Titel/Title: **Free movement, the welfare state, and the European Union's over-constitutionalization: Administrating contradictions**

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ADMINISTRATING CONTRADICTIONS: FREE MOVEMENT, THE WELFARE STATE, AND THE EUROPEAN UNION'S OVER-CONSTITUTIONALIZATION

ABSTRACT

The European Union (EU) has to reconcile free movement rights with national welfare states. Case law of the European Court of Justice (ECJ) has broadened rights to welfare of economically inactive or marginally active EU citizens. Applying the Court's jurisprudence, which is vague and specific at the same time, poses serious challenges for national administrations. Vague criteria for individual assessments have to be translated into mass procedures. And legislative corrections of the case law are often foreclosed given the EU's skewed separation of powers and the over-constitutionalization of European law, where crucial policy choices are taken by the Court's Treaty interpretation. We compare the British and the German approaches and show that ECJ case law impacts through different channels, but triggers similar challenges for national administrations.

INTRODUCTION

With supremacy and direct effect, as established by the European Court of Justice (ECJ) in the early 1960s, the European Union (EU) received a constitution, all but in name. Case law of the Court has been an important driver of European integration. In developing this constitution of the EU further through different rulings, the ECJ influences EU legislation that has to follow its Treaty interpretation (Davies 2016). Largely ignored in research so far, being directly effective, case law of the Court also impacts member-state administrations.

In this explorative study we ask and analyze how ECJ case law structures member states' administrative practice in a policy field with high political salience: the access of newly settled EU citizens to non-contributory social benefits. Granting welfare benefits to recently arrived EU citizens is politically contentious. By picking this area, we have good reason to assume that if member-state administrations follow ECJ case law here, it will also matter elsewhere.

We show that, compared to judicial-administrative interactions at the national level, European case law poses particular challenges for national administrations. Nationally, an administration applies laws that are incomplete contracts, being subject to judicial review. The judiciary fills in legal gaps incrementally, increasing legal certainty (← p. 437) for administrative practice and citizens, being subject to occasional legislative overrule should the legislator disagree with judicial interpretation. In the EU, the separation of powers model is skewed, with a judiciary often assuming a quasi-legislative role and a legislature being largely unable to override the Court, resulting in a very different dynamic. More specifically, in order to ensure the applicability of its rulings across 28 member states and to stay flexible in promoting an 'ever closer Union', we often find the Court establishing general criteria, which then have to be applied on a case-by-case basis by national administrations. For national administrations that are engaged in mass procedures such individual assessments are, however, difficult to handle and challenge legal certainty. Presenting case studies on Germany and the UK, we show that very different political systems respond in a similar way. In contrast to the constrained

European legislature, the German case provides an example for legislative overrule in the national context.

We start with setting out the differences in the separation of powers at the European and the national level, then discussing the implications for national administrations. Turning to our policy field we describe how the Court has ruled on workers' and other EU citizens' access to national welfare systems. In this context, we show empirically the limits of legislative overrule in the EU. In our case studies, we analyze how national administrations in Germany and the UK face very similar problems, despite the different political traditions and welfare systems of these countries.

THE SEPARATION OF POWERS AT THE NATIONAL AND THE SUPRANATIONAL LEVEL

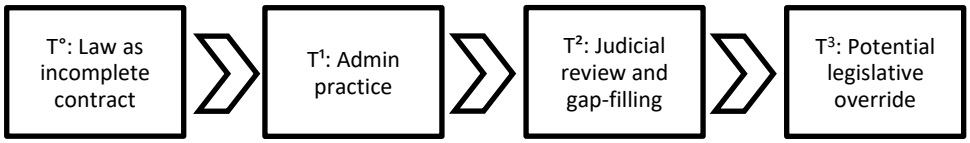
Central to the rule of law in Western democracies is the separation of powers between the executive, legislature, and the judiciary. Rarely, does the implementation of this model correspond to the letter of the original Montesquieu idea, but we find different kinds of entanglement, the classic example being parliamentary systems where the government is rooted in parliament and commands its majority there. Notwithstanding such modifications, focusing on the implementation of legislation through the administration, we can derive certain standard requirements from the separation-of-powers-model that are needed for the rule of law. We begin by contrasting these standards with the skewed separation of powers between the legislature and the judiciary in the EU and, subsequently, discuss implications of the ECJ's case law for national administrations.

Judicial-legislative interactions

Laws, typically, are incomplete contracts that fail to address each and every situation (Maskin and Tirole 1999). Administrative practice has to interpret these laws in view of the different circumstances it confronts, subject to judicial review. The judiciary then fills in legal gaps incrementally, increasing legal certainty for administrative practice and concerned citizens alike (Stone Sweet 1999, p. 161). In as far as the legislator disagrees with judicial interpretation, it occasionally resorts to legislative override by reforming these laws (see Figure 1).

