

The Judiciary as Legislator?

How the European Court of Justice shapes Policy-Making in the European Union*

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Abstract

During the 1990s, intergovernmentalists and neo-functionalists explored the relevance of the European Court of Justice for European integration. Both approaches promoted quite extreme hypothesis. In recent years, several studies analysed judicial influences on integration empirically, but without providing distinct theoretical arguments. The aim of this paper is to conceptualize the judiciary's importance for the integration path beyond the rivalry between the two grand theories. The Court can only influence integration effectively when the legislator incorporates judicial considerations in the policy-making process. After clarifying the judicial impact on legislation theoretically, the paper elucidates in an empirical case study of European social coordination, how constitutional review shapes policy-making in the development of exchange students' social rights. In this case, the Court successfully promoted distinct legislative outcomes.

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1 Introduction

“The process of European integration faces the existential dilemma which is inherent in most forms of social organization – be it family, a tribe, a nation or even the world order of states. It is the dilemma of reaching an equilibrium between, on the one hand, a respect for the autonomy of the individual unit, freedom of choice, pluralism and diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony and, at times, unity” (Cappelletti, Seccombe and Weiler, 1986, 4).

For more than fifty years, integration has been restructuring the political landscape in Europe. During this process, decision-makers in Europe always faced a dilemma: how to be united in diversity? This tension was the driving force behind the European project. Consequently, to explain integration, one has to analyse how the relevant actors in European decision-making reached an equilibrium between autonomy and unity.

In this respect, the European Court of Justice played a crucial role. Several recent studies explore the Court’s relevance for integration empirically (see for example Martinsen 2003, 2005a, 2005b, 2007). However, distinct theoretical arguments, about how the judiciary effectively influences the integration path, are still missing. Neither the intergovernmental, nor the neo-functional approach provide an adequate analytical scheme in this issue. To bridge this gap, I will conceptualize the Court’s impact for the advancement of European integration theoretically. I argue that the judiciary can only influence integration effectively, when its considerations and doctrines become incorporated in the policy-making process. The power of constitutional review enables the Court to shape legislation, as it provides and promotes distinct policy outcomes. I will highlight this causal mechanism of the judicial influence on policy-making in a detailed case study.

The importance of the European Court of Justice for integration is highly visible in the evolution of European social policy. Social policy seems to be one of the last fields where the Nation State is still fully sovereign. In many studies, scholars of comparative political science explore the distinctiveness and diversity of modern Welfare States. In the light of such differences, social integration constitutes a least likely case of integration. Nonetheless, since the Community’s advent, European social coordination and harmonisation steadily evolved. The European Court of Justice continuously pushed the advancement of social integration.

The free movement of people is one of the Community’s basic freedoms. To ensure that Europeans can move freely inside the Union, Member States have to coordinate their welfare systems. While the European Court of Justice advocated far-reaching European coordination rules, Member States defended national prerogatives in social politics. The trade-off between unity and diversity was omnipresent in those debates.

By taking activist decisions, the Court eventually forced reluctant Member States to overcome their resistance against coordination policies. This way, the judiciary defended a basic freedom of the Treaties and paved the way towards a complex social coordination legislation.

Yet, the Court's case law only impacts integration effectively, when the Council incorporates judicial considerations in the policy-making process. As long as this is not the case, the implementation of case-law is somewhat uncertain. I will flesh out in the theoretical part of this paper, how the judiciary can directly influence European legislation. In a detailed case-study, which analyses the recent evolution of European coordination law, I will elucidate my theoretical claims empirically. But beforehand, I will discuss in the next section, the main points and developments in European social policy. Although this paper will exclusively focus on social policy, the broader notion about the judicial impact on integration is applicable to other policy areas too. I argue that scholars analysing European decision-making, should not only focus on the Council, the Commission, the Parliament, epistemic communities or non-governmental organizations, in some cases, the judges in Luxembourg might have foreclosed legislation outcomes in activist decisions.

2 European Social Policy

“European social policy is fragmented, and concentrated on a few specific issues, particularly those linked with economic integration and with the labour market” (Kleinmann, 2002, 132).

Welfare systems are deeply rooted in national societies and were historically crucial for the creation and consolidation of the Nation State (Majone, 1993; Leibfried and Pierson, 1995a). But nowadays, globalization and the politics of the European Union constrain social policy and traditional components of Welfare States. Therefore the statement, “Welfare States are National States” (de Swaan, 1992, 33), is somewhat out of date. National sovereignty in the social field eroded, because some legal authority, or *de jure* competences, shifted to the European level, and secondly, because the autonomy of Member States, which means the *de facto* regulatory capacity, declined. Various studies have been carried out to capture the social dimension of the European Union. While some scholars highlight the problems in establishing European social policies (Kleinmann, 2002; Scharpf, 2002; Leibfried and Pierson, 1995b; Leibfried, 2005), others claim that a European social dimension is already in place and dynamically evolving (Falkner, 1998; Falkner et al., 2005; Pauwen, 2001; Ferrera, 2005; Eichenhofer, 2007).

In the Rome Treaties, the founding Members agreed to increase social protection nationally.¹ For the following decades, Gilpin's (1987, 355) famous formulation,

¹Guy Mollet, former French Prime Minister, tried to establish a social Europe already in the

“Smith abroad, Keynes at home”, perfectly summarizes the predominant paradigm. The common market should generate fresh resources for the Welfare States, whereby social policy remained the preserve of domestic politics. However, since the 1980s, the European influence on social politics grew consistently, while national and supranational interests often opposed each other. European social policy can be divided in two main categories:

- Member States *harmonize* some social policy competences at the supranational level.
- The *coordination* of welfare systems ensures the free movement of people.

In the next sub-sections, I will shortly summarize the content and limits of harmonized social policies and introduce European social coordination.

2.1 Harmonisation and its difficulties

To shift social authority to the European level was for a long time only assertive, when it had an economic purpose. A supranational rule about equal payment between men and women,² for example, has already been introduced in the Rome Treaties based on economic, rather than social reasons. The argument for this agreement was as follows: competition would be distorted, as long as countries, discriminating against women in the labour market, would have a comparative advantage in the common market (Schulte, 2003, 396). Later on, a social dimension of this Article evolved steadily, with the European Court of Justice, as one of the most important actor tabling gender issues on the European agenda.

