

The emerging European solidarity: Enabling conditions and their limits

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INTRODUCTION

The EU has been heavily criticised for its democratic deficit. The European Council, consisting of the Heads of State or Government of the EU Member States, hence the executive power in nation-state terms, have *de facto* legislative power, defining the general political direction and priorities of the EU.¹ Critical scholars point out major parallels between the EU and what Nicos Poulantzas calls “authoritarian statism”, and have made his state theory fruitful for analysing the European integration process. Lukas Oberdörfer describes the institutional form of the EU as “authoritarian constitutionalism” (Oberndorfer 2014: XX). This account of the EU emphasises the increase of the discretionary power of the European executive or what Poulantzas describes as:

“[an] intensified state control over every sphere of socio-economic life
combined with radical decline of the institutions of political democracy”
(emphasis in the original, Poulantzas, 2000 [1978]: 203).

Hubert Buch-Hansen and Angela Wigger argue in favour of continuity, and show how the EU has gradually extended the discretionary power of the European Commission since the 1970s (Buch-Hansen and Wigger 2011). Their study focuses notably on competition policy. Other scholars consider the authoritarian turn rather to be a

response to the current crisis. This account provides a different analysis of the authoritarian turn by pointing out the simultaneity of a strengthening and weakening of the EU and its Member States (cf. Bruff 2014: 124). It describes how the current political crisis of the EU essentially becomes exacerbated as a consequence of the re-inforcement of executive state authority (see also Sandbeck and Schneider 2013). This latter attempt to make Poulantzas' theory fruitful for European studies is particularly interesting, since it also points out the limits of such an endeavour and suggests some modifications with a view to grasping the nature of the European Union better. Far from considering the EU to be a state, Sonja Buckel prefers the notion of the "European state project" (Buckel 2011: 640-2). Along these lines, Ulrich Brand *et al.* coined the notion of a second-order condensation of societal power relations (Brand *et al.* 2011). These studies highlight an important transformation of society, which used to be predominantly organised by a neo-corporatist form of the state. They point out how the weak material condensation of the emerging European governance structure - and hence the lower degree of autonomy of the EU bureaucracy - turns the EU into an easy target for powerful lobby groups. It reduces its effectiveness in ensuring cohesion and unity, which Poulantzas considered to be a key function of the capitalist state. The authoritarian turn also undermines the EU efforts to present itself as a neutral arbiter which would strengthen its legitimacy and authority.

In their attempt to explore the causes of the missing coherence Sune Sandbeck and Étienne Schneider inter-relate Leon Trotsky's theory of uneven and combined development with Poulantzas' state theory. The theory of uneven and combined development, recently re-conceptualised by Alex Callinicos and Justin Rosenberg, emphasises the contradictory tendencies of capitalism, which equally underpin both the differentiation and the equalisation of levels and conditions of development (Callinicos and Rosenberg 2008). The present crisis in Greece indicates how the integration process has deepened both historical unevenness and the varying *tempo*s of development both *between* EU Member States and *within* the Member States, Sandbeck and Schneider argue. This fragmentation puts great pressure on the nation states and their capacity to homogenise space. Accordingly, Sandbeck and Schneider relate the current crisis of the EU to its incapacity to compensate for the weakening of this role of the state (Sandbeck and Schneider 2013 : 15).

If the EU and its mode of governance is in deep crisis, why do the people not mobilise themselves more against the EU? Why is there (still) a majority of Europeans

who even support *more* decision-making at EU level, in areas such as unemployment, migration and social security, according to a recent Eurobarometer survey (Eurobarometer 2014: 25-6)? How can we explain the paradox that even the right-wing political parties with their anti-EU agendas felt the need to nominate candidates for the EU Parliament in the 2014 election? Is it just the result of defeatism? I will argue in this contribution that we need to understand better the social kit that the EU has already established, as well as the mechanisms by which it strengthens transnational cohesion. The contribution will particularly focus on the role of the European market integration in this context. The analytical framework that I suggest draws upon Poulantzas' state theory and further develops it by integrating Michel Foucault's analysis of Ordo-liberalism. Transferred to the EU, a Foucaultian perspective makes it possible to grasp the role of the market in establishing a European form of statehood and European subjectivity. However, it fails to provide a sociological understanding of the social bonds established through market exchange and competition. More helpful in this context is Max Weber's notion of de-personalisation, which I will further develop in the vein of Karl Marx's theory of commodity fetishism. This latter account makes it possible to grasp better the role of competition and power relations in establishing a specific type of social bond.