In the EU multi-level system, we find a very different kind of separation of powers model. While this concerns all branches of government, our focus here is on judicial-legislative interactions. EU legislative functions are divided between the Commission, having the right of initiative, and the two chambers of the Council of Ministers and the European Parliament. Compared to the national level the number of veto players is important. This gives European law a status quo bias, as it is difficult to get the needed qualified majority to change existing European secondary law

FIGURE 1 *Judicial-legislative interaction at the national level*



(← p. 438)

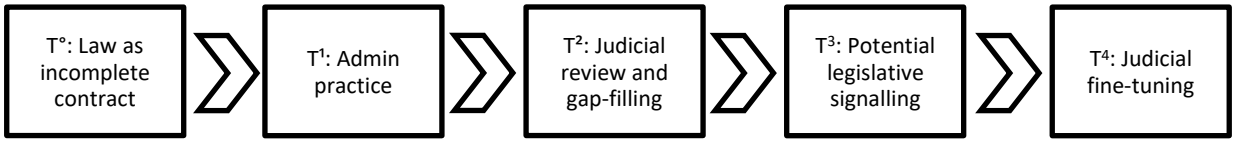
or even unanimity to change the underlying Treaty base – an institutional feature of the EU that is captured by Scharpf's joint-decision trap (Scharpf 1988). If we turn to the judiciary, we see that the relative weakness of the European legislature strengthens the ECJ (Weiler 1981). In as far as the Court develops case law, this becomes the relevant European law, with a low likelihood of legislative override given the many veto possibilities. Moreover, even if EU member states manage to politically agree on secondary law to signal their political intentions, they may still be challenged by the Commission and the ECJ with reference to the Treaty (Davies 2014; Schmidt 2009, p. 860).

If we refer back to the model of laws as incomplete contracts, with gaps being filled in an interaction between administrations and the judiciary, we note an important difference between the European and the national level: In as far as case law is based on the Treaty, there is no potential legislative overrule in T^3; and even if case law is based on secondary law this potential is significantly lower than at the national level. Ultimately, given the supremacy and the pervasiveness of Treaty law, the EU legislature is limited to giving political signals, the effect of which depends on the willingness of the Court to align its interpretation of the Treaties with the legislator's will in T^4 (see figure 2).

At least two reasons make case law particularly relevant in the EU. Firstly, the EU's constitution is based on a succession of intergovernmental Treaties, giving it features uncommon to national constitutions. While it contains details on 'state' organization as the latter do, there is also an abundance of policy goals and rules in the European constitution that would be ordinary law in the Member States. Grimm calls this 'over-constitutionalisation' (Grimm 2015: 469f.) and emphasizes that constitutionalizing material policy 'immunizes the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law' (Grimm 2015: 471). Recently, Dorte Martinsen (2015) argued that EU member states often manage to modify the Court's jurisprudence through legislation. Her analysis, however, does not sufficiently distinguish situations, in which ECJ case law is constitutionalized and cannot be altered by secondary legislation. In such situations, as we will show, it is up to the ECJ whether it takes into account the 'signal' of member states' preferences enshrined in legislation.

Second, it is crucial to understand the peculiarity of the most important judicial procedure in the EU, i.e. preliminary references from national courts. Whenever it appears that European law is relevant for the decision of domestic judicial disputes, and its interpretation is not yet settled, domestic courts of any level can address the ECJ in a preliminary procedure to ask specific questions on how to interpret EU law. Questions from national courts are normally very precise, as they relate to a specific case, and demand interpretation guidelines for EU law. As we will see below, this may concern the question as to how many hours of work and pay entitle someone to the status of 'worker' under the free movement of worker provision of the Treaty. The Court has the difficult task of answering these questions by giving general guidelines that cannot only be applied to the facts of the case, but also by other courts throughout the EU in order to build the unity of European law. At the same time, the Court has an interest in not overstretching its own legitimacy and in ensuring cooperative relations with national courts. The ECJ, therefore, typically requires complex individual assessments in light of its own interpretative guidelines, but leaves it to national courts to apply these guidelines to the facts of a particular case. Moreover, it also has to keep European law, being constitutional law, dynamic to respond adequately to new conflict constellations – a necessity relevant for all constitutional courts (Kranenpohl 2009, p. 389). For the ECJ,

Figure 2 Judicial-legislative interaction at the EU level



(← p. 439)

flexibility also relates to its self-perceived role as motor of European integration. Oriented towards the 'telos' of ever closer integration, the Court has to assure that it does not foreclose future steps of integration.

As a consequence of these peculiarities, EU law and ECJ jurisprudence are very detailed and indeterminate at the same time. As Davies (2016: 848) argues, this makes the 'Union legislature (…) more akin to that of a specialist regulator than a national parliament', the Court acting as its de facto 'principal'. EU policy, thus, is much more shaped by the EU's constitution – as interpreted by the Court – than is true at the national level. One implication is the constraint on the EU legislature. Another constraint is on national administrative practice, to which we turn now.

