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THE IMPACT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE DEVELOPMENT OF THE EUROPEAN UNION SOCIAL POLICY

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ABSTRACT

Social policy as a subject of welfare state has been studied mostly from the point of citizenship rights. Yet, the regulations of social policies at the European Union (EU) level are increasing day by day, which makes it an important subject for the European studies. Therefore, it is necessary to seek an answer to the question of how social policies that have been perceived as main subject of national policies have become part of the European legislation.

This research attempts to answer this question. The research benefits from the cases of the Court of Justice of the European Union (CJEU) as an explanatory factor, following the elaboration of social policy and European integration relationship. Thus, a bridge between various welfare systems and a uniformed EU social policy is more likely to be built. The paper argues that as the selected cases, Viking and Laval indicate, the CJEU is an important actor that promotes the argument about social policies at the EU level. The cases are not offering only a solution to the pertinent problem but also supporting

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more consistent social policies in the member states of the EU thanks to its "spill- over" impact.

Keywords: European Social Policy, Social Policy, European Integration, The European Court of Justice, Europeanization.

The Impact of the Court of Justice of the European Union on the Development of the European Union Social Policy

AVRUPA BİRLİĞİ ADALET DİVANININ AVRUPA BİRLİĞİ SOSYAL POLİTİKASININ GELİŞİMİNE ETKİSİ

ÖZ

Sosyal politika refah devletinin bir konusu olarak çoğunlukla yurttaşlık hakları bağlamında çalışılmıştır. Fakat Avrupa Birliği seviyesinde giderek daha fazla düzenlenen sosyal politika, zamanla Avrupa bütünleşmesi araştırmalarının da önemli bir konusunu oluşturmuştur. Bu nedenle ulusal politikaların temel düzenleme alanı olarak algılanan bir konunun nasıl olup da Avrupa Birliği mevzuatının bir parçası olduğu cevap aranması gereken bir sorudur.

Bu çalışmanın amacı bu soruya cevap aramaktır. Çalışma, sosyal politika ve Avrupa Bütünleşmesi arasındaki ilişkinin değerlendirilmesinin yanısıra, Avrupa Birliği Adalet Divanı (ABAD)'nın kararlarını açıklayıcı bir faktör olarak kullanılmaktadır. Böylelikle farklı refah devletleri sistemleriyle bütünleşmiş bir Avrupa Birliği (AB) sosyal politikası arasında bir köprü kurulacaktır. Seçilmiş örnek vakalar olan Viking ve Laval yargılamalarının da gösterdiği gibi, ABAD sosyal politikaların AB düzeyinde geliştirilmesi için önemli bir aktördür. Bu vakalar ABAD'nin yalnızca varolan sosyal politika sorunlarını çözmediğini, aynı zamanda hem AB düzeyinde hem de üye ülkeler düzeyinde sosyal politikaların giderek birbirleriyle uyumlu hale geldiğini göstermektedir.

Anahtar Kelimeler: Avrupa Sosyal Politikası, Sosyal Politika, Avrupa Bütünleşmesi, Avrupa Birliği Adalet Divanı, Avrupalılaşma.

1. SOCIAL POLICY AND EUROPEAN INTEGRATION RELATIONSHIP

Social policy as a subject of welfare state has been studied mostly from the point of citizenship rights. Marshall indicates that there are three elements of citizenship: civil, political and social (Marshall, 2006). Whereas the civil rights are about the individual freedom, such as the freedom of speech, belief, and religion, the right to own a property; the political element revolves around the participation of decision-making mechanism, namely to elect and to be elected. The social element, on the other hand, covers "the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society" (Marshall, 2006: 30). The social elements of citizenship rights embedded social policies in the national context. The definition of Marshall (1950) coincides with the first steps of the European Community, which has become the EU in due course.

The ones that established the EU most probably would agree with Marshall and leave the issue of social policy to the national policies of member states. As Haas (2006: 437) said "such constraints were not anticipated by actors at the time such organizations were set up". All the six founders did not expect any problem regarding social policies because they were having a similar Bismarck-type pension and health care system. "They also had highly regulated labour markets and industrial relations systems, and all had a large sector of public services and industrial relations systems, and all had a large sector of public services and infrastructure functions that were either provided directly by the state or in other ways exempted from market competition" (Scharpf, 2010: 215).