In the second part of the contribution, I will then illustrate the heuristic value of this theoretical framework for empirical research. The case study will focus on social policy, which is instrumental in strengthening social cohesion and solidarity. It will examine the role of competition and the underlying principle of non-discrimination in deepening the integration in this policy field. The text ends by pointing out the limits to the role of the market in Europeanising social bonds and solidarity structure. I will argue that we can relate the current crisis also to these limits. I hope, therefore, to deepen our understanding of the current crisis while simultaneously pointing out the extent to which the European integration process has already profoundly transformed the societies of the Member States.

2. THE DOUBLE MOVEMENT OF HEGEMONY

Poulantzas' general theory of the capitalist state further develops Antonio Gramsci's theory of hegemony (Poulantzas 2000 [1978]). More than Gramsci, Poulantzas points out the role of bureaucratisation in establishing hegemony. He sees the state taking over the role which Gramsci had assigned to intellectuals (ibid., 57). Each of the different state

apparatuses condensates the social forces of capitalist societies differently. The state is described in relational terms as a hierarchically-organised interplay between these different nodal points. In this regard, the state is an important mediating authority. Through the interplay, the state mediates between different conflicts and antagonisms, and helps to establish a social compromise and a certain degree of cohesion. This mediation is characterised by a strategic selectivity, as Bob Jessop points out in his study (Jessop 2008).

At the core of this process is a dual movement by which hegemony is established, Poulantzas argues (Poulantzas 2000 [1978] : 70). On the one hand, the very function of the state is to split the social body into isolated atoms which re-inforces the fragmentation established through the capitalist division of labour. On the other hand, the capitalist state derives its legitimacy from the fact that it presents itself as the unity of the people-nation (ibid. 70). It is in this sense that:

“individualization and privatization of the social body are grounded on practices and techniques of power employed by a State which, in one and the same movement totalizes the divided monads and incorporates their unity into its institutional structure” (ibid. 72).

Integrating insights of the legal scholar Evgeny Pashukanis, Poulantzas points out the role of law in this context. It fragments the social body into individual legal subjects, ensuring private property while simultaneously imposing a framework of cohesion on social agents. It represents their unity by writing them into the social imagination of the community to which the legal system belongs (see also Buckel 2007).

This dual movement is undermined by the authoritarian turn, which massively favours the interest of a particular fraction of society over the others, and this capture of the state undermines its capacity to organise the interplay between the different interests and fractions of society. As a consequence, it becomes difficult for the state to resort to the ideological safety-screen of its “role as neutral arbiter” (Poulantzas 2000 [1978]: 244) which is, however, instrumental for its legitimacy. The burden of mediation and legitimising the state is increasingly put on the state administration-bureaucracy, which, at the same time, has fewer and fewer means at its disposition to carry out this task. As a result, the economic crisis is transformed not only into a political crisis, but also into a crisis of the state. With Claus Offe, we can speak of the “crisis of crisis management” (Offe 1976). This perspective sheds light on the reasons why a strengthening of the

executive power also weakens the state. However, it runs the risk of paying too much attention to the extra-economic mechanism of establishing hegemony and of overlooking the role of the market in this context. Foucault's study of governmentality provides interesting insights in this role.

3. STATE EFFECT OF THE MARKET

Foucault's study distinguishes two sub-currents of neo-liberalism, the American neo-liberalism and the German neo-liberalism, the latter being essentially equated with Ordo-liberalism (Foucault, 2008: 129, 160).ⁱⁱ Both "regimes of truth" emphasise the role of the market and private property in ensuring the freedom of the individual. They favour a formalisation of society based upon the model of enterprise, in which everybody is turned into a (potential) entrepreneur who should have the same opportunity to ensure his or her gains within the society in question (ibid., 160). Competition is key in this context. Foucault describes the shift from liberalism to neo-liberalism as a shift in *emphasis*. It is no longer *exchange* which is considered to be the most important feature of the market, but *competition* instead (ibid., 118).

However, the two sub-currents differ in their view on competition. In contrast to the liberal *laissez-faire* orientation, Ordo-liberalism does not consider competition to be the consequence of any natural law. Instead, it underlines the importance of state intervention into the economy, with a view to avoiding market failures which tend to privilege oligopolies and monopolies (Müller-Armack 1978: 327). Ordo-liberalism is thus a political-ethico project which relates the *raison d'état* to its function of ensuring fair competition.