Implications for national administrations

The Europeanization literature in political science that deals with domestic changes following European integration has only started analyzing the domestic impact of European jurisprudence more recently (Treib 2014, p. 13). ECJ case law may impact member-state administrations, their legislation, and the judiciary alike. Member-state legislatures may change legislation in response (Blauberger 2014); domestic courts may enforce recent ECJ case law through their rulings and drive the development of case law along by addressing the ECJ (Davies 2012). Largely ignored in the Europeanization literature so far have been the implications of ECJ jurisprudence for member-state administrations. With supremacy and direct effect, national administrations responsible for the implementation of EU law need to conform to case law of the ECJ. This concerns rulings that are based on the Treaty and on secondary law alike. From the preceding discussion of the EU's skewed separation of powers and the reasons for the particular relevance of ECJ case law, we can derive at least two important implications for national administrations.

First, the combination of broad interpretative guidelines arising from the ECJ's case law and the requirement to apply these guidelines on a case-by-case basis, poses a particular challenge for national administrations. In contrast to courts, administrations are typically engaged in mass procedures. The ECJ's approach to issue broad interpretative guidelines, but to leave considerable discretion for their application to individual cases, is often seen as crucial in order to ensure national courts' cooperation (Davies 2012: 88). For administrations, however, the requirement to apply vague EU legal principles individually, yet, consistently across many cases, poses problems in terms of workload as well as legal certainty. Depending on the domestic administrative system it may be common that there are administrative circulars from the national ministry on how to change administrative practice in light of the new case law of the ECJ. There may be seminars organized by the government in order to increase knowledge, and citizens may be alerted via webpages of the new legal development, and what it means to them. And yet, where the Court's case law develops dynamically and where it explicitly rules out

fixed thresholds or shortcuts – as we will discuss with regard to workers' and other citizens' rights below – these measures can only partly mitigate the administrative challenges of applying ECJ case law on a case-by-case basis.

Second, where national administrations struggle persistently with the application of ECJ jurisprudence, the constitutionalization of European law precludes the response most common in the national context, i.e. legislative corrections. Strong theoretical arguments have been made as to why the Court is sensitive and anticipates – despite its low likelihood – the possibility of legislative override (Garrett, Kelemen and Schulz 1998; Larsson and Naurin 2016) and the threat of non-compliance (Carrubba and Gabel 2014). Yet, these arguments about the Court's *ex ante* considerations are less pertinent for cases in which conflicts about its case law only arise and become visible *ex post*, i.e. at the stage of administrative implementation. Not only European judges, but also national governments are often unaware of the potential implications of individual rulings for administrative practice. By issuing only broad interpretative guidelines, the Court ensures domestic courts' cooperation and minimizes governmental opposition, but it increases the practical challenges for member-state administrations. Once these difficulties with the application of ECJ jurisprudence reach the surface, however, any political response is constrained by the EU's high decision-making thresholds and essentially limited to legislative signals wherever the Court's interpretation of the Treaties is concerned. As a consequence, much depends on the Court's willingness to be receptive to member states' (← p. 440) legislative signals and to the feedback given by national administrations. Regarding the latter, Obermaier (2008) uses the concept of 'fine-tuning' to argue that the ECJ is sensitive towards implementation problems of the member states and takes care to adapt its rulings, keeping them acceptable for member states.

Having shown how the interplay between legislative incomplete contracts, administrative practice, and judicial review differs at the European from the national level, we now turn to our policy field of access of EU citizens to non-contributory welfare benefits. Crucial guidelines determining access have been set by the Court, and the EU legislature's signals have long gone unheard.

INTERPRETING EUROPEAN CITIZENS' RIGHTS: THE CASE LAW OF THE COURT

The free movement of persons is one of the founding principles of European integration, which had originally largely been reserved to workers and self-employed persons (Wollenschläger 2011, p. 4). Despite its long history and the specific focus on economically active citizens, however, the equal treatment of workers still gives rise to many implementation conflicts directly involving the interpretation of primary law, which makes the ECJ often resemble a *perpetuum mobile* (Kelemen and Schmidt 2012), extending the reach of EU law and of European integration. Union citizenship was only introduced with the Treaty of Maastricht in 1993, supposedly as a symbolic measure, but the Court used the Treaties' citizenship provisions to gradually extend free movement and equal treatment rights to all EU citizens, even after member states' attempt to circumscribe the Court's case law with the Citizenship Directive in 2004. Only recently, has the Court started to embark on a more restrictive interpretation of rights, partly fine-tuning and arguably even reverting some of its earlier case law, paving the way for a less contentious implementation of EU citizenship rights at the domestic level.

The free movement of labour: constitutionalization at work

The free movement of workers is laid down in Article 45 TFEU and was explicitly linked to non-discrimination from the outset: 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' Non-discrimination requires the host-state to treat nationals and EU-nationals alike.