Since the agreement on the Single European Act (1986), the European Council equipped the Union in every Treaty amendment with more social competences. One of the most important achievements could be reached at the Amsterdam summit (1997). After the new Labour government gave up Britain’s opt-out, the social agreement could be brought into the Treaties. Several fields of mandate, from occupational health and safety, social security of workers to working conditions, are nowadays part of the ‘*acquis communautaire*’. What is striking, however, is that all those competences have a clear connection to the labour market. Effective supranational social policies, beyond the necessity of the single market, are quite rare.³ Various analytical concepts explain this modest harmonisation success.

The most frequently mentioned obstacle to the adoption of European social policies is the *diversity between Welfare States*. During integration, the different Welfare States

negotiations leading to the Rome Treaties. But he did not prevail (Scharpf, 2002, 645-646).

²EC-Treaty: Article 119.

³Scharpf (2002) points out that economic integration and social policies are in a constitutional asymmetry, as European rules promoting market efficiencies are widespread, but policies promoting social protection only limited.

expanded rapidly, and the European enlargement caused an even more pronounced distinction among national welfare systems. The social philosophy in a country is the result of fierce and ongoing democratic debates, which ultimately determine national social policy. Substantial changes in social policy are difficult to enact, what makes Welfare States predestinated to study *path dependencies*. A further important obstacle for the construction of a broad European social mandate is the *joint-decision trap* (Scharpf, 1988). National governments have to decide unanimously to enact supranational competences. But for some of them, a European social dimension is simply not acceptable. Throughout integration, the United Kingdom was the usual suspect blocking social initiatives. Hence, *lowest common denominator* decisions characterize the Union's mandate in social policy.⁴

Despite all the mentioned difficulties, the Union has some authority in social policy because the *spill-over* dynamic could, at least partly, override those obstacles. The ever denser economic integration made European social action necessary. Even the most sceptical Member States accepted that in order to fulfil the single market, some assimilation in social policy is indispensable. Formulated in a more general way: the thesis from the political economy, that economic and social policies can not be strictly divided, has been confirmed. The analysis of social harmonisation and its problems highlight the general ambiguity of European integration. While spill-overs explain the need to legislate at the supranational level, diversity, joint-decision traps or path-dependency predict gridlock and standstill. The free movement of people triggered the most effective spill-over dynamic into the social sphere. I will now move to social coordination, which evolved out of this mechanism.

2.2 European coordination law

The most important part of European social policy is the coordination of social security schemes. Its origins stem from the free movement of people, one of the Community's basic freedoms, and a vital precondition for the fulfilment of the single market. Historically, the primary goal of coordination rules was to foster mobility of the production factor labour (Graser, 2004, 174).

In 1971, the Council adopted Regulation 1408/71,⁵ "the most advanced social policy achievement of the EU" (Martinsen, 2003, 2). Two doctrines shall guarantee that intra-European migrants can move freely inside the Union: firstly, European migrants

⁴According to Héritier (1999), three reasons explain gridlock and standstill in European decision-making: Member States have different interests, decisions are usually taken unanimously and most policies provoke redistributive conflicts (1999: 1-30). These three points are omnipresent in European social policy.

⁵This Regulation has been modified on numerous occasions. See it online (latest check 28.11.2008): <http://europa.eu/scadplus/leg/en/cha/c10516.htm>; In May 2004, Regulation 883/2004 came into force, replacing Regulation 1408/71. But the new Regulation is not yet applicable, as its implementing Regulation is still under discussion and its Annexes have to be completed. Regulation 883/2004 has been published in the Official Journal of the European Union L 200, 7.6.2004, 1-49.

are entitled to *equal social rights* compared to nationals in their state of residence, and secondly, acquired welfare entitlements have to be *exported*. In other words, European coordination law forces Member States to export welfare entitlements and to treat nationals and European migrants equally. Even though national governments were reluctant to export welfare payments abroad, and keen on keeping their autonomy in defining the personal scope of their welfare clientele, the Council adopted a complex legislation of mutual welfare responsibility. The Court pushed the advancement of the material and personal scope in coordination law, provoking numerous legal-political controversies in this issue.

A longstanding legal-political dispute arose around the question of which welfare entitlements are exportable and which not. The Court, on the one hand, advocated a wide application of the exportability, Member States, on the other hand, were reluctant to pay welfare entitlements to people living abroad. Regulation 1408/71 distinguishes between *social assistance* and *social security schemes*.⁶ The latter have to be exported, while Member States can keep the former territorial. Therefore, the distinction between those categories determines, to what extent national authorities have to pay welfare payments to people living in other jurisdictions.

Since many benefits contain characteristics of social assistance and social security, the distinction between those two categories became a controversial matter.⁷ A well-known case from the year 1983 concerned Paola Piscitello, an elderly woman, who moved from Italy to Belgium. The European Court of Justice ruled that the Italian authorities violated supranational law, by refusing the payment of her social aid pension.⁸ Five years later, the judges also forced France to export a means-tested pension to Italian migrants returning home.

Yet, the French government did not accept the Court's judgement, arguing that these pension benefits are in their characteristics social assistance.⁹ In this case, the French taxpayers were "de facto subsidizing some poor elderly people in Italy's Mezzogiorno" (Ferrera, 2005, 134). The Commission, however, issued an infringement procedure against the French resistance to the Court's decision and, not surprisingly, the judiciary confirmed that France has to export those pension benefits.¹⁰ In turn, the French government initiated a political response to counter judicial activism. Despite the joint-decision-trap, the Council unanimously overruled the Court's jurisprudence by adopting Regulation 1247/92.¹¹ In fact, the Council retained control in a delicate

⁶*Social security* payments provide security from social risks like maternity, invalidity or unemployment, whereas *social assistance* is usually means-tested, non-contributory and financed through taxes.

⁷For a detailed analysis of this dispute see Martinsen (2005b, 100-110 or 2007, 6-15), Conant (2002, 177-212) or Verschuere (2007, 315-319). Verschuere, from 1992 to 2004 a civil servant at the European Commission, analyses this controversy from a biased Community perspective.

