCIAL EUROPE 261, 270 (Niklas Bruun et al. eds., 2012).

[113] *See* Antonio Ojeda Aviles, *Diritti fondamentali, concorrenza, competitività e nuove regole per il lavoro in una prospettiva di diritto comparato*, *in* NUOVE REGOLE DOPO LA LEGGE N. 92 DEL 2012 DI RIFORMA DEL MERCATO DEL LAVORO COMPETIZIONE VERSUS GARANZIE? 9 (Giappichelli ed., 2013); Stefano Giubboni & Antonio Lo Faro, *Crisi finanziaria, governance economica europea e riforme nazionali del lavoro: quale connessione?*, *in* NUOVE REGOLE DOPO LA LEGGE N. 92 DEL 2012 DI RIFORMA DEL MERCATO DEL LAVORO COMPETIZIONE VERSUS GARANZIE? 41 (Giappichelli ed., 2013).

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awareness that the "virtuous nesting" of national Welfare States needs to undergo a re-discovery of supranational social harmonization in new forms. Beyond their legal-political impracticability,[114] both of these proposals signal the need to set a common minimum floor of labor and social rights to protect against the risks of de-regulative competition and social leveling-down pressures inherent in the new EU constitutional landscape. While waiting for Croatia's adhesion, a new minimum harmonization strategy obviously must take into account the increased social and economic dis-homogeneity and differentiation of the Union "at Twenty-seven." Therefore, we need to imagine it under the new guise of framework directives and legislation by general principles[115] open to flexible national implementation even in the context of principled differentiation through the enhanced cooperation route envisaged by the Lisbon Treaty.[116] A complementary route would be rediscovering at the EU level the forgotten virtues of auxiliary legislation. This rediscovery would foster a process of minimum standard setting through European collective bargaining of sectorial or transnational nature in the shadow of EU law.

Moreover, the re-politicization of the European social issue passes through the discovery of a truly autonomous sphere of national social regulators—States and social partners—against the excessive intrusiveness of the EU fundamental freedoms and the tinged logic of negative integration. At least in theory, the Lisbon Treaty provides the Luxembourg justices with a wide range of conceptual tools and new hermeneutic opportunities to reconsider the constitutional doctrines of the internal market in order to assure a broader "margin of appreciation" for the Member States in relation to sensitive choices regarding social policy and distributive justice within their welfare systems.[117] In connection with the meta-principle of the inviolability of human dignity that is enshrined in Article 1 of the EU Charter of Fundamental Rights,[118] a well-crafted interpretation of the provisions of Chapter IV of the Nice Charter would enable the Court of Justice—at least in theory—to effectively recast its way of understanding the "balancing" of social rights and economic freedoms.[119]

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[114] *See* Herwig Verschueren, *Union Law and the Fight Against Poverty: Which Legal Instruments?*, *in* SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY 205 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

[115] *See* S. Klosse, *Balancing Europe's Economic and Social Goals: Fighting a Losing Battle?*, 3 EUR. J. SOC. L. 176 (2012).

[116] *See* Niklas Bruun, *Economic Governance of the EU Crisis and its Social Policy Implications*, *in* THE LISBON TREATY AND SOCIAL EUROPE 261, 275 (Niklas Bruun et al. eds., 2012).

[117] *See* Alain Supiot, *Conclusion: Europe's Awakening*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 292, 303 (Marie-Ange Moreau ed., 2011) (arguing how a greater deference for these choices is required by the provision on the national constitutional identities now contained in TEU art. 4.2).

[118] *See* STEFANO. RODOTÀ, IL DIRITTO DI AVERE DIRITTI 39 (2012).

[119] *See* Bruno Caruso, *I dirittisocialifondamentalinell'ordinamentocostituzionaleeuropeo*, *in* IL LAVORO SUBORDINATO, VOL. V DEL TRATTATO DI DIRITTO PRIVATO DELL'UNIONE EUROPEA 707 (Silvana Sciarra & Bruno Caruso eds., 2009); Giuseppe

Even proper reference and due deference to the Strasbourg Court's advanced new case law on the right to strike and the right of collective bargaining[120] could offer the Luxembourg justices a fresh constitutional starting point under Article 6 of the TEU that would allow them to overcome, or at least mitigate, the interpretative *aporia* of the *Viking* and *Laval* cases on the standards of international protection of collective rights.[121] A dialogue between the two courts, renewed on these grounds, would allow them to overcome the "crisis of trust"[122] regarding the "social" jurisprudence of the European Court of Justice that was triggered by the *Viking* and *Laval* cases.