Since the beginning of European integration, secondary law has shaped the conditions of free movement. In 1968, the freedom of movement for workers and their families was established in secondary legislation (EEC Nr. 1612/68 (now 492/2011); 68/360/EEC), by granting them non-discrimination and national treatment rights. The residence right in a member state after the termination of employment followed in 1970. In 1990, three directives further regulated residence of workers, students, retired and self-employed workers. The Citizenship Directive 2004/38/EC, discussed in greater detail below, consolidated and replaced most of this secondary law. Numerous regulations and directives furthermore specify the terms and conditions under which workers are affiliated to different national social insurance schemes. Most importantly, regulation EC 883/2004 (formerly 1408/71) coordinates the social security systems of EU member states.

Despite this secondary law, ECJ case law relating to Treaty provisions has continuously broadened member states' obligation to enable access to welfare to workers from other member states. In doing so, the Court pays often little deference to secondary law (Martinsen 2011). The EU's legislature is then bound by the Court's interpretation. The term 'worker' demonstrates this. Not being specified in the Treaty, the Court set guidelines for a broad understanding already in 1964 in its *Hoekstra* decision (Case 75/63), that show how constitutionalization works, foreclosing national as well as European secondary legal changes to constitutionalized concepts such as 'worker': (← p. 441)

> 'The establishment of as complete a freedom of movement for workers as possible, (…) constitutes the principal objective of Article 51 and thereby conditions the interpretation of the regulations adopted in implementation of that Article. (…) If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person.'

Since then, the Court has consistently ruled in favor of interpreting the status of worker broadly. In the 1980s, a series of cases essentially subsumed anyone subordinated under the control of an employer under the concept of worker (*Lawrie-Blum*, C-66/85). According to the Court's standard formula, established in *Levin* (C-53/81), to be considered as a worker, one's employment has to be 'genuine and effective', but not 'purely marginal and ancillary'. This broad interpretation includes part-time workers who do not earn enough to be self-sufficient (*Levin*, C-53/81), who depend on supplementary benefits (*Kempf*, C-139/85) or who just receive pocket money (*Steymann*, C-196/87). The Court, thus, precluded any fixed threshold in terms of contract duration, working hours or minimum income to qualify as a worker and rather insisted on the 'nature' of the activities and the employment relationship (*Ninni-Orasche*, C-413/01). Typically, the ECJ leaves it to national courts to assess the facts of individual cases and to apply its broad definition of worker in practice (Meeusen, C-337/97).

In the light of what was argued above, such broad interpretative guidelines allow the Court at once to keep the potential of the Treaty for future integration steps open while shielding itself from criticism of stepping in the role of the legislator. Importantly, and as will be analyzed below, 'genuine and

effective', but not 'purely marginal and ancillary' is difficult to translate into daily administrative practice. At the same time, the constitutional status of these guidelines hampers the EU legislature to define clear-cut criteria in terms of hours worked and pay.

Apart from broadening the definition of workers, the ECJ has also repeatedly found national welfare provisions to be discriminatory. The Court tested for indirect and covert discriminatory measures (Oliver and Roth 2004, p. 416), including only a potential effect (Barnard 2001, pp. 38f). Several cases sought 'to challenge key pillars of national welfare and social provision internal to the Member States which were never intended to interfere with free movement' (Barnard 2001: 50). Starting with *d'Hoop* (C-224/98), the Court has argued that any measure is a restriction making the take up of free movement rights less attractive. However, in *Hartmann* (C-212/05) the Court agreed that member states can require a 'link' to their territory when social benefits are concerned.

In sum, the free movement of workers has been one of the core provisions since its inclusion in the original Treaties. Despite decades of 'gap filling' through an enormous amount of case law, however, the 'perpetuum mobile' of Court jurisprudence is still running. Importantly, rather than elaborating a clear-cut definition of workers, the actual essence of the Court's case law is that no such definition must be fixed (Common Market Law Review editorial 2014, pp. 733-4). Before turning to member states' persistent difficulties in implementing this case law on workers, we first outline the Court's related line of rulings on EU citizens more broadly, including economically inactive citizens.

Citizenship rights: unheard legislative signals

EU citizenship merely supplements national citizenship for all EU member state nationals and Article 18 TFEU extends EU citizens' right to equal treatment only in so far as they are not already protected by the free movement of workers. The essence of EU citizenship is that all EU citizens may move and reside freely within the EU, albeit 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (Article 21 TFEU). Despite the intended supplementary nature, in its case law the ECJ has steadily extended rights from workers to economically inactive citizens. It is only recently with the severe crises that the EU is facing that the ECJ started to limit the reach of citizenship rights, fine-tuning its case law and arguably turning to reversion. (← p. 442)

After a first case established non-discrimination in granting child-raising allowance to an economically inactive Union citizen lawfully residing in Germany (*Martinez Sala,* C-85/96), the important case *Grzelcyk* (C-184/99), decided in 2001, established a right of residence also for economically inactive Union citizens requiring social assistance. Member states have to show an 'unreasonable burden' to deny treating EU nationals on a par (Tryfonidou 2010: 39). Shortly afterwards, in *Baumbast* (C-413/99), the Court declared Article 18 I directly applicable, giving EU citizens a right of residence and movement (Wind 2009: 256, 259). And in *Collins* (C-138/02) the Court emphasized that the general principle of non-discrimination (Articles 6, 8) implied rights 'to benefits of financial nature'.

