Introduction

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This introduction contextualises the hypothesis of the two-year research project on which this book is based, and explains how the single chapters relate to this hypothesis. The reader will see that we are opening a new debate with new questions, which still await definite answers.

I The context of the book

Over the past decade tensions between 'Social Europe' and 'European economic integration' have surged at manifold sites.[1] Frequently, these tensions were perceived as dissonances between the European economic integration project and social policies at national level. Once the Court of Justice delivered its judgments in the *Laval* and *Viking* cases,[2] clashes between the EU market freedoms of services and establishment with industrial action at national and transnational level have been discussed widely.[3] These spectacular cases have prompted authors who were alien to debates on European labour law to position themselves in this

[1] F. Scharpf, 'The European Social Model: Coping with the challenges of diversity', *JCMS* 40 (2002), 645; W. Streeck, 'Competitive solidarity: Re-thinking the European Social Model', MPIfG Working Paper 8 (September 1999); A. Giddens, P. Diamond and R. Liddle (eds.), *Global Europe, Social Europe* (Cambridge: Polity Press, 2006); U. Neergaard, R. Nielsen and L. Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Copenhagen: DJØF, 2009); J. Trachtman, *The International Law of Economic Migration: Toward the fourth freedom* (Kalamazoo: W. E. Upjohn Institute for Employment Research, 2009).

[2] C-341/05 *Laval* [2007] ECR I-11767 and C-438/05 *ITWU, FSU* v. *Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

[3] See R. Blanpain, A. Świątkowski (eds.), *The Laval and Viking Cases: Freedom of Services Establishment* v. *Industrial Conflict in the European Economic Area and Russia* (Deventer: Kluwer, 2009); for more references see chs. 1 (Schiek) and 3 (Lindstrom).

field,[4] as well as giving those who had foreseen these conflicts for a long time the dubious satisfaction of seeing their predictions realised.[5] Conflicts between EU market freedoms and competition law on the one hand and national social policies on the other not only exist in relation to (national) labour standards,[6] but also to national social security systems,[7] in particular healthcare systems.[8] Some of this debate focused on the judicial activism of the Court of Justice,[9] but it also became acute through legislative endeavours initiated by the European Commission, such as the services directive,[10] or the port directive,[11] which were seen as pushing neoliberalism

[4] C. Joerges and F. Rödl, 'Informal politics, formalized law and the 'social deficit' of European integration: Reflections after the judgments of the ECJ in *Viking* and *Laval*', *ELJ* 15 (2009), 1.

[5] After the ECJ held that France's omission to take a tough stance on French farmers' collective action against the Common Market constituted a breach of free movement of goods (C-265/95 *Commission* v. *France* [1997] ECR I-6959), future impact on industrial relations was widely foreseen (e.g. J. Kühling, 'Staatliche Handlungspflicht zur Sicherung der Grundfreiheiten', *NJW* (1999), 403; P. Szczekalla, 'Grundfreiheitliche Schutzpflichten', Deutsches Verwaltungsblatt (1998), 219; K. Muylle, 'Angry farmers and passive policemen: Private conduct and the free movement of goods', *ELRev* 23 (1998), 467; and G. Orlandini, 'The free movement of goods as a possible "Community" limitation on industrial conflict', *ELJ* 6 (2000), 341. Orlandini drew the line from *Commission* v. *France* to *Viking* in 'Trade union rights and market freedoms: The European Court of Justice sets out the rules', *Comparative Labor Law & Policy Journal* 29 (2008), 573.

[6] See N. Bruun and B. Hepple, 'Economic policy and labour law' in B. Hepple and B. Veneziani (eds.), *The Transformation of Labour Law in Europe* (Oxford and Portland: Hart Publishing, 2009), pp. 31–57; B. Bercusson, *European Labour Law* (Cambridge: Cambridge University Press, 2009).

[7] G. de Búrca (ed.), *EU Law and the Welfare State* (Oxford: Oxford University Press, 2005); B. von Maydell *et al.* (eds.), *Enabling Social Europe* (Berlin: Springer, 2006); U. Neergaard *et al.* (n. 1 above).

[8] E. Mossialos *et al.* (eds.), *Health Systems Governance in Europe: The role of EU law and policy* (Cambridge: Cambridge University Press, 2010).

[9] e.g. J. Monks, 'European Court of Justice and Social Europe: A divorce based on irreconcilable differences?', *Social Europe Journal* 4 (2008), 22.