However, the welfare systems of the member countries have varied with the first wave of enlargement regarding the membership of the UK, Denmark and Ireland. Whereas Denmark was more of a Scandinavian welfare system example, the UK and Ireland were more liberal. The plurality have been increased with the membership of the Mediterranean countries, which even required a new identification on Esping-Andersen (1990)'s threefold categorization, namely the liberal, conservative and social democratic welfare states. Ferrera (1996)

discusses that the typology of Esping-Andersen cannot explain the Southern European countries' welfare systems, which is a combination of his threefold typology. These Southern European countries have "a weak role for the state and the uneasy coupling of universal access to health services with extreme occupational fragmentation and dualism in social insurance" (Anderson, 2015: 18). The most recent enlargement waves complicate the situation even more. The new members of East Europe are stuck between the remains of pre-transition period and the liberal west, which they want to be part of. So, their welfare system features a "coexistence of extensive social insurance commitment inherited from the pre-transition period, modest social insurance and publically mandated but privately provided welfare"(Anderson, 2015: 19).

The variety of welfare systems is a barrier for European integration regarding social policies, because the European Union (EU) decision mechanism requires the consensus of all members in most subjects. Heisenberg (2005) says that 81 percent of decisions are made by consensus. Moreover, the formal decision-making mechanism is complicated. In fact, "in the original allocation of functions, European integration was to be achieved either by intergovernmental agreement on amendments to the Treaties or by European legislation initiated by the Commission and adopted by the Council of Ministers" (Scharpf, 2010: 214). The complexity of the decision-making mechanism goes along with the subsidiarity principle. The subsidiarity principle, which was accepted in the Maastricht treaty, enshrines the exclusive position of the member States for European integration. In these conditions, unified social policies would not be expected but the reality was different than the expectations.

In due course despite the various welfare systems of member countries, social policies have argued more and more at the EU level. The relationship between economic integration and social integration (Gallie, 2013; Kleinman, 2002; Moravcsik, 1998; Scharpf, 2010), the European citizenship arguments in terms of a deviation from the classical national citizenship (Evers, Guillemard, 2012; Faist, 2001; O'leary, 1996) were some of these topics that were argued in the academia.

The arguments about the increasing importance of social policies could be best understood through neofunctionalism. Neofunctionalism focuses on the spill-over impact of political process.

> *"The process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones"* (Haas, 1958: 16)

For neofunctionalism, sociological dynamics that facilitates regional integration or the interaction among various institutions are important (Falkner, 1998). So, instead of a uniformed spill-over impact, various variants of spill-over occur over time, such as functional, political, geographical, cultivated and cultural (Falkner, 1998). The interdependence between sectors, the shift in the decision-making process, the impact of EU institutions on each other and the approach of elites indicate various spill over impact.

This paper focuses on the impact of the Court of Justice of the European Union (CJEU) on creating a spill-over impact. Among the EU institutions, the CJEU is one of the most effective institutions on the integration of social policies. As Joerges & Rödl (2009: 14) explains, the CJEU provides an opportunity for "integration through law". Here, the approach of the CJEU indicates the "cultivated spill over", in which the EU institutions pushes for common interests (Falkner, 1998: 9). There are some significant cases, which show this impact clearly. This research uses the cases, Viking and Laval as examples of the spill-over impact. The decisions taken by the CJEU cannot be separated from the increasing importance of social policies at the EU level in due course.

2. THE PROGRESS OF SOCIAL POLICIES AT THE EU LEVEL

With the expansion of the EU, both in academia and at the EU level, the argument about whether an economic integration without a social integration would be possible, has been fuelled. The arguments

indicate that at the start social policies have been derived from economic policies. Yet, many social policy subjects have become part of the EU agenda. Celik (2014) indicates that while social policies regarding working conditions, health, social welfare, education and research, and employer-employee relations were left to national authorities in 1950s; with the Lisbon Treaty (2000), decisions about these policies were partly taken at the EU level. The improvement has not been sudden; it has gradually improved in due course. Even if economic integration was over social policy in the early years of the EU, in 1970s a more active approach regarding social policies has been taken (Anderson, 2015). The Council adopted the first Social Action Programme (SAP) in 1974. The new membership of Greece, Spain, Portugal, the UK, Ireland and Denmark in 1970s and 1980s increased the variety of welfare states at the EU.