It is against the background of this developing case law that the Citizenship Directive 2004/38/EC was adopted. Shortly before the Eastern enlargement in 2004, the legislature of the EU-15 was under significant time pressure to come to agreement. The directive distinguishes EU citizens' rights according to length of residence in other member states. In the first three months, all EU citizens may freely take residence with no right to support of the host state; jobseekers may reside longer if they

have a chance of being engaged, albeit without entitlement to social assistance; only workers and self-employed persons enjoy full equal treatment. After five years, all EU citizens have equal rights to nationals. Between three months and five years, economically inactive EU migrants only enjoy a right of residence if they possess sufficient resources and a health insurance.

However, Art 14 III of the directive complicates this seemingly clear distinction, holding that an 'expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.' Abiding with the *Grzelczyk* ruling, the directive could not overrule the Court's Treaty interpretation and simply deny all assistance under five years. But neither was it wanted to generalize the claim of EU citizens to non-contributory welfare benefits. In this situation, member states preferred to refer to the case law in the directive, and to grant benefits under an individual assessment. As Wasserfallen (2010, p. 1142) points out, member states took the legislative process as an occasion to signal to the Court that they did not want to grant social assistance to economically inactive EU migrants.

However, it took long for the Court to 'listen'. In subsequent case law the Court continued broadening member states' obligations to grant equal access to welfare benefits to all EU citizens. In *Vatsouras* (C-22/08; C-23/08), the Court interpreted the Citizenship Directive extensively with reference to the free movement of workers under Article 45 TFEU by arguing that financial benefits intended to facilitate access to the labor market were not 'social assistance' in the meaning of Article 24II of the directive and had to be granted if a 'real link' to the member state existed. In *Brey* (C-140/12), the Court classified an Austrian supplementary pension as 'social assistance' within the meaning of this Article, but nevertheless held that it may only be denied following an individual assessment of the personal circumstances and the burden for the welfare system as a whole.

It is neither possible nor necessary to summarize the case law here in detail that has transformed citizenship from a symbolic Treaty addition to the 'fundamental status' of EU member state nationals. Already our short overview should suffice to show the limits of modifying and constraining ECJ jurisprudence through secondary legislation as long as the Court builds its case law on constitutional principles such as union citizenship and non-discrimination. As a consequence, the ECJ could gradually align its case law on the rights of workers and non-workers (Wind 2009, p. 243), making it increasingly contentious, whether member states could still privilege their own nationals according to EU law (Kochenov 2014). Given the vague nature of core elements of the Court's legal doctrine – such as 'unreasonable burden' or 'real link' – and the Court's insistence on individual assessments, the implementation of EU citizenship rights involves a high degree of legal uncertainty for member-state administrations and concerned EU citizens alike (Blauberger and Schmidt 2014; Shaw 2015).

But recently, the Court has become more permissive towards member-state restrictions to welfare benefit access, thereby taking on board what member states aimed to signal with the Citizenship Directive. In *Dano* (C-333/13), decided in November 2014, the ECJ held that a Romanian, who had applied for minimum subsistence benefits lacked sufficient resources and, hence, lawful residence. Germany could refuse social assistance. In *Alimanovic* (C-67/14), Germany was backed in denying unemployment assistance for over six months to those having worked less than a year. Following in *Garcia Nieto* (C-299/14), the Court argued that German legislation not (← p. 443) granting social assistance to newly arrived jobseekers from other member states is compatible with EU law. And in

Commission vs UK (C-308/14), the Court approved the contentious British 'right to reside'-test, which requires lawful residence as a precondition for the access to social benefits.

Although this case law is still very young, it is already interpreted by legal scholars as a substantive restriction of EU citizens' rights (Spaventa 2015; Verschueren 2015). Arguably, the shift shows that the ECJ reacted to the politicization of (alleged) 'welfare migration' (Blauberger and Schmidt 2014), which gained momentum when transitional restrictions for Romanian and Bulgarian citizens terminated in 2014 and in the context of the British re-negotiation debate since 2015. In its substantive reorientation the Court is emphasizing the rather technical interpretation of EU secondary legislation, while leaving aside almost any constitutional rhetoric of Union citizenship being 'destined to be the fundamental status' of all EU member state nationals. Moreover, the Court appears to concede that the financial self-sufficiency of the Citizenship Directive cannot be met via welfare benefits of the host state.