Foucault also provides an interesting explanation of why Ordo-liberalism became so influential in post-Second World War Germany. His governmentality studies point out how Ordo-liberal ideas helped to legitimise state-building in a moment of "state phobia" (Foucault, 2008: 77), in which the German state had lost all credibility in the aftermath of the defeat of the Nazi regime.ⁱⁱⁱ The EU struggles with a similar state-phobia even if the reasons for the hostility differ fundamentally from those of post-Nazi Germany. The defeat of the project to establish a constitution for Europe as well as the major reluctance of the Member States to confer competences to the EU in policy fields which are vital for the state's legitimacy, such as education, health and social policy, well illustrate this EU-phobia. It is in the vein of Foucault that we can relate the major influence of Ordo-liberal ideas on the EU architecture to this hostility, as they help to

legitimate an anti-state state-building project.^{iv} The importance of this regime of truth should therefore not be merely related to the strong position of Germany. Instead, it is part of a strategic apparatus (*dispositif*) which Foucault describes as a “formation which has as its major function at a given historical moment that of responding to an urgent need”. (Foucault 1977). However, we still do not know how competition contributes to underpin the EU state project. The term “output legitimacy” coined by Fritz Scharpf only points out the “re-distributive” or, to use a better adjective, the “co-optative”, dimension (Scharpf 1999).

4. THE SOCIAL RELATIONS OF DE-PERSONALISATION

In recent years, a new interest has emerged within sociology, focusing on competition in the manner that the sociology of the early twentieth century did (Wetzel 2013; Rosa 2006; Geiger 1941). The different sociological accounts of competition all agree in their basic assumption that competition is a mode of social interaction. The accounts differ profoundly, however, with regard to the social role that they assign to competition. Some underline the centripetal quality of competition as something that strengthens individualisation and differentiation. Others underscore the centrifugal effects. This account draws heavily on classical sociologists and the notion of de-personalisation, with a view to grasping the quality of the social bonds (Birla 2013: 65).

Max Weber’s study of the economy and society, for instance, has already identified “impersonality” as a major characteristic of the social relationship established through market exchange (Weber 1978: 85). Following Weber, Richard Swedberg underlines, in his economic sociology of law, the crucial role of law in enabling market exchange (Swedberg 2003; see also Ashiagbor *et al.* 2013). Law inter-relates the two major types of rationalisation that Weber sees at work in modern market societies, *i.e.*, the rationalisation of market exchange with its own mode of calculation and the rationalisation of bureaucracy (Weber 1978: 698). However, this account of the social bonds established through market exchange fails to explain how power relations and exploitation act through this very process of impersonalisation and rationalisation, and mask what Derek Sayer calls the “violence of abstraction” (Sayer 1987). Thus, in the next section, I turn to a historical materialist account of the social relations established through the economy and through law.

5. THE MARKET AS A MODE OF ABSTRACTION

Karl Marx's study identifies a major transformation of the products of labour through market exchange, by which the product is turned into a commodity. This transformation, rendering one commodity exchangeable with *any* other commodity, is characterised by the simultaneity of difference and equality that establishes the nexus between production and circulation. Products are turned into commodities when they are assigned an exchange value that abstracts from their concrete-use value and the condition of their production (Marx 2008 [1935]: 44) (Marx, 2008 [1935]: 44). Marx calls this transformation the "mystical character" (Marx 2007 [1867]: 46) or the "fetishism" of the commodity. The "fantastic form of a relation between things" (*ibid.*, 47) is not a simple fiction but a social process of dissociation that makes it possible to displace something from its original context into another setting. It abstracts from the commodities' "use value", their individual conditions of production, and the individual labour expended in them (Marx 1971[1867]: 85). In relation to their "exchange value", all these privately-produced products become something which they are not, *i.e.*, equal and thus exchangeable. Isaac Balbus speaks of "a mode of substitution" (Balbus 1977: 577) in which everything becomes - in principle - replaceable. This account provides a very different understanding of the impersonal relationship to which Weber refers. At its core is an abstraction and equalisation process which is organised through competition which detaches the goods and services from the context in which they originated, and renders the differences between them, also in terms of exploitation, invisible.