In 1980s, Single European Act (SEA) has been accepted. The SEA was trying to have a new balance between economic integration and social dimension (Anderson, 2015). It strengthened the social aspect of the European integration. Besides, the SEA introduced the qualified majority voting (QMV) for many social policies and thus decision-making regarding social policies at the EU level have been facilitated despite the variety of welfare states. In 1980s, also the Commission emphasised the need to include the social dimension of the single market (Anderson, 2015). Likewise, Falkner (1998) argues that there has been partially a social state building at the EU in the 1990s.

In 1990s, the Maastricht Treaty accepted majority voting system in many subject, instead of consensus based system. The majority voting system helped member states to take decisions on social policies at the EU level. Falkner (1998) argues that with the QMV, the corporatist decision gap has been closed and the block of the UK has been removed. Thus, the majority voting system facilitates the integration of the EU social policies. New subjects such as the "information and consultation of workers, the regulation of working conditions, and the integration of persons excluded from the labour market" (Falkner, 1998: 1) have been regulated at the EU level, which helped to move towards a more integrated EU in terms of social policies.

The increasing importance of social policies was not smooth at all. The problem had two dimensions: the choice between liberal and social Europe (Scharpf, 2002); and the contradiction between national and

the EU preferences (Scharpf, 2010). The solution of those problems is expected to be solved through legislative integration. The decisions of the CJEU, therefore, become an important part of European integration.

The cases of Viking and Laval indicate the approach of the CJEU in terms of the contradiction between the liberal and social Europe. Besides, the cases indicate the role of the CJEU on the conflict between the national preferences and the EU integration.

3. THE CASES OF VIKING AND LAVAL

The Viking (*Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP*, 2007) and Laval (*Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007) are very significant cases, because these two cases indicate the struggle between the economic freedom and social rights at the EU (Davesne, 2009) .

In the Viking case, one side of the case is a Finnish ferry operator Viking, which works between Estonia and Finland. On the other side, there is the Finnish Union of Seamen, called the FSU. The FSU and its associated International Federation of Transport Workers' Union (ITF), centred in London declared that Rosella, one of the vessels of Viking should be under the law of Finland, because of "flag of convenience" policy. Accordingly, there is a clear link between the flag of the ship, the nationality of the owner and the conditions of the seamen. Being under the Finnish law requires paying the workers according to the Finnish crew wages. However, for the vessel owner, paying its crew according to the Finnish wages makes it difficult to compete with the Estonian counterparts because the wages are cheaper in Estonia.

The company tried to reflag Viking by registering in Estonia but the FSU objected the idea. The disagreement between the ITF and Viking were brought in the High Court of Justice of England and Wales on account of the action taken by the ITF and FSU is against Article 43 of EC. The Article 43 (EC Treaty) prohibits "restrictions on the freedom of establishment of nationals of a Member State in the territory of

another Member State". Viking claims that the action of FSU and ITF are against "the freedom of establishment" (Article 43 EC), "the freedom of movement" (Article 39 EC) and "freedom to provide services" (Article 49).

The court agreed with the Viking and the ITF appealed the case. The Court of Appeal (England and Wales) appealed to the CJEU. The CJEU stated that "the protection of fundamental rights, *(in this case the right to take collective action)*, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods" (*Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP*, 2007, paragraph 2). Similarly, the Court refers to international instruments such as the European Social Charter or Article 136 EC to emphasise the importance of the right to take collective action.

Yet, the Court emphasises that the right to take collective action may be restricted under the obligations imposed by Community law ((*Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP*, 2007, paragraph 45). The principle of proportionality would restrict to use the right to take collective action. So, the court establishes an equilibrium between fundamental rights and the fundamental freedoms. Even if the case of Viking does not offer an immediate solution for the struggle between the economic and social Europe, it indicates the problem and the principles that also later would affect the solution of the problem.

