Containing (Social) Justice?
Rights, EU Law and the Recasting of Europe’s ‘Social Bargains’

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A conventional wisdom has taken hold about European integration which is broadly consistent with ‘globalisation’ arguments. Whatever the disagreements that animate debates between conventional ‘integration’ theories, increasingly they seem to take a common view of the ‘deep’ causes of integration as grounded in the economic developments elsewhere often clustered under the heading of globalization.

Thus while ‘intergovernmentalist’ theories might seem antithetical to ‘globalisation’ emphasizing as they do the on-going centrality of core national executive decision-makers in the process of integration, the underlying logic of ‘liberal intergovernmentalism’ concentrates on the changing structure of economic opportunity driving them down the path of liberalisation and the destruction of national economic boundaries.

Contemporary neofunctionalists downplay the role of national leaders in the process of integration and offer a much more complex image of the integration process when compared to intergovernmentalists. The creation of institutions and rules interacts with social and economic dynamics of transnational exchange to drive integration forwards. While any of these elements can initiate a process of transnational integration, contemporary neofunctionalists tend to regard transnational exchange as the most fundamental. Once started the process is understood as being self-sustaining to a very high degree. Economic transactions feature strongly in the theoretical account – and very strongly indeed in empirical work within this tradition. The clear emphasis on such transactions escaping national regulation sits easily with a general ‘globalisation’ type logic. In addition contemporary neofunctionalists explicitly invoke globalisation as a possible cause of European integration, albeit without unpacking the concept to any great degree.

Liberal intergovernmentalists explicitly regard the ‘action’ in European integration as being on the ‘demand’ side. If powerful actors ‘demand’ integration then its ‘supply’ is
unproblematic. While contemporary neofunctionalists are somewhat more cautious on this point – seeing ‘supply’ of institutions or rules as a potential initial trigger for integration, their intuition that transnational exchange is somehow fundamental points in the same direction. I want to make a different argument.

Liberalizing economic integration in Europe has clear institutional pre-conditions. Like all functioning market systems it requires rules and a system for enforcing them; that is law and a legal system. The ‘supply’ of these institutions has been anything but straightforward. Each stage of the construction of the EU legal system was specifically resisted by (representatives of) (many) member state governments (pace intergovernmentalist theory). Moreover, even today the EU legal system remains much more fragile than neofunctionalist claims would lead us to believe.

If the liberalisation of Europe depended on a complex and fragile institutional system that was not intended by the states responsible for the Treaty of Rome, an intriguing possibility is raised. Rather than seeing globalisation as an autonomous cause of European integration, the process might have emerged the other way round. Moreover, if the perceived ‘success’ of European integration has provoked other forms of liberalising regionalism, including NAFTA we might hypothesise that globalisation – that is economic liberalisation at the expense of national capacities for self-government may be more a consequence of European integration than its cause. At least we should analyse ‘globalisation’ to specify its component elements, the trends, tendencies and counter trends and tendencies to which it alludes, rather than invoking it as one overarching and ineluctable logic.

2. The EU Legal System: What contribution to the EU policy regime?

2.1 Conventional Theories

Political Science lagged behind events in the 1980s. While mainstream theories expected stasis or even retrenchment in European competences, integration became dynamic. How did the academy try to catch up with events?
‘Modified Neofunctionalism’ The Court is seen as ‘the unsung hero of an unexpected twist in the plot’.

Picks up on an extensive legal literature on the heroic Court creating a Constitution out of an international treaty. Generalises from the construction of ‘federal prerogatives’ to depict the Court as highly autonomous in the creation wide-ranging policies.

‘Liberal Intergovernmentalism’ National pursuit of commercial interests provides the necessary and sufficient explanation of EU liberalisation. Exceptional qualities of the ECJ are acknowledged (its independence from national executives reflected in the role the Court played in the construction of the EU legal order often against clear statements from states) but not any independent impact on the process of integration.

2.2 ‘Justice Contained’

The painstaking and incomplete process of constructing ‘supremacy’

The European legal system relies upon cooperation between national courts and the ECJ.

ECJ’s supremacy doctrine was announced in the 1960s.

But courts in major member states resisted it in principle, in practice or both. Major resistance in France was not resolved until 1989. For example, the Conseil d’Etat simply refused to send references to the ECJ throughout the 1970s and into the 1980s.