⁸Piscitello: C-139/82 (1983).

⁹Giletti et al.: C-381/85 (1987).

¹⁰Commission v. France: C-236/88 (1990).

¹¹Regulation 1247/92 amends Regulation 1408/71.

issue and signalled that the Court's jurisprudence was beyond political intentions.

Ten years later, the European Court of Justice declared again, in its judgements about Jauch and Leclere, that it will not accept the territorialisation of social benefits at any rate. Jauch is the case of an Austrian care allowance and Leclere about a Luxembourgian maternity allowance.¹² The legislator declared, in the mentioned Directive, the non-exportability of those two entitlements. But in the view of the Court, the territorialisation of such benefits violates the free movement of workers. Only very recently, the Court ruled, once more in contrast to secondary legislation, that national authorities have to export a Finnish, a Swedish and three UK benefits.¹³

This legal-political controversies about the exportability of welfare schemes highlight how political issues become legal and how judgements are political. By referring to the free movement of people, the Court advocated more coordination and unity, while Member States defended their autonomy in social politics. To evaluate, whether the judiciary could influence the path of social coordination law or not, one has to take an informed look at the political reactions to the cases at hand. Even though European governments respect the rule of law, the implementation of case law is by no means assured. Conant (2002, 187) concludes that *contained compliance* is "the dominant response to ECJ decisions on social [...] advantages."

Moreover, the French case shows, how a government could convince all other Member States to *overrule* the Court's doctrine. In effect, when legal considerations and political intentions are too far away from each other, politics will prevail. Thus, to have a stake, the Court has to take decisions, which are in line with the preferences of at least some Member States. The judiciary eventually impacts integration most effectively, when the Council and the Parliament incorporate judicial doctrines in the legislation process. As long as this is not the case, the general implementation of case-law is on somewhat shaky grounds. In the next sections, I will analyse theoretically the Court's influence on integration.

3 Conceptualizing the Court's influence for integration

"[T]he legal and politico-economic systems are interdependent, with the law being a product of the polity and the polity to some extent the creature of the law" (Cappelletti, Seccombe and Weiler, 1986, 4).

Fifteen years ago, political scientist begun to evaluate the judiciary's autonomy in European integration. *Neo-functionalists* and *intergovernmentalists* promoted funda-

¹²Jauch: C-215/99 (2001), Leclere: C-43/99 (2001).

¹³Commission of the European Communities vs. European Parliament, Council of the European Union: C-299/05 (2007).

mentally different views about the importance of the judiciary. The former argued that the European Court of Justice can almost independently pursue its own agenda, while for the latter, the judiciary has no autonomous influence on integration whatsoever.

Burley and Mattli provided the first neo-functional account of the judiciary. They called the European Court of Justice a “hero” (1993, 41), who “signals and paves the way [...] on which the political actors can further integration” (1993, 48). Accordingly, the judiciary determines and expands the authority of the European Community and it becomes “inevitable” for Member States to follow “the path chosen” (1993, 51). Moreover, the Court rules fully independent from political pressures, as “member-state preferences will not have a significant impact on judicial outcomes” (Stone Sweet and Caporaso, 1998, 116).

It is exactly this denial of Member States’ importance for European integration, which correctly attracted most of the criticism. Neo-functionalists underestimated the role of European governments, celebrating the creativity and autonomy of supranational institutions. Just at the time when Burley and Mattli began to analyse the European Court of Justice from a neo-functional point of view, Garrett explored the judiciary from an intergovernmental perspective. He claimed that the Court has no autonomous influence on integration, because its “decisions [...] are consistent with the preferences of France and Germany” (1992, 558).

Arguably both, neo-functional as well as intergovernmental scholars, promoted extreme hypothesis about the relevance of the judiciary. Over time, their opposing positions slowly converged (Mattli and Slaughter, 1995; Garrett, 1995). Their discourse was mainly about whether the Court is superior upon governments or vice versa. But neither law, nor politics is determinant towards the other. In the late 1990s, scholars from both sides declared that their dispute became “unproductive” (Garrett, Kelemen and Schulz, 1998, 175) and that their “debate [...] reached the limits of its usefulness” (Mattli and Slaughter, 1998, 178). Nowadays, the rivalry between the two grand theories of integration is out of date. Political scientists moved “beyond the black-and-white painting” (Falkner, 1998, 18), which was omnipresent in integration theory for a long time. However, the broader question about the Court’s importance for integration remains open.

According to the separation of powers, one could take up an intergovernmental point of view and argue that courts simply implement law. In this sense, courts are agents performing tasks, which are clearly defined by the legislator. Yet, such a perspective on the judiciary is too narrow. Judgements are not only based on rules, judicial interpretations create themselves new law.

Norms in modern legal systems follow a clear hierarchy. The constitution is on the top, and the highest Court ensures that every public act meets constitutional obligations. After World War II, constitutional review by High Courts spread throughout Europe, becoming part of the legal self-understanding on the old continent (Shapiro

and Stone, 1994). It is exactly by using its power of constitutional review that the European Court of Justice can influence integration outcomes.

3.1 Constitutional review: the Court's power resource

Legal interpretations of constitutional rules are highly relevant for legislators. In the European context, the Treaties rank at the constitutional level, while Directives and Regulations constitute secondary law. Hence, secondary law has to be compatible with the Treaty obligations. To highlight the power of constitutional review, let's assume that a qualified majority in the Council agrees, in a certain issue, on a Directive or Regulation and that this rule conflicts with the Court's interpretation of the Treaties. In such a situation, the legislator has two possibilities. Either, to *amend the constitution*, or to *make secondary law compatible* with the Court's interpretation. Pollack (2003, 172) calls the treaty amendment accurately the "nuclear option": threatening the judiciary with an amendment of the Treaties is exceedingly effective, but because of the unanimity requirement seldom credible. This threat is, since the 2004 enlargement, even less effective, as the diversity between Member States' preferences increased.

By interpreting and clarifying constitutional norms, the judiciary can heavily influence the policy-making process. In fact, constitutional review promotes new policy ideas, strengthens some political groups vis-à-vis others or forecloses specific outcomes. Stone Sweet (2000, 202) points out that "[l]egislators today routinely take decisions that they would not have taken in the absences of [constitutional] review."