In *Sindicato dos Bancários do Norte and others*,[123] the Court of Justice was asked for a preliminary ruling that, for the first time, explicitly raised the question of the compatibility of national measures for strong compression of workers' rights—implemented by a Member State within the scope of EU fiscal consolidation policies—with the EU Charter of Fundamental Rights. The reference for a preliminary ruling indeed raised the question of the compatibility with Articles 20, 21.1, and 31.1 of the EU Charter[124] with the measures taken by Portugal at the end of 2010, especially with those concerning the reduction of public employee salaries as a condition of gaining access to Union financial aid. Although, in early 2013, the Court declared its incompetence to rule on such a question, concluding that no specific element suggesting that Portuguese law was intended to implement EU law could be identified in the case at hand. But beyond the technical contingencies of this case, the matter raised by the Labor Court in Oporto is destined to recur. The central constitutional issue is whether the rigors of the new European conditionality politics have to be balanced with the social values, objectives, rights, and principles enshrined by the Lisbon Treaty, in particular with the provisions of Articles 2 and 3 of the TEU, and also with the horizontal clause provided for under Article 9 of the TFEU[125] and the endowment of full

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Bronzini, *Solidarietà, coesione, diritti fondamentali nel calvario istituzionale dell'Unione*, *in* IL NODO GORDIANO TRA DIRITTO NAZIONALE E DIRITTO EUROPEO 129 (Elena Falletti & Valeria Piccone eds., 2012).

[120] See the well-known judgments of the European Court of Human Rights, Demir and Baykara v. Turkey, ECHR App. No. 34503/97, ECHR 1345 (2008) and Enerji Yapi-Yol Sen v. Turkey, ECHR App. No. 68959/01, ECHR 2251 (2009).

[121] *See* Filip Dorssemont, *How the European Court of Human Rights Gave us Enerji to Cope with Laval and Viking*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"? 217 (Marie-Ange Moreau ed., 2013); SILVANA SCIARRA, L'EUROPA E IL LAVORO. SOLIDARIETÀ E CONFLITTO IN TEMPI DI CRISI 92 (2013).

[122] Marzia Barbera, *Diritti sociali e crisi del costituzionalismo europeo* 6 (Centro Studi Diritto del Lavoro Europeo "Massimo D'Antona," Working Paper No. INT—95/2012, 2012).

[123] Sindicato dos Bancários do Norte v. Banco Português de Negócios, CJEU Case C-128/12 (Mar. 7, 2013), http://curia.europa.eu/.

[124] *See* Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 364) 2.

[125] *See* Stefano Giubboni, *Social Europe after the Lisbon Treaty. Some Sceptical Remarks*, 4 EUR. J. SOC. L. 244 (2011); Filip Dorssemont, *Values and Objectives*, *in* THE LISBON TREATY AND SOCIAL EUROPE 45 (Niklas Bruun et al. eds., 2012); Franck Lecomte, *Embedding Employment Rights in Europe*, 17 COLUM. J. EUR. L. 1 (2011).

legal force to the Nice Charter. And the hope is that, in the future, the Court will overcome its negative and elusive attitude and, at least for the Fiscal Compact, reconsider the bold statement made in *Pringle* that the EU Charter is essentially inapplicable to the measures of the ESM.[126] A change in approach seems necessary in order to avoid possible "constitutional collisions" of a new type. The spectrum of these possible collisions clearly hovers over the recent judgment in which the Portuguese Constitutional Court declared the unconstitutionality of a substantial part of the measures adopted by Portugal through the Financial Law for 2013, again within the austerity policies agreed upon with the Troika.[127]

Finally, the same CJEU jurisprudence on the transnational access of economically inactive European citizens to the Member States' welfare systems should take care of conceptualizing in a more balanced way the interdependence of the territorially bounded dimension—and delimitation—of these social solidarity systems and the redistributive choices—and tradeoffs—democratically expressed therein by the national legislatures. It has been persuasively suggested that a re-conceptualization of the freedom of movement protected under Article 21 of the TFEU[128] should better take into account the bonds of political reciprocity underpinning national systems of social solidarity. Such a re-conceptualization should only allow transnational access to the guaranteed benefits for those EU citizens who can actually meet the necessary conditions of reciprocity as a consequence of the degree of integration achieved and the contribution given to the host country's social life. In this way, it has been argued, "the internal capability of electorates to decide on the social question [would be] to a large extent insulated from external pressures, while at the same time preventing discriminatory assessments (by including those migrants who deserve access, by virtue of meeting the preconditions of reciprocity)."[129]

[126] *See* Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, 2011 O.J. (L 91) 1 [hereinafter ESM].

[127] *See* Tribunal Constitucional [T.C. – Constitutional Court], Case No. 187/2013 (Apr. 2013) (Portugal).

[128] *See* TFEU art. 21.

[129] Floris De Witte, *EU Law, Politics and the Social Question*, 14 GERMAN L.J. 581 (2013).

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