German Judiciary has a good record of practical compliance with ECJ, but has helped to shape European Law through on-going principled opposition. For example forcing the development of an EC/EU fundamental rights jurisprudence.

Key distinction between ‘federal prerogatives’ and ‘policy impact’

The ECJ has been relatively successful ‘constitutionally’, but the construction of a legal framework is not the same as having an impact on particular policies. Popular reaction
and conventional academic analysis exaggerate the Court’s policy impact. The main (and significant) influence of the Court has been through changing the ground rules for legislation, not by creating fully-fledged policies. Indeed, while Courts certain have an impact on public policies, judges are typically concerned with procedural issues – with legitimate process being an initial concern of judges, rather than substantive, outcome-oriented, legitimacy. That having been said, the European Court has often been an ally of other supranational actors, with Court judgments ‘unblocking’ political or legislative processes that go generate substantively integrationist policies. For all that their decisions ‘make law’ thinking in ‘policy’ terms sometimes seems rather alien to judges.

‘Justice Contained’ is the title of a recent book by Lisa Conant (2002) which focuses on the inability of the Court to impose policies on Europe. The book provides an important corrective to the established conventional wisdom among political scientists who study the Court. Indeed, the demolition is so comprehensive as to make the reader wonder whether it wrestled with a real opponent or a straw doll.

Conant has an ambivalent sensibility, mixing characteristically American and European views of the relationship between courts and representative politics, although it does her rich analysis an injustice to concentrate on this issue too closely. Her title, ‘Justice Contained’, suggests that within (the) Europe(an Union) Justice has been limited. While this certainly reflects the ability of wealthy and powerful actors to pursue expensive and systematic litigation strategies, Conant sometimes suggests that litigation is a more promising route than legislation for weak and diffuse actors. She argues that the ‘freedom to develop and apply rules that depart from prevailing power relations puts courts on a natural collision course with elected officials who usually prefer to coddle particular groups and who must allocate the resources necessary to implement court decisions’ (2002: 30). This argument may reflect an US sensibility, as ‘progressive’ movements in the US have long focused on the courts as a medium through which to generate pressure for political change. Electoral politics often appears less promising.
By contrast, and generalising heroically, in Europe’s democracies mass mobilisation through political parties provided the foundation on which welfare states integrated national populations as citizens. Traditionally, courts have been regarded as limiting the legitimate power of elected politicians and – precisely the opposition of Conant’s apparent position – tending to reflect the interests and concerns of the powerful. (Parenthetically, this ‘European’ tradition seems to stand at odds with the Australian historical experience, where adjudicative fora (including, but not limited to, Courts) seem to have been strongly involved in the construction of systems of social protection.) The implication of Conant’s initial position is that improving access to the European Court would enhance ‘Justice’ – an issue to which I will return.

But by the end of the book a more ‘European’ sensibility seems to have infected Conant. She argues that the ‘inconsistent application of high court decisions across the universe of relevant cases impedes equal treatment before the law, but it also prevents a perversion of the democratic process, where the authority to impose decisions on society rests in the hands of a few judges’ (2002: 226).

Asking how Conant defines ‘justice’ provides another perspective on this same issue. Initially, to paraphrase Harold Wilson on Labour government and socialism ‘justice’ appears to be whatever judges decide. Anything other than the full and general application of principles embedded in judicial decision appears to represent an abrogation of justice. Yet by the end of the analysis Conant has either shifted to a position in which justice may have some substance separate from the decisions of judges, or is regarded as ‘balanced’ by other important normative valuable principles.

Final point: for all the importance of acknowledging the limits to EU law, it is necessary to underline the crucial contribution of the law the shape and character of the European political regime. In the context of an analysis of telecoms liberalization, Conant herself argues that ‘the successful push to open telecommunications markets across the entire EU, in states with more and less competitive telecommunications industries, is also inconceivable outside the EU institutional context, where aspiring liberalisers could
exploit liberal treaty provisions, exceptional supranational autonomy in the field of competition, *and a binding legal regime* to achieve relatively rapid and widespread reforms.’ (2002: 110-1, emphasis added).

3. **Law, Market Liberalisation and Regulation**

3.1 **Law and Market Liberalisation**

Economic integration – **market liberalisation** – is at the **heart of the European treaties** – the ‘Constitutional Law’ interpreted by the Court. So – unsurprisingly – the underlying **trend of Court rulings favours** the **liberalisation** of the market, often developing very wide-ranging doctrines against national rules and practices that might (‘actually or potentially, directly or indirectly’) impede cross boundary economic exchanges. Arguably this was particularly true during the period when the Court was extended the EU legal system – as it needed to be on strong substantive ground when developing innovative legal principles (although it was hardly on strong ground when it took the very first steps developing the principles of direct effect of Treaty provisions and supremacy of European law).