Several facts indicate that this mechanism of judicial law-making is in the European Union exceptionally important:

- To limit political control over the judiciary, judges at the European Court of Justice hold office for six-year terms and they can not be dismissed during their tenure. They take decisions secretly by majority voting, without publishing dissenting opinions. Therefore, it is virtually impossible for governments to threaten individual judges with sanctions.
- The European Treaties can be labelled as an "incomplete contract" (Stone Sweet, 2004, 24), which must be specified not only by legislative, but also judicial means. The four freedoms seem to equip the Court with an almost unrestricted ability to advance integration, as "there will be hardly any field of public policy for which it will not be possible to demonstrate a plausible connection to the guarantee of free movement of goods, persons, services and capital – and thus to the core objectives of the European Union" (Scharpf, 1994, 6).

High *judicial independence* and the remarkable *potential of constitutional review*, which stems from open formulations in the Treaties, seem to support the neo-functional notion discussed above. At first sight, the Court's ability to advance integration is

almost unlimited. That's why many scholars, studying the Court's influence on integration, overestimate the judicial impact. I rather argue that considerations about constitutional review must be combined with more power-based institutional arguments, to capture the Court's influence on integration adequately.

3.2 Constitutional review in an institutional perspective

The dynamics of coordination law, summarized in section 2.2, highlight Member States reactions to undesired legal decisions. Next to legislative overrule, which is because of the unanimity requirement obviously difficult, Member States often simply refuse to comply with the Court's jurisprudence. As it is impossible to legitimize a total obstruction against judicial interpretations, Member States usually vow not to reject undesired jurisprudence per se. Yet, governments can, at the same time, respect the individual decision and neglect its political consequences, as well as its general implications. Such *contained compliance* is indeed a frequently observed political reaction against objectionable legal verdicts (Conant, 2002, 187).

Scholars of European law might respond to this argument that individuals can claim their European rights directly at national courts. Thus, as long as national Courts respect the European Court of Justice' jurisprudence, it does not matter whether national governments back up those decisions or not. In this sense, judicial interpretations are addressed "to judges on other courts, to lawyers and to law professors" (Shapiro and Stone, 1994, 414). Consequently, when the judicial branch supports the Court's doctrines, political considerations are somewhat irrelevant.

Theoretically, this is true. The support of national Court's can breach political resistance. But first of all, it is by no means clear, whether national Courts share the conclusion put forward in the jurisprudence or the government's argument. Moreover, European policies are in general *implemented domestically*, and every rule, which is not accurately implemented, remains meaningless.

When we take the problems of implementation and contained compliance seriously, and when we furthermore take into account that the European Court of Justice can apply its jurisprudence only on a case-by-case basis, it becomes evident that the potential of judge-made law is highly limited. In effect, activist decisions per se are not yet relevant for integration. What matters, is whether new legal doctrines become incorporated in legislation. If this is not the case, the Court's jurisprudence is somewhat redundant, as its implications will not be generally applied, and consequently do not effect the everyday life of Europeans. Following that, I argue that *the Court effectively influences integration only when the legislator incorporates judicial considerations in policy-making*. Hence, to assess whether the Court impacts integration, we have to capture its legislative role. But is the judiciary important in policy-making? Can activist decisions shape legislation outcomes?

To analyse these questions systematically, it is worth taking an actor-centered institutional perspective, and to think about the Court as one of several actors in the policy-making process. Generally speaking, new legislation is “the outcome of interactions among intentional actors” (Scharpf, 1997, 1), while the institutional setting determines the leverage of the involved parties. In this sense, *constitutional review is the Court’s power resource to influence policy-making by shaping the available legislative options*. The legislator definitely considers legal arguments put forward by the Court. Consequently, judicial considerations strengthen the bargaining position of those actors which share the Court’s interpretations.

It is necessary to specify the legislative situations, in which the judiciary can have stake. There is good reason to assume that the European Court of Justice acts as a unitary, rational competence-maximizer, advocating further integration (Pollack, 2003, 36). The Council, however, is a heterogeneous actor without stable and distinct preferences. In many important integration issues, Member States promote different policies. It is in those topics, where the Council lacks leadership by virtue of a missing political consensus, that the judiciary can have a stake. Yet, the Council is not the sole actor in European policy-making. The Commission and the European Parliament are in this context relevant too.

The strengthening of the European Parliament is the most important recent institutional change in European policy-making. Most decisions are nowadays taken in the co-decision procedure, where an absolute majority of the Parliament and a qualified majority in the Council have to agree on a legislation proposal. Once again, to react to activist constitutional review, the legislator has either to change the Treaties or secondary law. If only a few Member States support the Court, the first option fails because of the unanimity requirement. Let’s assume that secondary law has to be legislated in the co-decision procedure and that the Parliament agrees, more or less, with the Court’s conclusion. In this case, the leverage of Member States opposing the Court and the Parliament is seriously minimized.

In effect, the judiciary’s influence on legislation increases, when secondary law has to pass through the co-decision procedure, when the Parliament, the Commission and the Court share the same policy goals, and when Member States can not agree on a corporate position in the Council. In those situations, constitutional review can promote distinct policy outcomes and in fact shape new legislation, which would not be in the zone of possible agreement without judicial activism. Besides this rather rational institutional arguments, constitutional review can shame reluctant Member States into acquiescence, as those decisions always refer to the core objectives of the Treaties. It is difficult to counter such arguments.

After I clarified theoretically how, and when the European Court of Justice can directly influence legislation, I will present a case study elucidating this causal mechanism.

4 Methodology

An important methodological issue for qualitative case studies is the case-selection problem. As the causal mechanism of the judicial influence on policy-making is, theoretically, quite straightforward, the aim is to find a case, which empirically elucidates this mechanism. In such a situation, Gerring (2007, 122) suggests to analyse a *pathway case*, which is a case, “where the causal effect of one factor can be isolated from other potentially confounding factors.”