Where does this development leave us? Taking the Treaty and its constitutional nature, the ECJ has constantly expanded and refined the interpretation of workers' rights and, until recently, of EU citizenship. Importantly, in its adjudication of single cases, the Court neither enacted strict criteria for defining workers or citizenship – for which the judiciary is also hardly legitimated – nor has it simply followed the EU legislature's definitions relating to length of residence for citizens. In line with its focus and competence to decide single cases, the Court required from national administrations individual case-by-case assessments. For administrations dealing with mass procedures this is as problematic as it is for the concerned persons uncertain about their rights.

IMPLEMENTATION AT THE DOMESTIC LEVEL

In the following, we trace the implementation of the ECJ's workers' and citizens' jurisprudence in the UK and Germany. Our case selection is guided, firstly, by picking countries that are part of recent debates about 'welfare migration'. In the UK, restricting migration and banning migrants from welfare benefits was one of the highest priorities surrounding the Brexit referendum. German courts have been very actively involved in the recent development of EU free movement case law, leading to several important preliminary references. Secondly, both countries show variance with view to their welfare arrangements and legal traditions. Our two case studies will show that ECJ case law triggers similar challenges for national administrations in both countries, albeit through different channels. We start both country case studies by highlighting important characteristics of the welfare and legal systems before discussing similar problems in the implementation of workers' and other EU citizens' welfare rights.

UK

EU migrants used to have fairly open access to the UK and to parts of the British welfare system. The UK did not impose transitional restrictions for workers from the 2004 EU accession countries and, due to the tax-financed nature of many British benefits, migrants enjoyed relatively generous access to non-contributory benefits. As to legal tradition, case law typically structures policy-making in the UK, without, however, constraining parliamentary sovereignty. Being a common law country, administrations are used to take in case-law requirements, while the lack of a strong constitutional

court makes the British legislator less likely to accept judicial constraints. To what extent did these characteristics of the British welfare and legal systems shape the UK's response to the ECJ's case law?

Since late 2013, the Cameron government enacted a whole range of measures to limit EU citizens' access to British non-contributory benefits. Strikingly, the most controversial part of the 'renegotiation' debate concerned restrictions regarding *workers*. In February 2016, the European Council agreed on an 'emergency brake' ban on in-work benefits for up to four years for exceptional situations where EU migration affects essential aspects of the British welfare system. Given the referendum's outcome it may suffice to emphasize that, according to foreign secretary Philip Hammond, the UK would have preferred a 'redefinition of 'workers' so as to narrow the range of (← p. 444) people … who would have access to benefits' in the first place (The Guardian 2016). This option, however, would have required a Treaty change. Already the negotiated emergency brake was discussed as likely to be challenged before the ECJ as to its Treaty conformity. The debate on the Brexit, thus, shows how over-constitutionalization removes many policy options that are normally subject to contending political preferences from the political debate.

The UK's implementation of the definition of worker likewise shows the problem of doing justice to the required individual assessment. Criticized as legally questionable, in 2014, the UK introduced a so-called minimum earnings threshold to establish whether someone was undertaking 'genuine and effective' work. To pass the threshold, an EU migrant has to prove earnings of at least £150 a week for the last three months, which is the equivalent to 24h a week at National Minimum Wage (O'Brien 2016, p. 956). This measure contradicts the ECJ's prohibition to determine the status of worker in terms of a minimum amount of working hours or income. But the UK argues that the threshold only constitutes one part of a two-step approach, where an individual assessment regarding the worker status follows.

Also the implementing measures concerning *EU citizens* more generally show how ECJ case law, in line with its common-law tradition, structures the UK's administrative practice. Already in 1994, the conservative British government introduced a 'habitual residence test' that does not clearly define habitual residence, but takes into account the length of residence, prospects of employment, existing links to the UK, and the intention to settle there, which are all criteria established by the ECJ . The test translates the Court's requirements into mass procedures, and points to an important dilemma: in its individual assessment, the Court leaves open the relative importance of the different criteria, as the Court is hardly legitimated to set up such a general rule. Its existing case law, however, subsequently constrains the legislature to settle such definitions.

In 2004, the habitual residence test was complemented by the 'right to reside test', directly linked to Eastern enlargement (Kennedy 2011). The test is relevant to different benefits like job-seeker allowance, child and housing benefits. Basically, the right to reside test seeks to make sure that those EU citizens settling in the UK are either self-sufficient or economically active (Kennedy 2011, p. 4). In late 2013, the government announced a 'more robust' habitual residence test with more individualized questions, guided by an intelligent IT system, including queries regarding efforts to get into work (Kennedy 2015, pp. 8f.). The right to reside test was legally contested from its introduction. While national courts repeatedly found the test conforming to EU law as a justifiable way to prevent welfare tourism (Abdirahman v Secretary of State for Work and Pensions [2007] and Patmalniece v Secretary of State for Work and Pensions [2011]), the European Commission challenged it as discriminatory. In its infringement action, the Commission criticized that the test is not applied to UK citizens, but in line

with its recent more restrictive case law, the Court allowed the UK to restrict benefits of newly settled EU citizens (C-308/14).