‘**Free**’ markets need the rule of law. The crucial contribution of the EU legal system is in providing the foundation on which governments could make deals to dismantle barriers confident that parallel moves in their ‘partner’ member states would be enforced by the Court. Although potentially vulnerable to the ‘containment’ of Justice discussed by Conant, if the existence of a European Court could not provide full ‘guarantees’ to the private actors that ‘make’ a market in the end, it certainly enhanced their confidence in ‘risking’ new activities across Europe’s borders.

3.2 **A Regulatory State?**

The **deregulatory effects of European policies** are **at the national level**. They are matched by **market making (re)regulation at the European level**. Here it is important to note that the wholly ‘free’ market desired by the neoliberals is a chimera. Neoliberalism is a strategy or a project of ‘freeing the market’ it does not provide a
blueprint – indeed the ‘neoliberal regime’ almost qualifies as an oxymoron. The wholly ‘free’ market is a myth or ideology. Instead contemporary sophisticated market liberalism in Europe takes the form of a ‘regulatory liberalism’. The European tendency may be for regulation to replace intervention and redistribution in the politics of economics.

Those who have attempted to provide a normative justification for this ‘regulatory state’, notably Giandomenico Majone, have pinned their hopes to the separation of economics from politics. The ‘economically’ oriented EU level becomes a sphere of ‘efficiency’ legitimated by its outputs. Politics remain national, require (but perhaps also engender) solidarity. Redistribution may be legitimate at this level.

3.3 The EU Social Agenda
There is no prospect of an EU Welfare State – once dreamt of on the European left – for a variety of reasons. Prosaically, the EU does not have – and is extremely unlikely to acquire the budgetary capacity to sustain a welfare state. Indeed, it is only in the area of agriculture that the EU has had the budgetary capacity to engage in large scale redistribution for the benefit of a particular class of individuals (rather than, say regions). I defer to others here on agriculture, but it has hardly been a template for subsequent developments, nor would it have made an attractive template.

More fundamentally the EU lacks the social foundations for a welfare state. No European identity exists to ground a solidaristic ‘we’ feeling on which extensive redistribution might be based. Nor is there an EU analogue for the seismically powerful conflict of social (class) groups that generated national social policies in the context of (mass) democratization. Indeed, the level of social conflict involved in these process might tear the EU apart if transposed to that level today. It is debatable whether such social forces still exist at the national level in Europe. In their place national welfare provisions retain something of a ‘taken for granted’ quality, and are bolstered – and sometimes even extended – as a result of such factors as bureaucratic entrepreneurialism, professionalism and specific forms of activism.
The overall tendency of EU economic liberalism – at least since 1980 – has been subversive of national welfare state provisions and traditions. Perhaps the clearest example is the pressure created by ‘convergence’ prior to EMU. This ‘*subversive liberalism*’ is much debated – and has on occasion given rise to counter-movements in particular national contexts. The Dutch and Irish examples include some (re)constitution of concertation among economic interest groups partly in the face of economic pressures from Europe.

However, if market liberalism presupposes regulation, a new politics becomes possible. The precise boundaries of regulation – and what counts as an efficiency enhancement – are contested. Some business groups are as vociferous in their complaints about ‘excessive’ red tape and other regulatory burdens as they are about the ‘imposition’ of taxation. Nonetheless, even if EU level social policy is an impossibility, **clear opportunities for ‘social regulation’** exist. The classic example here is gender equality, particularly equal pay. A substantial body of EU law and policy has developed in this area. It has subsequently opened out into a broader strategy for ‘gender mainstreaming’. While ‘efficiency’ is a somewhat elusive concept, it seems broadly plausible to argue that equal pay is efficiency enhancing, in the sense that efficiency should be improved if all factors of production are appropriately rewarded.

However, the politics of gender policy-making in Europe may be mis-described by Majone’s regulatory theory. Lowi’s classic analysis of policy types would lead us to expect regulatory policies to provoke pluralist politics. Yet Lowi’s interest-based account may gloss over the ways in which gender identities have been transformed through engagement in the EU political arena.