The focus of my empirical study is on *the recent legislative development of social rights entitled to intra-European exchange students*. This case is suitable for an empirical analysis of the judicial influence on policy-making, because in the initial period of this legislative process, the European Court of Justice delivered a controversial constitutional review, covering the topic under legislative scrutiny. That’s why the Court’s legal interpretation became part of the negotiations in the Council. Hence, it is possible to isolate the implied causal mechanism of judicial intervention from other potentially intervening factors. Next to the case-selection, the methodology of my qualitative study needs some clarification.

I will firstly draw on *within case-evidence*, to assess the Court’s importance for the legislation of exchange students’ rights. Specifically, I will show that reluctant Member States had to give up their resistance against more coordination in European social policy, where the Court suggested distinct policy outcomes. In other disputed issues, which were part of the legislative negotiations, but have not been covered by the Court’s jurisprudence, the advancement of social rights for students failed. In this sense, the following analysis will present counterfactual arguments, documenting the impact of judicial law making, and indicating, what outcome we could have expected without constitutional review. Secondly, another important source of empirical evidence is the *temporal variation* in this case.

I will organize my analysis in different judicial and political sequences, from the early 1990s until the formulation of the new legislation in the year 2004. The methodology of *process-tracing* is highly suitable for this study, as its focus is on a sequential chain of events in order to assess, whether the assumed principles generated the observed outcome (George and Bennett, 2005, 205-232). By linking my theoretical claims to the discussed sequences, I will demonstrate the mechanism of a continuous causal path. The combination of the general arguments discussed in the theoretical part and the detailed empirical case study are the crucial components, highlighting the implied causal mechanism.

Throughout my analysis, I will follow Moravcsik’s (1998, 80-82) advice to rely on ‘hard primary sources’ whenever possible. Hence, I focus on Treaty Articles, Directives, European Parliament documents, European Court judgements and reports on the negotiations in the Council.

5 Residence and social assistance for students?

In section 2.2, I introduced the two basic pillars of European social coordination law: intra-European migrants can export acquired welfare entitlements, and they have equal social rights compared to nationals of their state of residence. Moreover, I summarized the judicial-political dispute over the question of which social benefits have to be exported. I will now focus on the second doctrine of coordination law, which is about equal treatment in social issues. This doctrine states that Europeans, moving to another Member State, shall have access to the welfare system of their state of residence.

The main divide in this issue culminated around the question of whether Member States should only grant welfare benefits to economically active people. It was somewhat uncontroversial to grant them social access, because they help financing Welfare States, as they are usually not in need of social payments. But what is about economically non-active people, such as students or pensioners? Would it lead to ‘welfare tourism’ when people out of work could claim social payments in any Member State? It is important to bear in mind that social coordination stems from the free movement of people. Hence, everybody having the freedom to move is in general entitled to welfare benefits at his or her place of residence.

A European citizen can only claim social security rights after having acquired a resident permit. Therefore, a general right of residence, irrespective from any economic activity, would enhance the personal scope of social coordination remarkably. The Commission already presented such a proposal in the year 1979, provoking fierce resistance. Several Member States, notably those with generous welfare systems, shared one big concern: they feared that unrestricted entry and residence would cause ‘welfare tourism’. At that time, reluctant Member States succeeded.

I will now analyse the recent advancement of European social coordination law, by taking an informed look at the specific situation of migrant students. There are basically two controversial questions about exchange students. Firstly, *whether their resident rights should be restricted*, and secondly, *whether the state of residence should grant them social assistance*.

5.1 Directive 93/96

In the early 1990s, the Council granted the right of residence to economically non-active people. But the Council’s legislation declared that pensioners, students or other people out of work are entitled to resident rights only, as long as they possess sufficient financial resources and medical coverage.¹⁴ The approach was clear: economically non-

¹⁴Directive 90/364 on the right of residence; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity; Council Directive 93/96 on the right of residence for students.

active people shall have the freedom to move, without relying on welfare payments.

The right to stay in the host state only upholds, when migrant students fulfil these conditions. Consequently, the state of residence does not provide assistance granted to students.¹⁵ Such restrictions were disappointing for those who wanted to construct a Community beyond economic reasoning. According to Directive 93/96, a Member State can withdraw students' resident rights after she or he has, for whatever reason, no more financial means. This is a severe and controversial consequence.

As I will show, the European Court of Justice ruled that the approach chosen in Directive 93/96 violates basic European rules. In the Maastricht amendment (1992), the heads of state introduced the concept of *Union citizenship* into the Community's constitution.¹⁶ Subsequently, the judiciary advanced the content of Union citizenship. Following the logic of the discussed power of constitutional review, the Court's jurisprudence tackled the political doctrine institutionalised in Directive 93/96. The activist interpretation of Union citizenship constructed exchange students' right to claim welfare payments in their host state, despite the clear wording in secondary legislation.

5.2 Constitutional review: the Grzelczyk decision

Social rights are missing in the Treaty Articles about Union citizenship. Hence, at first glance, Union citizenship has nothing to do with the right to obtain welfare benefits. Kostakopoulou (2007, 623) argues that most scholars saw the introduction of Union citizenship "as a purely decorative and symbolic" act. This statement might be exaggerated, but it is true that the 'masters of the Treaties' introduced the concept of Union citizenship in the meaning that it will have only marginal practical effects. For integrationists, however, this was the beginning of a major change. For them, the aim of Union citizenship is to move the Community "beyond the market-oriented objectives of the internal market with respect to the rights of the individual" (O'Leary, 1996, 128).¹⁷ In this sense, O'Leary (1996, 103-142) argued that the resident conditions of medical coverage and sufficient financial means, listed in Directive 93/96, violate Union citizenship rights and are therefore void. Union citizenship and the freedom to move are constitutional rights. Secondary legislation should not contradict the substance of the Union's constitution.

Even though O'Leary's conclusions are somewhat out of touch with the wording of the Treaty section on Union citizenship, her analysis highlights the activist Community perspective. Member States, in contrast, argue that the free movement of economically non-active people has to be restricted in order to prevent 'welfare tourism'. Yet, the European Court of Justice has the power to interpret and to define the scope of the

¹⁵Directive 93/96: Article 4, Recital 10 and 11.

¹⁶EC-Treaty: Article 17-22.

¹⁷O'Leary wrote this, when she worked as a *référéndaire* at the European Court of Justice.

Treaties. So did the European Court of Justice begin constructing a social dimension to Union citizenship in a way O'Leary suggested it?