Money, with all its different expressions (gold, paper, virtual, *etc.*), assumes the role of a generalised equivalent in which all commodities can represent their (exchange) value and thus relate to each other. Law works as another generic equivalent, putting people on an equal footing. In his general theory of law, Pashukanis outlines how the transactors recognise one another reciprocally as proprietors under the abstraction of the real relation of hierarchies and exploitation (Pashukanis 2007[1929]). Through the employment contract, the owner of living labour is put on an equal footing with the capitalist, masking the major inequalities between them – notably in relation to the ownership of the means of production. Law abstracts from the existing ties of mutual dependence and exploitation in the same way that exchange value abstracts from the plurality of use values and the condition of production. It establishes similar to money chains of equivalence which enable the process of dissociation (*ibid.*, 119). This

fetishisation renders the social conditions of production, and hence exploitation, invisible (ibid., 176).

This process is thus characterised by a double movement. The market splits the social body into isolated atoms competing with each other. As a result, they appear to be on an equal footing, and it is through the exchange that these atoms become incorporated into a unity, the market. In this regard, the market takes up a similar role that Poulantzas' state theory assigns to an extra-economic way of establishing hegemony. It therefore also has a hegemony-building effect. We have now gained a better understanding of the "state" effect of the market to which Foucault had referred in his study of governmentality.

6. ORDO-LIBERALISM AND SOCIAL POLICY

European social policy is heavily influenced by Ordo-liberalism. Ordo-liberals consider this policy-field to be vital to turn workers into entrepreneurs, even though they do not own the means of production (Bonfeld 2013). It helps to restore "small property ownership" (Campbell 2009: xvi) without challenging the overall ownership order. A minimum of state support is considered to be crucial, so that a person in need can quickly get on his or her own feet again and re-join the play of differentiation and competition, strengthening a society in which "inequality is the same for all" (Foucault 2008: 143). Social policy is closely-related to economic growth and part of the social-market economy, a term coined by the Ordo-liberal scholar Alfred Müller-Armack (Müller-Armack 1978; see also Ebner 2006; Joerges and Rödl 2004; Ralf Ptak 2009). This account provides a better understanding of the *sui generis* nature of social policy which mainstream EU studies also emphasise (cf. Daly 2006: 463; Falkner 2009). We can relate the difference between European and national social policy to a different articulation between the economic and extra-economic way of establishing hegemony. However, this articulation has also changed over time at the EU level, where we can identify three generations of European social policies.

7. THE FIRST GENERATION

The role of the economy was particularly prevalent in the first generation of social policy, which was directly linked to the single market project. This project heavily builds on the principle of non-discrimination which is to ensure that "dissimilar conditions [are not applied] to equivalent transactions with other trading parties" (Article 85(1)(d) EEC

Treaty, now Article 101(1)(d) TFEU). The principle is thus part of the mode of dissociation and equalisation which was established with a view to enabling the core four freedoms of the EU including the free movement of goods, workers, services and capital (see EEC Treaty, Part II, Titles I & III and post-Lisbon TFEU Part III, Titles II & IV).

The strong subsumption of this first generation of social rights under the single market project and its competition regime explains why the work-related non-discrimination provisions prevailed in this first generation, and not the more abstract non-discrimination provisions which had also already been established by the Treaty of Rome in 1957, according to which “any discrimination on grounds of nationality shall be prohibited” within the scope of EEC/EU law (Article 7 EEC Treaty, TFEU Article 18). This more general provision was to play a role in the next generation. The work-related non-discrimination provision states that the Member States’ obligations:

“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” (Article 48 EEC Treaty).^v

This provision became the main justification framework for strengthening the trans-border mobility of workers notably through Regulation 1612/68 on the freedom of movement for workers within the Community (now replaced by Regulation 492/2011). A crucial element here is Article 7(2), according to which a migrant worker of another Member State is to enjoy the same social and tax advantages as national workers. The provisions of the first generation dissociate people from their specific national context and individualise them by assigning them the status of workers which, in turn, puts them on an equal footing with all other workers of the EU. Thus, they become unified into one European labour force enjoying the same solidarity related to their status as workers. It is through this dual movement that competition and its legal regulation contribute to the creation of European social bonds.

However, the dissociation that such a “a mode of substitution” (Balbus 1977: 577) requires is particularly complex when it comes to labour, as Adam Smith already knew when he wrote:

“it appears evidently from experience that a man is of all sorts of luggage the most difficult to be transported.” (Smith 2007 [1901] : 67).