On the other hand, Conant’s analysis of the ‘containment’ of compliance with EU laws and ECJ judgments would alert us to two further issues in this case. The first is the rather heavily reliance of the development of EU equality policy on the UK Equal Opportunities Commission providing institutional support for a sustained litigation strategy. Without
this support – which was also partly the product of the peculiarities of UK politics in the 1980s which denied the EOC the opportunity to make its case in domestic political fora – EU equality policy might have taken a quite different and arguably more limited form.

Secondly, important questions remain about the impact equality law ‘on the books’ has on day-to-day social and economic practices. Evaluation of the impact of such policies is always difficult. Conant seems to advise us not to expect too much.

Other, more recent examples of innovative social regulation include ‘disability’ policy within the Commission’s ‘New European Community Disability Strategy’ (1996) and the Framework Equal Treatment Directive. ‘Disability’ activists (largely brought together at the European level by the Commission) typically explicitly rejected traditional welfare state solutions, which they saw as making them clients of welfare bureaucracies. Instead, they explicitly argue for a ‘social model’ of ‘disability’ in which the disability does not inhere in the individual, but is rather located in a disabling environment. For these activists ‘disability’ is – emphatically – not a matter of social rights, but of civil rights.

**A Paradox of Rights and Social Regulation?** There is an incontrovertible progressive rationale for the development of social regulation of the kinds just described. Yet if it leads to a more judicialised form of politics it may have other consequences as well. In a variety of ways the rise of social regulation may increase the pressure on traditional social policies, for example by increasing attention on individual rights in the context of traditional ‘programmatic’ welfare provision resources may be diverted from provision towards insurance as litigation increases (a growing pressure the UK’s National Health Service). This issue raises profound dilemmas – I wouldn’t want to deny support to someone injured by a negligent medical practitioner. Equally however, judicialisation of politics tends to increase the resonance of claims to civil rights over those to social rights. The French political theorist and historian Pierre Rosenvallon identifies an inability in the US for collective risks to be addressed through ‘social’ forms of insurance. This, he argues leads to a pathology of ‘social victimisation’, where those seeking restitution argue that their civil rights have been violated, that they are the ‘victim’ of some
identifiable agency, with the consequence that their sense of autonomous citizenship is weakened.

Clearly European disability activists make precisely the opposite case. Equally, it would be hard to sustain a case that the political consequences of EU gender policies was anything other than an empowering of women, rather than a process of ‘social victimisation’.

Nevertheless, recent developments in the theory of accountability have emphasized the importance not of a ‘single accountability mechanism but of … the overall balance within the regime.’ (Scott 2000: 57). While the EU regime (and particularly the judicialisation of politics it involves) creates important opportunities for progressive politics, its impact on the overall balance of European politics may point in another direction.

Majone argues that there is an ‘inherent tension’ between (social) regulation and social policy. ‘Sooner or later, voters have to choose between expanding or even continuing welfare programmes and devoting sufficient resources to environmental protection and other types of social regulation’ (1996, 52 emphasis added). In this context it is important to remember that Majone’s separation of ‘European’ ‘economics’ from ‘politics’ rests on a wider critique of majoritarian democracy for the EU than the usual arguments about the perverse consequences of rent-seeking interest groups. As a consequence, in making his ‘inherent tension’ argument Majone begins to undercut his own claim that the EU is legitimate because it separates economics from politics.

A good deal hinges on the kinds of rights claims that are made, and in particular how far a ‘European Constitution’ could effectively entrench variable ‘social’ rights at least delivered and arguably only having existence at the national level (something that has begun to emerge in the EU treaties, its current ‘constitution’, as we shall see below). Thus far, however, social activists do not seem to have grasped this issue in the round. Thus, for example, in the protests surrounding the Nice Summit, ‘anti-globalisation’ groups including ATTAC adopted an oppositional stance, standing against changes that
would facilitate decision-making in the EU, a position that seems unlikely to reverse the existing liberalising trajectory of the EU.