In addition to tightening the right to reside test, the Cameron government enacted further cuts targeting particularly recent EU citizens that were broadly criticized (Guild 2013; O'Brien 2015). Particularly interesting in the context of free movement of labour is the jobseekers' allowance. It was cut from 2014 onwards for the first three months of stay in the UK, but it is paid for the following three months in line with the Court's case law on benefits intended to facilitate labor market access (*Collins*, C-138/02). Beyond this period of six months, member states may limit the right of residence of jobseekers, requiring them to show 'genuine chances of being engaged' (Case C-292/89 *Antonissen*, No. 21). The UK has interpreted this requirement strictly and demands from jobseekers 'compelling evidence' that they are likely to find employment – otherwise, they lose their jobseekers' allowance, and their right of residence. The UK introduced a Genuine Prospect of Work test in mid-2014 in the attempt to translate the Court's requirement of individual assessments into the needs of an administration dealing with mass applications (Kennedy 2015, pp. 17-9). In sum, translating ECJ obligations of case-by-case assessment causes repeated conflicts in the UK, if not the broadest interpretation is chosen.

Germany

Germany had a more restrictive policy regarding EU citizens' access to welfare benefits from the beginning. Referring to Article 24 II of the Citizenship Directive, Germany excluded all foreign jobseekers and economically inactive (← p. 445) migrants without permanent residence from access to social benefits. Newly arrived EU jobseekers never received an allowance and no elaborate procedures for case-by-case assessment, which EU case law requires, were established. Another difference relates to its tradition of judicial review of administrative decisions with a strong constitutional court as well as a specialized system of social, administrative, and labour courts. Next to the comparison with the UK regarding the administrative practice towards workers and other EU citizens, the German case allows us to contrast the national to the European separation of powers model.

Regarding the status of *workers,* we find an elaborate framework for individual assessments in Germany; albeit different to the UK, this individual assessment is not structured primarily by administrative procedures but by the courts. The administrative guidelines of the federal employment office regarding the worker status of EU law only give some examples referring to case law, requiring an individual assessment for persons working less than 8h/week (Bundesagentur für Arbeit 2016, pp. 4-5, 11-13). As Wollenschläger (2015, p. 9) traces in detail, German courts have developed guidelines of when non-standard forms of employment qualify for the worker status of EU law, not being only 'marginal and ancillary'. Earnings and hours worked are considered, sometimes in relation to the general subsistence level, next to additional aspects of the individual case. Thus, a court deemed EUR 154/ month and 5,5h of weekly work as sufficient, in combination with a contractual rise of pay and hours worked and social security registration. Another court held that earnings of EUR 100/ month were fine when coupled with 7,5h/ week. Then again, a court required contributions to social security as a threshold for eligibility, which means earnings of 450 EUR/ month. Other criteria relate, for instance, to the continuity and regularity of work and to the right of paid sick leave. The diverse

requirements show the legal uncertainty confronting those EU citizens in need and the significant arbitrariness resulting from the question of which social authority and which court happens to decide on the claim. The same holds for the 'Antonissen test' of a 'genuine chance of employment'. Here, courts require that the intention to work has to be 'verifiable and discernible from an external point of view' (Wollenschläger 2015, p. 18). But, again, we do not find detailed administrative guidelines, adapting the case law to mass procedures, as we did in the British case.

Regarding *economically inactive citizens*, the legal exclusion of EU citizens resulted in social administrations regularly denying social assistance for EU citizens. Only those being employed or self-employed and requiring additional support to cover their subsistence, those having permanent residence in Germany, or raising children here normally qualified for social assistance. Given the ambivalence of EU law towards such a discriminatory practice excluding EU citizens, German social courts increasingly questioned the legality under EU law, leading to the cases of *Dano*, *Alimanovic*, and *Garcia Nieto*, discussed above. These conflicts were clearly fueled by earlier ECJ jurisprudence, including the question whether German authorities had the duty to assess all benefit claims of economically inactive EU citizens individually (as in *Brey*, C-140/12). The German government warned that 'individual assessments in mass procedures … would simply not be feasible in terms of administrative workload' (cited from Blauberger and Schmidt 2014, p. 3). To the surprise of many, the Court found German legislation to be compatible with the citizenship directive 2004/38, thereby deferring to the will of the legislature. Deviating from its earlier jurisprudence, the Court did not require German authorities to assess in each case the individually.