The co-ordination of social policy has become a major means of underpinning this dissociation. Accordingly, the Treaty of Rome authorised the Council to “adopt such measures in the field of social security as are necessary to provide freedom of movement for workers” (Article 51 of the EEC Treaty). Given the worry that the lack of transferability of social security would impede the mobility of labour, the European Commission came up with a first proposal as long ago as April 1958, just a few months after it had taken up its duties, and prepared the adoption of Regulation 3 and 4 on social security for migrant workers. This entered into force on the 1 January 1959 (Cornelissen 2009: 12).^{vi} The co-ordination of social security has become the main sphere for advancing an EU social policy. Regulation 3 was changed 14 times, and its successor, Regulation 1408/71, was modified 39 times, before it was replaced by Regulation 883/2004.^{vii} These modifications essentially codified ECJ rulings, and clearly illustrate the vital role of the Court in advancing the integration process that several scholars have emphasised (De Witte *et al.* 2013; Mattli and Slaughter 1998; Leibfried and Pierson 2005; Stone Sweet 2010). However, we should not under-estimate how the plethora of individual migration acts substantiates the mode of abstraction and re-unification as a social practice. It is this broader practice which, essentially, was capable of establishing new social bonds.

All the other dimensions of the first generation of the EU social policy were also labour-market related (for safeguard provisions see Neal and Wright 1992: 1-14).^{viii} The Treaty of Rome identified workers as the primary target group of the European Social Fund (Article 123 of the EEC Treaty, now Article 162 TFEU). The Fund is to contribute not only to raising workers’ living standards, but also to improving their employment opportunities with a view to enhancing competition, much in the vein of *Ordo-liberalism*. Furthermore, it was only vocational training that was included in the social policy title of Treaty of Rome (1957), for it was considered to be directly related to the labour market. By contrast, higher education remained the exclusive competence of the Member States until 1992 (Article 128 ECC, now Article 166 TFEU).

Once established, the scope of the beneficiaries of the non-discrimination provisions was gradually extended. Regulation 3 was restricted to “wage earners or assimilated workers” (Article 4) who were the nationals of another Member State. Driven by the case law of the ECJ, this notion was subsequently modified with a view to including frontier workers,^{ix} seasonal workers,^x and seafarers.^{xi} This extension established

a broader sense of the “employed person” as introduced by the successor legislation, Regulation 1408/71. The ECJ used this increased room for interpretation and pushed for a further extension of the scope of the beneficiaries. Essentially codifying the Court’s rulings, Regulation 1408/71 was modified to include self-employed persons. Today, the notion of workers essentially includes everyone providing a service in exchange for remuneration.

This first generation of European social rights stands in sharp contrast to the notion of social policy understood as de-commodification, upon which, for instance, Gøsta Esping-Andersen’s typology of welfare states builds (Esping-Andersen 1990). In the vein of an Ordo-liberal understanding of social policy, the European social policy aims to improve integration into the labour market, which has become European in scope. Thus, at its centre is commodification, rather than de-commodification. This generation highlights best the “state” effect of the market which Foucault highlighted in his study of governmentality.

The European social policy also differs from national social policies with regard to the level of harmonisation. The level and kind of social benefits continue to be determined by the Member States. The European social policy essentially focuses on the harmonisation of the access criteria. Drawing on Brand’s notion, we could speak of a second order social policy. Member States were no longer allowed to use citizenship as access-requirement criteria, at least as long as the person in question was a working migrant from another EU Member State. The new demarcation line of European citizens was thus restricted to workers. The only economically non-active beneficiaries falling within the scope of the non-discrimination provisions were the workers’ children, spouses, and survivors, hence their rights are directly derived from the ones of the workers.

8. THE SECOND GENERATION

The second generation of European social rights was established through a gradual extension of the group of economically non-active EU migrants entitled to non-contributory social benefits. In this sense, they are more re-distributive in nature. However, a closer study of this extension shows how much the justification framework for the extension continues to be related to the free movement for workers connected through the single market project.