[10] U. Neergaard, R. Nielsen and L. Roseberry, *The Services Directive: Consequences for the welfare state and the European Social Model* (Copenhagen: DJØF, 2008).

[11] COM (2004) 654 Final. The draft inter alia contained the principle of self-hauling of cargo in its attempt to liberalise port services. This would exclude legislating providing dock workers with stable employment locally. (For a successful legal challenge of such legislation see C-179/90 *Merci Convenzionali Porto di Genova* v. *Siderurgica Gabrielli* [1991] ECR I-5889.) Self-haulage of cargo was the main concern of European trade unions (P. Turnbull, 'The war on Europe's waterfront – Repertoires of power in the port transport industry', *British Journal of Industrial Relations* 44 (2005), 305), but the draft was also opposed by some Member States and business representatives on other grounds (see A. Pallis and G. Tsiotsis, 'Maritime interests and the EU port services directive', *European Transport* 38 (2008), 17).

with undue emphasis. Opposition to these legislative proposals commanded one of the first 'Euro-demonstrations' in front of the European Parliament, which in turn led to the withdrawal of one proposal and the thorough overhaul of another. Against this background, debates about Social Europe were pursued in the Convention debates about a Constitution for Europe and also subsequently in negotiating the Treaty of Lisbon (ToL). During both processes, the EU was widely perceived as threatening social policy by favouring economic integration. This perception arguably contributed to the demise of the Constitutional Treaty and the initial Irish rejection of the ToL.[12]

While these debates raged, notions of 'social integration' were increasingly used in EU immigration law and policy. Originally, 'social integration' was meant to enhance social inclusion of those migrating into the EU, which could have been perceived as an increasing acknowledgement of an emerging European society. More recently, social integration has been re-conceptualised as a requirement for third-country nationals (TCNs) to fulfil, partly before coming to the EU. This can be understood as a perversion of integration into an instrument of social exclusion.[13]

Recently, conflict about Social Europe has intensified again as a consequence of the mid-term review of the Lisbon process. This process had been launched in 2000 in order to inter alia reconcile economic and social objectives of the European Union. However, the Commission's strategy 'Europe 2020'[14] has again attracted criticism for not enabling the EU to develop a sustainable social policy.[15] Last but not least, ever since the Lisbon

[12] According to the post-referendum surveys by Eurobarometer in France, the Netherlands and Luxembourg in 2005, 31% of French, 7% of Dutch and 37% of Luxembourg 'no-voters' feared negative effects on the employment situation in their country; 19% of French, 6% of Dutch and 11% of Luxembourg 'no-voters' found the Constitutional Treaty too liberal; while 16% of the French, 2% of the Dutch and 22% of the Luxembourg no-voters missed emanations of 'social Europe'. ('Flash Eurobarometers' 171–2, available from http://ec.europa.eu/public_opinion/index_en.htm. These questions were not asked for Flash Eurobarometers 168 and 245 on the Spanish Referendum on the Constitutional Treaty and the Irish referendum on the Lisbon Treaty.)

[13] For critical appraisals of EU immigration policy see S. Carrera, *In Search of the Perfect Citizen? The intersection between integration, immigration and nationality in the EU* (Leiden: Martinus Nijhoff, 2009); E. Guild, K. Groenendijk and S. Carrera (eds.), *Illiberal Liberal States: Immigration, citizenship and integration in the EU* (Aldershot: Ashgate, 2009).

[14] COM (2010) 2020 of 3 March 2010.

[15] L. Magnusson, *After Lisbon: Social Europe at the crossroads*? (Brussels: ETUI, 2010), on earlier versions of the 'Lisbon process' see U. Liebert, 'The politics for a Social Europe and the Lisbon process' in L. Magnusson and B. Strath (eds.), *European Solidarities: Tensions and contentions of a concept* (Frankfurt a M: Peter Lang, 2007), p. 267.

Treaty reform has entered into force in December 2009,[16] the social repercussions of the global financial and economic crisis have aggravated the EU's search for a stable normative and institutional order. Thus, researching how the norms of economic and social constitutionalism perform in the practices of European Union governance is a highly topical endeavour.