Interestingly, legal conflicts regarding access of EU citizens to social benefits in Germany continued. In late 2015, the Federal Social Court (B 4 AS 44/15 R) decided that German constitutional principles require giving the basic social assistance (SGB XII) to EU citizens, if they do not qualify for the assistance for those that can be integrated in the labour market (SGB II). The Federal Social Court drew on case law of the German Federal Constitutional Court on the right of asylum seekers to have sufficient financial support, even if they do not have a residence title. It argued that, since alien authorities did not enforce German residence rules sufficiently, even EU citizens without employment or sufficient resources would become habitual residents after six months, so that Germany was responsible for their social needs. Given open Schengen borders and the restriction of barring re-entry of EU citizens only in serious cases of criminal misconduct, alien departments do not invest in futile efforts of limiting residence. In the end, thus, the Federal Social Court shows the conundrum of regulating access to social benefits if open borders and a closed welfare state contradict each other. (← p. 446)

The judgment was heavily criticized (Deutscher Städtetag 2016), several lower social courts refused to follow their higher court, and – crucial to our context of different models of separation of powers – the judgment was quickly overruled by the German legislator. Critics argued that the Federal Social Court not only disregarded the distinction between those being able or unable to work, but also contributed to the fiscal imbalance between the (richer) federal level and the municipalities, who have to pay the social assistance at issue (SGB XII). The responsible Federal Ministry of Labour published draft legislation in April 2016, granting only transitory social assistance for four weeks, with travel support, arguing that different to asylum seekers, EU citizens have a home state they can return to. Permanent residence is awarded only after five years. The new law was adopted just one year after the Federal Social Court's ruling, on 1 December 2016 (Deutscher Bundestag 2016). The example shows how common it is in the national context for the legislature to step in and overrule case-law

developments that are politically unwanted. Altogether, the German case presents quite the opposite from the initial situation in the UK, but both countries encountered similar problems in implementing ECJ case law, oriented on the individual case, in daily administrative practice. Germany started excluding most newly arrived EU citizens from social assistance, where the UK originally only took into account need, and not residence. From here, the UK has continuously restricted access, in a process that raised domestic and European contention. In line with the common law tradition, the UK translated ECJ case law requirements into administrative procedures, thereby reconciling judicial demands for case-by-case assessment with the needs of administering mass applications. There was no notable pressure by domestic courts but from the European Commission. Germany started by clearly discriminating against EU citizens, with domestic courts increasingly pushing for the granting of benefits. The pressure of domestic courts is countered with national legislative overrule. While we find active domestic courts in Germany, there is a lack of translating ECJ requirements into administrative guidelines. Both countries profited from the fine-tuning and partly reversion of the ECJ's citizenship case law.

CONCLUSION

The Court is an important policy maker in the EU. Its rulings have direct implications for member states' administering and legislating social benefits. When cases concerning the free movement of workers and the non-discrimination of citizens are brought to the Court, it can only react to the dispute at hand, as it is up to the legislature to devise general rules. Yet, because of the EU's over-constitutionalization, the EU legislature is no longer free to regulate according to its preferences, once the Court has ruled. The British 'renegotiation deal' and its aftermath show the limits of legislative corrections in the EU. Even under the exceptional circumstances of the looming Brexit referendum, EU member states decided early on in their negotiations that Treaty changes concerning free movement were excluded and any compromise had to be limited to a revision of secondary law. Following the negative referendum, the Commission quickly declared the deal void and argued that one of its most contested elements, the indexation of benefits for children living abroad, was incompatible with EU Treaty law anyway. Despite the demand from other EU member states such as Germany, therefore, the Commission excluded this proposal from its legislative initiative (European Commission 2016). And, ultimately, as secondary law does not beat primary law (Dougan 2013, pp. 135, 148), member states still depend on the Court endorsing their political signals in its subsequent rulings.

As we have demonstrated, member-state administrations often face the challenge of establishing the status of workers and EU citizens in a case-by-case assessment, taking into account their individual situation. Our two case studies show that both the UK and Germany struggle with this situation, but find themselves currently in very different stages of dealing with EU law. The UK's trajectory is from a quite permissive to a much more constrained position. These cuts are politically contested and the detailed rules the UK government has devised to comply with EU case law were under attack at the domestic and the European levels. Germany, in contrast, comes from a situation of blatant discrimination of EU citizens. Under their obligation to disapply national law that violates EU law, German courts increasingly granted social benefits to EU citizens, until the ECJ fine-tuned its own jurisprudence in (← p. 447) line with EU secondary legislation, thus, allowing member states to be more restrictive in the granting of benefits and giving them some more autonomy. In striking contrast

to the EU level, moves of German social courts towards a more generous handling under national law, were quickly countered by legislative overrule.

In the end, the fundamental problem is that in the EU the detailed Treaty provisions accord a constitutional nature to policy provisions that used to be open to political contention and legislative change in national political systems. The high political salience that social benefits for EU citizens have received in the Brexit debate shows that for the long-term well-being of the EU it may not be wise to remove such questions from political debate through constitutionalization. Reconciling free movement with closed welfare states remains a contradiction.

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