It started with the families of migrant workers, and extended the scope of social provisions. In the seminal *Casagrande* case, the Court established an equal access obligation to non-contributory benefits such as grants for maintenance and training (Case 9/74, ECR 773).^{xii} In a next step, the ECJ extended the scope of the beneficiaries. In the *Gravier* case, it no longer derived the social right from family ties (Case 293/83).^{xiii} Gravier, a French national, was charged a fee to enrol on a four-year course of higher art education in Belgium, where such fees did not exist for Belgian nationals. What turned this case into a landmark ruling was the fact that the Court no longer argued in terms of non-discrimination between workers. It loosened the ties between employment and social rights by bringing in a generic non-discrimination provisions (now Article 18 TFEU). However, this extension still kept a strong tie between labour market and social rights, since it remained restricted to vocational training and hence the preparation for the labour market. Along these lines, the Court re-defined the four-year course of higher art education in question as vocational training.

9. THE THIRD GENERATION

The third generation of social rights represents a significant extension of the scope of non-contributory benefits and a strengthening of the non-work related, generic non-discrimination provisions. The seminal *Grzelczyk* ruling involved a French student studying in Belgium who stopped working in the final year to focus on his studies after maintaining himself in his first years of study through several part-time jobs (C-184/99).^{xiv} To cover his living expenses, *Grzelczyk* applied for the minimum subsistence allowance, which every Belgium student would be entitled to in a similar situation. But, in his case, the national authorities rejected the application. The Court ruled that this discrimination over access to non-contributory social benefits upon the basis of nationality infringed the non-discrimination principle (C-184/99: No. 29, see also Van der Mei 2003: 149; Somek 2007: 7).^{xv}

What turned this case into a landmark judgment was also the re-balancing of the interests of the individual and the collective in favour of the former. The Court ruled that the refusal to provide non-contributory benefits could only be justified in cases of an “unreasonable’ burden on the public finances of the host Member State” (C-184/99: 44). Furthermore, it emphasised the need for a certain level of financial solidarity between the nationals of a host country and the nationals of another Member State. This re-balancing can be considered as a milestone in the transnationalisation of solidarity.

Stefano Giubboni is right when he argues that, accepting the entitlement to social benefits of economically-active persons is one thing, but that it is “quite another matter to open up national welfare systems to all European citizens as such, regardless of whether or not they participate in the economic process” (Giubboni 2007 : 362). The strengthening of de-commodification dimension brings the third generation of social rights closer to the type to which Esping-Anderson relates. This modification needs to be seen in the context of the European citizenship established through the Treaty of Maastricht in 1992. It is part of a broader struggle over the meaning of the European citizenship, and thus the dissociation of the notion of citizenship from the nation state and the nation as an imagined community, to use a term that Benedict Andersen coined (Anderson 1991).

The development of this third generation was characterised by several advances and setbacks, which clearly illustrate the highly-contested nature of these rights. Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States further clarifies the social rights of EU migrants in host countries. However, it also re-inforces the hierarchy between the different generations of social rights, and hence the stratification between the different types of beneficiaries. The more EU migrants are included in the labour market, the more social rights they enjoy. This group has been even extended beyond the EU in order to include third-country nationals (Wiesbrock 2012). Conversely, the lower the degree of a migrant’s affiliation to the labour market, the less he or she enjoys equal social rights. Directive 2004/38/EC imposed, for instance, a three-month legal residence requirement before a migrant can access social assistance in the host country (Article 24).^{xvi} The residence requirements are even higher for other non-contributory benefits, such as aid for studies, student grants and loans. Here, the directive confirms a five-year requirement (Article 24(2)).^{xvii}

It is the flattening of this hierarchy which is at the centre of many Court rulings aiming to strengthen European integration in this policy field. In the joined cases C-523/11 *Prinz* and 585/11 *Seeberger*, as well as C-11/06 *Morgan* and C-12/06 *Bucher*, the Court challenged a too restricted notion of the relationship between the duration of the stay and the entitlement to social benefits. All these rulings draw on the more generic non-discrimination clause, arguing that a too-long residence requirement could hamper the core EU value of the free movement of persons. In a number of cases, the Court

reminded the Member States not to establish restrictions which could dissuade students from studying in other European countries. It even went so far as to consider such restrictions a violation of the core freedom of movement (C-523/11 + 585/11: para 32)(C-11/06 + C-12/06: para 28).^{xviii} The fact that the inclusion of student-related non-contributory benefits turned out to be less contested can be related to the fact that higher education is increasingly perceived as preparation for the labour market. However, we can also relate it to the social status of this group, given the social selectivity of the education system in all European Member States. The inclusion of social benefits targeting the beneficiaries of the lower social classes turned out to be far more contested, independent of the financial implications. A case in point is the access of European Roma migrants to social benefits.