Accordingly, more has been written on these issues in parallel to the research leading to this book. Some contributions within the framework of the RECON project[17] have investigated the impact of EU law on national law, emphasising social and environmental issues,[18] and contributed to the debate on European constitutionalism.[19] The 'Blurring Boundaries' project[20] too investigated clashes between market access justice at European level and distributive justice at national levels, ultimately demanding a 'constitutionalisation of the European Social Model'. A 2010 edited collection assembles more sceptical views:[21] on the one hand, political science analysis is said to conclude that European social policy is a practical impossibility, on the other hand, legal scholars demand developing solidarity as a new EU constitutional principle, capable of supporting the development of 'new, potentially European, solidarities'.[22] Recent analysis of the ToL seems to concur with part of our deliberations in concluding that a number of imbalances remain in place after the Lisbon Treaty, among which the imbalance between opening internal borders to a free flow of goods, services, capital and workers on the one hand and maintaining differences between social and fiscal national laws, while pretending that these are not distortions of competition, on the other, features prominently.[23] This seems

[16] The ToL entered into force on 1 December 2009 with its ratification by the Czech Republic; see for consolidated versions of the Treaties OJ C 83/1–404 of 31 March 2010.

[17] For an overview of the project's results see www.reconproject.eu/projectweb/portalproject/Index.html.

[18] C. Joerges and F. Rödl, 'On the "social deficit" of the European integration project and its perpetuation through the ECJ-judgements in *Viking* and *Laval*', RECON Online Working Paper 6 (2008), published in *ELJ* 2009 (n. 4 above).

[19] N. Walker, 'Constitutionalism and pluralism in a global context', RECON Online Working Paper 3 (2010).

[20] See U. Neergaard and R. Nielsen, 'Blurring boundaries: From the Danish welfare state to the European Social Model?' (Copenhagen 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618758; and U. Neergaard *et al.* (nn. 1 and 10 above) and *The Role of Courts in Developing a European Social Model* (Copenhagen: DJØF, 2010).

[21] M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford: Oxford University Press, 2010).

[22] *Ibid.*, pp. 20–1.

[23] J.-C. Piris, *The Lisbon Treaty. A legal and political analysis* (Cambridge: Cambridge University Press, 2010), p. 334.

to suggest – as do the conclusions of the Blurring Boundaries project – that EU-level solutions to social imbalances resulting from European economic integration need to be sought.

II The specific contribution of this book

This book aims at presenting a new vision of reconciling economic and social dimensions of European integration under perspectives of constitutionalism and different forms of governance, reflecting on the impact generated by the ToL. It relates to intense debates having been conducted in different quarters of European studies, particularly in political science, sociology and legal studies.

In doing so, we depart from a two-part hypothesis. First, we assume that economic and social dimensions of European integration have been decoupled in the historic reality of the European integration process. Economic integration has been constitutionalised at EU level through individual rights. The ensuing juridification has advanced a rights-based promotion of commodification and market liberalisation, which in turn 'protected' European economic integration from political discourse. Merely judicial enforcement of fundamental freedoms and EU competition law tended to destabilise national institutions contributing to social integration. Concurrently, the European integration process failed to develop a hard-and-fast social dimension. As a result, EU-level institutions favouring social integration or safeguarding the functioning of national or sub-national institutions in nested systems of welfare[24] have not developed beyond some pin-pointed social policy initiatives, partly resulting in legally binding rules (e.g. through directives on equality or workers' protection and participation in cases of restructuring enterprises), but mainly focused on co-ordinating different national models of social law and policy. Thus, social integration is still a field for national level political discourse, although its reconfiguration is partly inhibited by the constitutionalised norms of European economic integration.

The second part of the hypothesis suggests that this state of affairs is neither sustainable nor an inevitable consequence of European integration. As a consequence of successful European integration processes, EU law and politics impact to an ever more discernible degree on social

[24] The image of nesting is owed to M. Ferrera, *The Boundaries of Welfare* (Oxford: Oxford University Press, 2005).

institutions which – at national level – mirror the provisional outcome of social struggles between antagonist forces. Such sites of conflict relate to industrial relations, the level of protection of the un-propertied populace against typical risks and ultimately poverty, or the division of reproductive work between families and more public spheres. As the EU increasingly influences and destabilises these compromises, its success becomes ever more contingent upon offering ways to provide equivalents. The EU discourse on equality and immigration – even if partly perverting the notion of social inclusion – is symptomatic for this need and thus warrants special attention.

Yet, we are not convinced by the increasingly popular proposition of maintaining mainly national responsibility for social policy while proceeding with economic integration at European levels in order to solve these problems.[25] Contrasting these trends, we aim to explore whether and how the economic and the social can be – and are being – reconciled within the EU multilayered polity. Any hard-and-fast separation of national and EU-level policy is increasingly untenable, as their interdependencies grow. EU policy and law impact upon national policy and law, enabling the development of sub-national spheres, as much as they are shaped by national law and policy. The interrelation of economic and social dimensions of European integration thus needs to be comprehended as a succession of dynamic interactions across different levels.