The judiciary indeed concluded in the year 1998 that Union citizenship establishes social rights for economically non-active people.¹⁸ This ruling, however, was very general. Three years later, the Court delivered a quite distinct conceptualization of Union citizenship's social dimension in its judgement on the Frenchman Rudy Grzelczyk, who began his studies at the University of Louvain-la-Neuve in Belgium.¹⁹ At the beginning of his education, he was able to make a living with minor jobs and by obtaining credit facilities. But the fourth and final academic year was more demanding. To accomplish his university duties, Rudy Grzelczyk gave up work and applied for the payment of a minimum subsistence allowance. Belgium refused his request, because he was an economically non-active student. Yet, the European Court of Justice ruled that Rudy Grzelczyk has the right to obtain the social support in question. In fact, the judges in Luxembourg forced Belgium to grant social assistance to a migrant student.

The conclusions of the Court were based on a constructive reading of the above discussed concept of Union citizenship. The judiciary referred to the Treaty section on Union citizenship and to the equal treatment clause,²⁰ declaring that a Union citizen, having a lawful resident permit, can, under certain conditions, apply for social benefits. This "landmark judgement" (Martin, 2002, 136) re-launched the debate about whether it is legitimate to treat economically non-active people differently than nationals or migrating workers. Interestingly, the Court overcomes the restrictive wording of Directive 93/96, without declaring this Directive to be void.

The judges elaborated a doctrine, balancing the rights of Union citizens and the Member States' concern about 'welfare migration'. The Court grants the right to obtain social assistance to students only, when they established a certain link to the society of their host state.²¹ The judiciary did not specify, how long it takes to establish such a link. Moreover, the Court argued that Grzelczyk's financial problems are only temporary.²² Accordingly, Member States can only repatriate exchange students, which have a weak link to the society of their state of residence and which apply for social benefits over a certain time period.

The Court's judgement was revolutionary because *it introduced exchange students' right to claim, under certain conditions, social assistance* in their state of residence.

¹⁸The judiciary ruled that Miss Martinez Sala, a Spanish mother out of work, should obtain a German child-raising allowance. See Sala: C-85/96.

¹⁹Grzelczyk: C-184/99 (2001). See this decision online (latest check 1.12.2008): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0184:EN:HTML>

²⁰EC-Treaty: Article 12.

²¹In the Grzelczyk case the Court makes clear that students can claim social assistance only in specific situations. Even though the judiciary did not mention the establishment of a certain link into the society, this implicitly follows from the logic of the judgement. The Court explicitly points to this condition in Collins: C-138/02 (2004) and Bidar: C-209/03 (2005). In the Bidar case, the UK refused to pay social assistance to a French student living in the UK.

²²Grzelczyk: C-184/99 (2001), paragraph 44.

Following the power of constitutional review, the Court signalled to the legislator, what kind of secondary law is acceptable, in the light of the constitution.

Some European lawyers heavily criticized the Grzelczyk judgement. In a detailed analysis, Hailbronner (2005) argues that the Court created in this decision new rights, which have basically no fundament in European law. Nonetheless, most European lawyers welcomed the Court's doctrine (Martin, 2002; O'Leary, 2005).

Despite the differences in legal analysis, which might stem from distinct normative views about the question of how integration as such should proceed, most lawyers agree on the following: the introduced doctrine is neither rational, nor coherent (Martinsen, 2007; Hailbronner, 2005; O'Leary, 2005; Martin, 2002). The criteria, considering the duration of welfare support and the link between an individual and the society provoke some legal uncertainty. Eventually both, critical and progressive lawyers, conclude that legislative action instead of case law should define the scope of social citizenship (O'Leary, 1996; Hailbronner, 2005).

I argue that the Court established its doctrine to signal, how the legislator should advance European law. In this context, it is interesting to take into account Member States' opinions about the Grzelczyk case. Governments submit their legal assignments to the Court in order that judges are aware of their arguments. Five governments informed the judiciary on their point of view, while four delegations argued that Belgium does not have to grant social benefits to Grzelczyk.

These opinions enabled the judges to assess their leverage in this issue. The Portuguese government took up the position that social rights are part of Union citizenship. Thus, the judiciary knew that an activist judgement would not be overruled with a Treaty amendment. But the Court also considered the critical opinions, submitted by the other four governments. Consistent with the arguments presented in the theoretical section, Member States' preferences limit judicial activism.

The European Court of Justice could maximize its influence on policy outcomes by displeasing Member States and lawyers, who expect coherent and consistent rulings. The judiciary could have followed the opinions submitted by most Member States. Assuming that, integrationists and most legal scholars would have blamed the Court for not advancing free movement rights and for dismissing the potential, as well as the importance, of Union citizenship. Intergovernmentalists, arguing that the Court strictly follows Member States' preferences, would expect such a decision. Yet, in a legally consistent and coherent judgement, the Court should have declared that the conditions in secondary law are in conflict with the constitutional rights of Union citizenship. Such a decision might have been welcomed by many legal scholars, but its financial and social consequences would have provoked fierce resistance from Member States.

The Grzelczyk verdict is consistent with the assumption that the Court balances legal and political demands. The judges did not declare that exchange students shall

have unrestricted welfare access, but elaborated criteria to limit the financial consequences. According to the jurisprudence, a student has to demonstrate a certain degree of integration into the society and its financial problems have to be temporary. Thus, the judges considered political concerns, at the expense of legal coherence in order to foster the establishment of a new European right. This is a very promising strategy to make sure that this decision will eventually be incorporated in policy-making and in turn be generally applied.

5.3 The legislation of Directive 2004/38

The Council and the Parliament advanced Union citizens' free movement rights, by agreeing on Directive 2004/38.²³ This new legislation re-formulates exchange students' social rights. A few month before the Court published the Grzelczyk verdict, *the Commission submitted a Directive proposal* to the Council and the European Parliament.²⁴ In this policy-making process, the legislator had to react to the before mentioned inconsistencies between Directive 93/96 and the Grzelczyk decision.