Proponents of the third generation of social rights also aim to further individualise the determination of the entitlement. They call for more attention to be paid to the specificity of each individual case (cf. ECJ/EJEU 2013a: paras. 64, 93, 108). A third extension strategy focuses on the expenditure side and European solidarity, and aims to increase the burden of proof when a EU Member States refers to an “unreasonable” burden on their public finances when refusing to implement a request of equal treatment. In several rulings, the Court has followed these two lines of reasoning. In the seminal *Brey* case, it underlined the need to carry out an assessment of the specific burden that a benefit would place on the social assistance system (*Brey* C-140/12: 65-72).^{xix} Furthermore, the Court also emphasised the need to pay more attention to the specific case in question, as well as the circumstances of the applicants, such as the length of stay and the temporary nature of the difficulty.

Accordingly, the third generation has been strengthened in recent years. However, and in comparison to the other types of social rights, it still lacks broad acceptance. Right-wing parties, in particular, are mobilising against it, and warning that it may cause a major influx of migrants. Such “benefit tourism” would put considerable strain on schools, healthcare and the welfare state, they argue (EurActive 2013). But some Member States also challenge the latest development of the third generation of social rights. Notably, the UK and the European Commission have entered into a major dispute about the British “right to residence” test, which the Commission deemed unlawful, since it applies more restrictive access criteria than the EU law foresees (EurActive 2014).

10. CONCLUSION

The stark difference between the acceptance of work-related access to social benefits and work-unrelated access is remarkable and cannot be reduced to the difference between contributory and non-contributory benefits, nor to the amount of the public finance involved. Our theoretical framework helps to understand why equalisation is better established for EU citizens with an affiliation to the labour market. The (labour) market is grounded on a mechanism of abstraction and dissociation which enables exchange. Drawing on Weber, we obtain an idea of the de-personalisation that social relations undergo at the moment of exchange. Marx's theory of the fetishism of the commodity highlights even better the change of the social relations established through exchange and its underlying power constellation. Through this transformation, products and services with a very specific "use value" gain "exchange value". This abstraction is not a simple fiction, but a social process of dissociation that makes it possible to displace something from its original context into another setting. This also applies to the population of the different EU Member States which have been placed on an equal footing as workers.

Along these lines, I have pointed out how not only the extra-economic processes, but also the economic processes, are vital for the double movement of hegemony. The role of the market is particularly prevalent in the context of the European Union, where it helps to establish a state project despite the hostility that this project meets. Foucault's study of Ordo-liberalism and state-phobia is helpful to understand this state-effect of the market. Along these lines we can understand Ordo-liberalism as part of a broader strategic apparatus (*dispositif*) which aims to establish a supranational institutional arrangement at European level. The cited hostility is particularly pronounced in the field of social policy, where Member States are reluctant to confer any competences to the EU. In my analysis, I have argued the major influence of Ordo-liberalism in this policy field can be related to this hostility.

Three generations of social rights can be identified. The linkage between social policy and the dissociation mechanism of the market and competition is particularly pronounced in the first generation. This first generation dissociates people from their national context and splits the populations of the EU Member States into individual workers. In a second move, it unifies them as equals into a European labour force which has become the nucleus of the "imagined community" (Anderson 1991) of Europe. The study has pointed out how this nucleus has gradually become extended, increasingly

including economically non-active citizens of the EU. Due to EU-phobia, this extension is particularly precarious where no affiliation to the labour market can be established. My study questions the interpretation according to which the contestation is simply due to the burden that it implies for the public budget of the different Member States. Instead, it relates the difficulties in establishing the third generation of social rights to the lack of an alternative mode of abstraction and dissociation which could complement those provided by the labour market. In the absence of an alternative equalisation mechanism, economically non-active EU migrants lack the same dissociation from their country of origin than economically-active migrants. They thus continue to be seen in terms of their home country and not as EU citizens with equal rights. In the worst cases they are even dubbed “benefit tourists”, allegedly trying to profit from the social benefits provided by the host country.

Accordingly, my study identifies another dimension of the weakness of the European authoritarian constitutionalism which is about to replace the national neo-corporatist form of the state. Poulantzas argues that this weakness is the consequence of the strategy of placing the burden of legitimising the state on the state administration-bureaucracy. Our case study illustrates how the burdening of the economic exchange with the organisation of hegemony at European level risks having similar limits. This limit of the market also contributes to the current crisis of the EU and its mode of governance. Accordingly, the re-establishing of the legitimacy of the EU not only requires a strengthening of democratic decision-making processes, but also the development of new modes of integration which will pave the way for a more inclusive European community of solidarity.