The success of any strategy in this direction will depend on different forms of governance. A common thread running through the book's chapters is the assumption that governance needs to be incorporated as an element of constitutionalism. This implies that different forms of governance are also considered in their relationship to and relevance for economic and social integration. As three archetypical modes of governance, we consider judicial enforcement of directly applicable Treaty norms (hard law), implementation of secondary Community legislation (harmonising law) and so-called soft-law mechanisms such as the open method of co-ordination (OMC). Here is another aspect in which this book deviates from received wisdom. We do not assume that a certain governance style is necessarily better suited to enhance economic or social aspects of European integration. Often, the implicit or even

[25] See e.g. F. Scharpf, 'The double asymmetry of European integration', MPIfG Working Paper 12 (2009); P. Syrpis, *EU Intervention in Domestic Labour Law* (Oxford: Oxford University Press, 2007); and G. Majone, *Dilemmas of European Integration: The ambiguities and pitfalls of integration by stealth* (Oxford: Oxford University Press, 2005), ch. 6.

explicit[26] assumption is that economic integration and hard law go hand in hand. Hard EU law, when applied directly by courts reacting to challenges by economic actors, engenders 'negative integration', i.e. the eradication of national rules conflicting with EU rules. Mainly, this form of integration results from applying economic market freedoms and competition law. However, application of the equal pay clause (Article 157 TFEU) may also lead to negative integration in that it may invalidate national legislation or collective agreements. Similarly, positive integration has been identified with social policies (or environmental, consumer or other policies). And indeed, harmonising legislation has been used to establish an EU level of social values. However, it has also been used to support economic integration, for example through the services directive, a number of directives regulating the European insurance market or establishing common bases for company law in the Member States. Thus, both economic integration and its social dimensions depend on positive integration. Even soft law is used in both realms – and indeed, the base of the European OMC has been laid initially in the Treaty chapter on economic and monetary union.

III The structure and common threads of the chapters

This book takes stock of ways of achieving sustained interaction between social and economic dimensions of European integration, by assessing norms and practices of European integration in fields where issues of economic and social imbalances are at stake. This is pursued in the following structure.

Part I of the book contributes different theoretical perspectives on European economic and social constitutionalism. It offers a theoretical appraisal of the balance of economic and social values within the EU integration project.

The first chapter in this part develops a normative perspective on re-embedding economic and social constitutionalism. Dagmar Schiek applies the 'Polanyian'[27] metaphor of social embedding to EU constitutionalism, countering a merely neoliberal notion of EU economic constitutionalism. As a first step, she develops a multidisciplinary societal perspective on European integration. In a second step, she recounts the

[26] F. Scharpf, 'Reflections on multi-level legitimacy', MPIfG Working Paper 7 (2003), esp. pp. 10–16.
[27] K. Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957).

incremental constitutionalisation of economic and social dimensions of European integration from the Treaty of Rome to the Treaty of Lisbon. While the familiar imbalance between fundamental freedoms and competition law on the one hand and the social and employment law on the other hand still persists, Schiek finds that the Treaties increasingly stress the normative intertwinement of economic and social dimensions of European integration. She demonstrates that this contradiction in values has increased considerably, and that the ToL has contributed a number of new social values in this regard. Socially embedded EU constitutionalism emerges as a way to overcome the discrepancy between the normative commitment and the familiar imbalance. Conceptualising law and constitutionalism as social practices, Schiek demands to embrace the potential of incrementally developing EU constitutional law as an instrument in the hands of civil society actors, who can use it to establish and support the social dimensions of European integration.

In chapter 2 Ulrike Liebert approaches the tensions between market integration and Social Europe from a political science and institutionalist perspective. Considering substantive changes by the ToL, she highlights inter alia the governance of globalisation, changes in relation to economic governance and monetary union, as well as changes in institutional matters, which in her account 'redefine' the inter-institutional balance of power. Enhancing the powers of the European Parliament and – through establishing a written catalogue of fundamental rights – also the importance of the Court of Justice, the ToL will, in Liebert's view, provide a multilayered playing field for solving collective-action problems. Further, she highlights the creation of new constituencies for Social Europe via expanded rights of citizens and TCNs. Taking a theoretical stance based on institutional political economy and social constructivism, Liebert suggests that scepticism based on the alleged 'decoupling' of economic and social dimensions of European integration disregards important aspects, such as 'new clues' for protecting the '*acquis communautaire social*' or new tools such as the citizens' legislative initiative and other forms of civil society participation. In conclusion, she suggests that provided they will use these formal rules as tools in practice, social constituents will eventually transform the model of social capitalism – widely viewed as defining Europe – in a more sustainable way.