Commission officials suggested that migrant students should neither possess financial resources, nor medical coverage to acquire the right of residence.²⁵ Surprisingly, they did not equip economically non-active people with social rights, proposing that "the host Member State shall not be obliged to confer entitlement to social assistance on persons other than those engaged in gainful activity[.]"²⁶ Hence, the Commission draft intended to advance students' rights, by granting them the unconditional right of residence. In this respect, the proposal was more progressive than Directive 93/96. The exclusion of migrant students from social assistance, however, marked a setback in the light of the Court's jurisprudence. The Commission proposal was somewhat contrary to the Grzelczyk decision.

At the first meeting in the Council's working party, delegations from several Member States declared that they oppose the unconditional right of residence for exchange students. Following the large majority, Commission officials reintroduced the condition that students have to be covered by health insurance before applying for a residence permit. Furthermore, many country representatives made clear that they will neither accept that students can move to another Member State, regardless of their financial situation. After several negotiation rounds, civil servants of the Commission changed the draft Directive. According to the new wording, students have to possess sufficient resources, but only in order that they will not burden the social assistance system of their host state. This specification is quite ambiguous, as it unclear how a student

²³The Interinstitutional file 2001/011 (COD) keeps record on all relevant policy-making documents.

²⁴Official Journal of the European Communities, C 270 E, 25.9.2001, 150-160.

²⁵Commission proposal: Article 7, 1(c).

²⁶Commission proposal: Article 21 (2).

should burden a social assistance system. But after all, Member States stuck to the conditions of Directive 93/96, forcing the Commission to hold medical coverage and sufficient resources as prerequisites for the right of residence.²⁷

Next to the resident conditions, Member States had to discuss whether they are willing to grant social assistance to migrant students. Commission officials could not consider the Grzelczyk judgement's criteria in their draft text, because they submitted the proposal to the Council, before the Court published its verdict. According to the proposal, Member States exclude migrant students from social support.

The delegations in the Council's working party, however, immediately *requested a judicial analysis on the consequences of the Grzelczyk judgement from their Legal Service*. The legal staff of the Council pointed out that the Grzelczyk decision constrains the legislation of the new Directive. The proposal excluded economically non-active people from social assistance, what obviously contradicts judicial interpretations about Union citizenship. Based on that, the representative from Austria reminded its colleagues that the limits set in case law should be reflected in legislation.²⁸ Still, most delegations declared that they are not willing to pay welfare benefits to exchange students, no matter what the Court said about that.²⁹ The Commission and the German delegation informed reluctant Member States that they will not accept any retrograde in relation to the Court's jurisprudence.³⁰

At this point of the policy-making process, the situation was rather confused. The legal expertise and the explicit support from several delegations for the Court's conclusion shamed reluctant delegations slowly into acquiescence. The bargaining power of the Commission, the Court and progressive Member States steadily grew, because they could legitimise their preferences with the free movement of people, one of the constitutive values of the Community. The position of reluctant Member States became even more uncomfortable, when the European Parliament started its consultation on the draft Directive. In the co-decision procedure, a proposal has to be accepted not only from a qualified majority in the Council, but also from a majority in the Parliament.

The parliamentary Committee prepared the debate for *the first reading of the European Parliament*, declaring that "the central purpose of the directive is to move from a mainly economic approach to the free movement of persons within the European Union to one based on the principle of European citizenship itself[.]"³¹

²⁷The discussions about the resident conditions for students are recorded in the following sources: The Council of the European Union, documents from the working party on free movement of persons: 15380/01, 18.12.2001; 10572/02, 10.7.2002; 12023/02, 17.9.2002; 12023/02, 2.10.2002; 14451/02, 19.11.2002; 6147/03, 7.2.2003.

²⁸Council document from the working party on free movement of persons: 15380/01, 18.12.2001.

²⁹France, the Netherlands, the UK, Greece, Austria, Finland and Sweden were among the most sceptical Member States. See working party on free movement of persons, Documents: 10572/02, 10.7.2002; 14451/02, 19.11.2002 and 6147/03, 7.2.2003.

³⁰Working party on free movement of persons, 12023/02, 17.9.2002.

³¹The European Parliament, First Report, Committee on Citizens' Freedoms and Rights, Justice

The European Parliament largely followed the advice of its Committee, amending the Directive proposal in order that students do not have to possess sufficient resources, but only medical coverage to apply for residence, and that they obtain social assistance, just like nationals of their host state.³² Obviously, the pressure on reluctant Member States increased once again.

The Parliament proposed that exchange students only need medical coverage to claim the right of residence. Yet, national delegations resisted these pressures, repeating in *the Council negotiations after the Parliament's first reading* that they will only grant resident rights to students possessing sufficient resources. Therefore, Commission officials deleted the Parliament's amendment. Accordingly, migrant students should still have sufficient financial resources in order that they will not burden social assistance systems.³³

The fact that the Council stuck to the resident condition of sufficient resources highlights that Member States can resist pressures from the Commission and the Parliament. The situation in the negotiation on exchange students' right to claim social assistance was different in two ways: the Court promoted in its case law specific legislative outcomes, and Member States' representatives could not agree on a corporate position.

The Parliament proposed that every Union citizen, legally residing in a Member State, should be entitled to claim social assistance. The Commission welcomed this amendment, declaring that it will not accept any retrograde to the case law.³⁴ Some delegations entered still scrutiny reservations.³⁵ To reach consensus in this delicate issue, Commission officials incorporated every aspect of the Grzelczyk judgment in the draft Directive. Consequently, students can claim social assistance only after a certain duration of residence and when their financial problems are temporary. Those criteria, limiting exchange students' access to welfare benefits, were extremely important to convince national representatives.

Eventually, the proposal entitled exchange students with the right to obtain social payments in their host state under the conditions elaborated in the Grzelczyk judgment. Representatives from Luxemburg, the UK, Belgium, Ireland and Denmark remained critical about this legislative confirmation of the Court's jurisprudence.³⁶ But throughout the policy-making process, the leverage of reluctant Member States continuously declined, to the point, where they were too weak to prevent the institution-

and Home Affairs, Session Document, A5-0009/2003, 23.1.2003.

³²The European Parliament, P5 TA(2003)0040, Amendments by the Parliament in its first reading, 11.2.2003, Strasbourg.

³³Council documents from the working party on free movement of persons: 10775/03, June 23 2003 and 10945/03, 30.6.2003.