However, another protest grouping, including the Daniel Cohn-Bendit – veteran of Paris in 1968 and more recently involved in Green politics contests this oppositional stance. He argued that ATTAC ‘have not understood that their claims contradict their aims’. ‘If the right of veto is retained then Europe will never make progress on its social plan’. Yet Cohn-Bendit’s position appears to rest on making new social and political claims at the European level. Only then, he argues will a ‘European Citizenship truly have been won’. If the EU itself does not have the resources, especially the budgetary resources, to deliver large-scale social programmes to give substance to these claims. If the EU cannot back up European level social rights with such programmes, the paradoxical result of the claims made by the likes of Cohn-Bendit may lead to a judicialisation of politics leading to social claims being cast in terms of civil rights and an increasing degree of the ‘social victimisation’ of which Rosenvallon warns. (Cohn-Bendit in Le Monde 8 December 2000

[http://www.lemonde.fr/article_impression/0,2322,126204,00.html](http://www.lemonde.fr/article_impression/0,2322,126204,00.html)
4. Further Twists?

**Solidarity** a new legal concept? Since the early 1990s the ECJ seems to have moderated its application of its competition rules in certain areas related to social policy. Under EU competition rules the mode by which an activity is organised (whether in the public, private or voluntary sectors) is not relevant to the issue of whether or not they are subject to these rules – this reflects a economically liberal philosophy. Moreover, Court decisions in the 1980s in related areas suggested that it would take a robust view of the application of competition rules to insurance schemes that were understood nationally as socially oriented. While maintaining that the institutional form of the bodies administering various forms of social insurance was not relevant in considering whether or not they contravened competition rules in the 1990s the Court developed the concept of ‘solidarity’ as a ground for ruling that these activities were not ‘undertakings’ in the meaning of EU competition rules. ‘Solidarity’ appears to have three aspects according to the Court.

1. Solidarity between contributors in the form of non-proportionality between contributions and expected benefits.
2. Solidarity between providers which refers to cross-subsidies between providers or when government appropriates surpluses and covers deficits.
3. Intergenerational solidarity due to payments being made out of current contributions (pay as you go schemes).

This approach has meet with sustained criticism from people working in the Competition Directorate General of the Commission.

Moreover, the Amsterdam Treaty also changed the legal basis for the regulation of the labour market, partly through the incorporation of the Social Agreement into the Treaty. In Article 136 it states that ‘the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations’. **Social Partnership** also seems to have become a concept used by the Court to protect national socially oriented rules and practices. Yet
the Court’s reaction here is somewhat double edged. *Albany* case decided in 1999 that socially oriented insurance schemes are economic and therefore the competition provisions of EU law do apply to them, apparently rescinding the ‘solidarity’ basis for exemptions. On the other hand, the Court endorsed the restriction of competition in this case, finding that it served a social purpose – that the aim of the restriction was legitimate and the means of achieving it proportionate. This may to mark a shift in the Court’s jurisprudence away from wholehearted market competition perhaps towards a ‘balancing’ of the benefits of competition against performance of public service –particularly or perhaps even exclusively when a clear link to the labour market exists.

While welcoming the apparent demise of the ‘solidarity’ principle, competition advocates (especially from D-G Competition) have displayed considerable hostility to the other aspects of this judgement. Its implications for the earlier body of jurisprudence concerned with the opening up of a single competitive market in insurance services are unclear – and likely to be challenged in subsequent litigation.

Watch these spaces.

The ‘Open Method of Coordination’ and non-binding ‘soft law’. Is the capacity of Europe’s states to revitalise national social provision enhanced through benchmarking and lesson drawing in the OMC? Some see the OMC as a further drive for convergence on a liberal/residual welfare model. Although it is very early days to judges this issue, the consensus so far seems to be that the OMC has some potential to rebalance social policy and regulatory liberalism within Europe. While it seems to accept limits to EU level redistribution, policy initiatives developed under the OMC in the areas of employment and social protection challenge the regulatory model by aspiring to integrate questions of efficiency and equality or redistribution, rather than making EU legitimacy contingent on their separation.

5. Concluding remark
If the EU legal system is indeed an essential prerequisite for transnational economic liberalisation in Europe then both its existence (on the one hand) and its contested character and limited scope (on the other) suggest that liberalisation was far from an automatic consequence of a general dynamic or process, such as globalisation. Moreover, the on-going re-negotiation of aspects of the regime of socio-economic regulation means that its final form may not yet be settled. There is certainly little reason to believe that the character of the EU reflects any clear and effective preference for economic liberalism on the part of European ‘states’ as liberal intergovernmentalists seem to believe, nor even on the part of the peoples of Europe as today’s ‘modified neofunctionalism’ might suggest. Nonetheless, the structure of Europe’s supranational institutions may tend to bend social forces to this end, even when they clearly intend to move in a different direction.