In chapter 3, Nicole Lindstrom takes up the discussion of the *Viking* and *Laval* cases, using these to reconsider tensions between market liberalisation and social protection against the background of EU

enlargement. She considers the potential to socially re-embed EU market liberalisation, stressing that market liberalisation will always lead to counter-moves re-embedding markets into society. She also investigates how re-embedding transnational markets in transnational societies may succeed. Lindstrom finds contradicting claims in this regard. On the one hand, the transnational legal procedures before the Court of Justice open discursive arenas for actors supporting market liberalisation as well as those seeking to re-embed markets. On the other hand, in the wake of these two judgments pushing market liberalisation, national and transnational actors find themselves under pressure to initiate countermoves. On the whole, this process of moves and countermoves may well contribute to transnational re-embedding of market liberalising moves between east and west.

In the final chapter of this part, Wouter Devroe and Pieter van Cleynenbreugel focus on EU economic constitution. From the start of their chapter, they stress that this economic constitution was always interwoven with non-economic, including social, overarching aims. They criticise the limited ambition of much of the EU economic constitutionalism scholarship, demanding to look beyond fundamental freedoms and competition law in a normative approach to EU economic constitutionalism. They propose to consider values, principles of governance, methods for balancing contradicting values, division of competences, mechanisms of decision-making and enforcement as well as foreign economic relations principles and constitutional modification works as necessary elements of any economic constitution. Evaluated against this yardstick, the EU Treaties after Lisbon emerge as a still incomplete economic constitution. Accordingly, the authors consider that the chosen mode of economic governance will be decisive for EU economic policies. They find the concept of economic governance to be rooted in 'corporate governance', which they consider as 'best served by voluntarily, non-binding codes'. They recommend developing more smoothly functioning ways of economic governance in order to make choices for and against certain values transparent. They conclude that the EU's economic constitution is at best an open one, which does not justify shortcomings in the realisation of social dimensions of EU integration.

The common cognisance of the four theoretical chapters in this foundational part lies in acknowledging the 'flux' (Liebert) of EU social and economic constitutionalisation. Between diverse and contradicting values without clear hierarchies, EU constitutionalism is constructed by

social actors. This conceptual framework also captures adaptive developments towards a more adequate and better balancing of European economic and social constitutionalism after the ToL.

Part II of the book assembles three chapters that exemplify conceptions of social and economic constitutionalisation for specific substantive policy fields.

Hildegard Schneider and Anja Wiesbrock open this part with a chapter on circular migration of TCNs to the EU. As one of the parameters of globalisation, international migration interrelates with other parameters, including the free movement of goods and services. From an economic perspective, liberalisation of migration might achieve greater welfare gains than liberalisation of international trade. The EU Commission encourages now circular migration as a positive tool to liberalise migration globally. Schneider and Wiesbrock critically analyse whether circular migration as practised within the EU realises the potential of generating 'triple win situations' for countries of origin, home countries and the migrants themselves. They compare three national varieties of this kind of migration policy, tracing 'circular migration' to its less progressive predecessor, the 'guest-worker model'. They find that circular migration in practice constitutes a tool for limiting migration rather than contributing to economic development in the migrants' home countries and the migrant's welfare. They conclude that the EU and its Member States should further develop circular migration as a sustainable form of migration policy, which enables TCNs to truly socially integrate into their host countries and to return to their countries of origin without losing acquired rights. In this way, they argue that EU migration policy could become an example of a globally responsible EU social policy.

In chapter 6 Thomas Biermeyer returns to the theme of tensions between economic and noneconomic dimensions of European integration, using the field of company law as an example. This field has been the subject of EU harmonising legislation from the 1960s and of a series of cases in the Court of Justice of the European Union (ECJ) concerning company mobility since the 1980s, thus offering an illustration of the interplay of these two archetypes of governance. Given the central relevance of companies for capitalist economies, it also provokes comparison between different types of capitalism in Europe. Biermeyer perceives the company as a compromise between different constituencies establishing a long-term relationship. The company's relationship with government depends much on the style of capitalism. Both the