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ⁱ The strengthening of the European Parliament over the last decades has not yet compensated for the loss of competences of the national parliaments; see European Parliament. 2012. Codecision and conciliation. A Guide to how the Parliament co-legislates under the Treaty of Lisbon, DV\898248EN.

ⁱⁱ Often, Foucault omits the qualifier “German”; as a consequence, it seems that he equates neo-liberalism with Ordo-liberalism.

ⁱⁱⁱ It is controversial among scholars whether the rise of Ordo-liberalism in Germany should be seen in continuity with Carl Schmitt’s notion of the *Ausnahmezustand*, indirectly justifying the abolition of the parliament and the re-enforcement of the bureaucracy in Nazi Germany, or rather as an alternative to the Nazi regime; see Ralf Ptak, R. 2005. *Vom Ordoliberalismus zur Sozialen Marktwirtschaft. Stationen des Neoliberalismus in Deutschland*. Opladen Leske und Budrich.

^{iv} On EU and Ordo-liberalism, see Werner Bonefeld, “Human Economy and Social Policy: On Ordo-liberalism and Political Authority”, (2013) 26 *History of the Human Sciences*, 106-125, Gareth Dale and Nadine El-Enany, “The Limits of Social Europe: EU Law and the Ordoliberal Agenda”, (2013) 14 *German Law Journal*, 613-649. Historical studies point out the co-existence of concurring ideational frameworks and the changes in the influence of ordo-liberalism Lorenzo Federico Pace, L.F. and K. Seidel. 2013. *The Drafting and the Role of Regulation 17: A Fragile Balance*. In *The Historical Foundations of EU Competition Law*, eds Patel, KK and Schweitzer, H, 54-88. Oxford: Oxford University Press., (2013).

^v Interestingly enough, an additional anti-discrimination provision was introduced prohibiting unequal payment between men and women (Art. 119 of the EEC Treaty now Art. 157 TFEU). Gerda Falkner, G. 1998. *EU Social Policy in the 1990s: Towards a corporatist policy community*. London: Routledge.

^{vi} Regulation (EEC) No. 3 of 25 September 1958 concerning social security for migrant workers, O.J. No. 30 of 16 December 1958.

^{vii} Amended by Regulation (EC) No 988/2009, Commission Regulation (EU) No 1244/2010, Regulation (EU) No 465/2012 and Commission Regulation (EU) No 1224/2012.

^{viii} The Advisory Committee was merged into the tripartite Advisory Committee on safety and health at work (ACSH) in 2003 by a Council Decision (2003/C 218/01).

^{ix} Regulation 36/63/EEC of 2 April 1963 concerning the social security of frontier workers, O.J. of 20 April 1963.

^x Regulation 73/63/EEC of 11 July 1963 concerning the social security of seasonal workers, O.J. of 24 July 1963.

^{xi} Regulation 47/67/EEC of 7 March 1967, O.J. of 10 March 1967.

^{xii} Ecj. 1974. *Casagrande v Landeshauptstadt München* Case 9/74, ECR 773.

^{xiii} Ecj. 1985. *Gravier v City of Liège* Case 293/83 [1985], ECR 606: European Community.

^{xiv} Ecj. 2001. *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* (C-184/99), ECR I-06193.

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- ^{xv} In this respect, the ECJ further developed the line of reasoning of the seminal *Martinez Sala v Freistaat Bayern* case where it explored the extent to which a non-economically active person can claim equal treatment regarding access to non-contributory benefits (C-85/96).
- ^{xvi} However, the distinction between social security and social assistance has become an issue and focus of several ECJ cases Ecj. 2013b. *Peter Brey v Pensionsversicherungsanstalt* [Case C-140/12].
- ^{xvii} However, most countries have reduced this time period to three years.
- ^{xviii} Ecj. 2007. Joined Cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln*, and *Iris Bucher (C-12/06) v Landrat des Kreises Düren*, ECR I - 9195. Ecj. 2011. Joined Cases C-523/11 and C-585/11, *Laurence Prinz v Region Hannover* and *Philipp Seeberger v Studentenwerk Heidelberg*.
- ^{xix} Ecj. 2013a. *Pensionsversicherungsanstalt v Peter Brey*, [C-140/12], 19 September 2013.