³⁴See the working party on free movement of persons: 10775/03, 23.6.2003.

³⁵Council document from the working party on free movement of persons: 8337/03, 9.4.2003.

³⁶See notes from the presidency: 12218/03, 5.9.2003 and 12538/03, 16.9.2003.

alisation of case law.

After the Commission introduced all the criteria from the Grzelczyk decision, the Council reached political agreement by qualified majority voting.³⁷ In its second reading, a majority in the European Parliament approved the Directive proposal presented by the Council.³⁸ Eventually both, progressive Members of the Parliament and reluctant Member States, criticized the political agreement. This indicates that the judiciary identified the zone of possible agreement. The Court successfully promoted distinct legislation outcomes for an enhancement of Union citizen's rights, without going beyond the politically acceptable.

Table 1 gives an overview over the development of exchange students' resident conditions and their right to claim social assistance from Directive 93/96 until Directive 2004/38. I furthermore summarized the preferences of the different policy-making actors in the legislation of Directive 2004/38.

Table 1: The development of exchange students' social rights

<i>Under which conditions can students claim the right of residence?</i>	<i>Are students entitled to obtain social benefits?</i>
<i>Directive 93/96</i>	
Medical coverage and sufficient resources	No
<i>The Grzelczyk decision</i>	
No reference	When students fulfil certain conditions
<i>The preferences of the policy-making actors in the legislation of Directive 2004/38</i>	
<i>Commission</i> No conditions	Yes
<i>Parliament</i> Medical coverage	Yes
<i>Council</i> Medical coverage and sufficient resources	Strong resistance
<i>Directive 2004/38</i>	
Medical coverage and sufficient resources	When students fulfil certain conditions

³⁷The working party on free movement of persons: 14067/03, 29.10.2003.

³⁸Directive 2004/38 has been published on 30.4.2004 in the Official Journal of the European Union, L 158, 77-123.

In controversial issues, the judiciary can have a stake in policy-making, when it correctly assesses the preferences of the relevant legislative actors. In the negotiations on the resident conditions, the Parliament, the Commission and progressive Member States failed. Several, reluctant delegations in the Council successfully stuck to the condition of sufficient resources. In fact, the Council made clear that European law still distinguishes between economically active and non-active people. The Court was well aware that unconditional free movement rights, based on Union citizenship, are at present politically too controversial.

The Grzelczyk verdict enabled the Parliament, the Commission and progressive Member States to introduce social rights for economically non-active people. In respect to students' access to social benefits, the legislator followed the Court's jurisprudence in every aspect. Hailbronner (2005, 1262) concludes that "[i]t is probably common legislative practice to follow the Court's reasoning and take up phrases used in judgments of the Court to draft Community legislation. After all, the repetition of the Court's sentences seems to be the easiest way to escape possible conflicts with the Court's jurisprudence." Many actors with different preferences were involved in the policy-making process leading to Directive 2004/38. They could not specify the criteria introduced by the Court. Arguably, the legislator lacks leadership, when Member States and Parliament can not elaborate a common position. In such situations, the Court can successfully take up the legislative role and effectively advance integration.

The criteria institutionalised in Directive 2004/38 are quite ambiguous. It is unclear, how a student should burden a social assistance system. And when can exchange students claim that they established a certain link to the society of their state of residence? The judiciary will again answer these questions. "[V]ague and ambivalent formulations in EU [...] directives [...] are effectively invitations to judicial specification" (Scharpf, 2007, 12). The more ambiguous European law is, the bigger the Court's influence. In effect, the European Court of Justice continues to be a leading actor in this issue, and when the judges consider Member States' preferences in their jurisprudence, the odds are good that the judiciary will foreclose policy-making over again.

6 Conclusion

Schmidt (2001) highlights how the Commission can change the political power balance in the Council, by initiating a Treaty violation proceeding against a Member State. Hence, Commission officials threaten governments with potentially far-reaching decisions from the European Court of Justice, and in turn, the Council takes decisions which otherwise may not have been supported by a qualified majority. This way, the Court's influence on policy-making is rather indirect. I argue, however, that the judiciary influences legislation also in a direct way, without loop to the Commission.

Many scholars focus in their studies about the judiciary only on the doctrines of supremacy and direct effect, without analysing the limits of judge-made law. This leads to a one-sided picture of the Court's power. The starting point of my paper instead is that one has to take into account the problems of contained compliance and effective implementation, as well as the fact that the court can only rule on a case-by-case basis. We should not exclusively focus on what the Court could decide, but also question, when actions by the judiciary effectively influence Europeans' everyday life. In this perspective, the judiciary is not anymore an autonomous institution, equipped with an almost unlimited potential to shape integration, but an actor, constrained by the competences of other institutions.

Rules and doctrines become effective, when they are incorporated in legislation. The power of constitutional review enables the Court to influence policy-making directly. In this paper, I elucidated this causal mechanism theoretically and empirically. Yet, it remains debatable, how often the Court impacts legislation in such a distinct way. Next to social coordination, the internal health market is another policy field, where the Court is highly active (see for example Martinsen 2005a). While the general pattern of the Court's influence in policy-making is rather straightforward, more systematic research is needed to identify, in which policy areas this pattern is relevant and to what extent. Moreover, my analysis deals mostly with institutional arguments. Apart from that, studies about the Court's ability to shame reluctant Member States into acquiescence with its argumentative discourse would enhance our understanding of the judiciary's importance for legislation.

The European Court of Justice is in highly salient policy areas a major centre of policymaking. Eventually, this is not only interesting for empirical studies, but raises normative questions too. From a democratic point of view, the Court's influence on policy-making is indeed problematic (Offe, 2000; Scharpf, 1999). In this context, Scharpf (2007) argues that the political modes of legislation should be strengthened at the expense of non-political modes of European policy-making. Strong political leadership or legislative processes, which allow partial opt-outs, would lead to more distinct Community norms and in consequence to less judicial law-making.

Activist decisions facilitate political agreements in the Council and are therefore a good escape route out of the joint-decision trap. Nonetheless, Europe's institutional setting must be improved in a way that political questions are, generally speaking, answered in political debates and not in Court rooms.

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