Similar to the Viking case, the case of Laval (*Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007), was about the contradiction between the freedom to provide services and the collective action of a union.

The case of Laval is about the conflict between a company called Laval and Byggnads (a trade union in Sweden that brings together construction worker), Byggetton (local branch of Byggnads), and Elektrkerna (Swedish electricians' trade union). Laval was a company under the Latvian law. This company brought 35 workers to Sweden to work under a Swedish company (L&P Baltic Bygg AB) for construction of a school.

In the negotiations between Laval and the aforementioned unions, the unions asked for SEK 145 (almost EUR 16) hourly wage for the posted workers and Laval did not agree with it. So, the aforementioned unions decided to take collective action. The unions started blockage and prevent Latvian workers and vehicles from entering the site of construction. Other unions in Sweden supported the blockage through sympathy actions. Thus, the town of Vaxholm terminated its contract with Baltic and the company went bankrupt.

So, Laval went to court to finish the collective action and get paid for its loss. Laval's main argument was about the "freedom to provide services" (Article 49 EC) and "the prohibition of discrimination" (Article 12 EC) and "the posting of workers" (Directive 96/71). So, the court asked the CJEU whether these decrees would be implemented in the case of Laval.

The CJEU repeated its approach in the case of Laval. It is clearly stated that industrial action is a fundamental right. Yet, this fundamental right could be restricted as stated in the Laval Case Decision in Paragraph 3:

> *"Although the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions" (Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet,* 2007, paragraph 3).

Moreover, the Court states that the community law would be exercised as long as it is compatible with the national law. The case is important because in this case not only the primary law such as the treaty, the secondary law is also referred. Laval referred the 1996 Directive 96/71/EC, which was about the posting of workers. This directive attributes the responsibility to the Member State, where the workers moved to take necessary measures to comply with its national standards and Sweden was signed the Directive in 1999. The court stated that "it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason

of public interest (…) justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty" (*Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007, paragraph 103). Thus, "protection of workers constitutes an overriding reason of public interest which may justify restrictions of the free movement of services and the freedom of establishment" (Malberg, 2008: 2-3).

The decisions of the CJEU both in the Viking and Laval cases show the contradiction between the liberal and social Europe and the contradiction between the community and national law (Scharpf, 2002, 2010). The EU protects the right to take collective action and the freedom of establishment and those two policies were contradicting each other in both cases. As an extension of this argument, the cases also answer the question of what happens if the EU legislation contradicts to the national legislation. In both cases, the sides of the cases are the Nordic countries, which have extensive social policies. The CJEU supported the national policies through stating "the Community law does not preclude Member States from applying their legislation or collective labour agreements" (*Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007). Yet, the national law should also respect the responsibilities that stem from both the EU membership and international treaties.

Both cases indicate also the struggle between "the fundamental freedoms and fundamental rights" (Davesne, 2009: 9), namely the protection of worker or the protection of work itself. So, the cases recognises the right to strike as a fundamental right but does not enhance the protection of this right (Barnard, 2008). The two cases also show that "the EU law does pose certain restrictions to the right to collective action enjoyed at national level" (Malmberg, 2008). So, the cases affect the regulations of social policies both at the national level especially in the Nordic countries and at the EU level.

Under normal conditions, the EU integration starts with the treaties. However, a regulation in the treaties is a long and complicated process. A new treaty requires the consensus of all members. As regulated in the Lisbon Treaty (Treaty of Lisbon Amending the Treaty

on European Union and the Treaty Establishing the European Community, 2007) Article 48, amendments in the existing treaties are also based on the consensus of member states. The Council reaches an agreement for the amendment in the treaty or proceed a co-decision with the European Parliament and afterwards each member country has a veto right. On the other hand, the judicial process directly affects national policies without involving all the political process. Thus, the judicial process offers a cross-cutting solution for existing social policy related problems. Instead of coercive power, the EU is trying to get the European social model through soft means (Davies, 2008). The following part will argue the impact of the Viking and Laval cases on the European integration of social policies.

4. THE IMPACT OF THE VIKING AND LAVAL CASES ON SOCIAL POLICIES

The approach of the CJEU on Viking and Laval cases demonstrates how the judge-made law affects European integration. The cases clarified the interpretation of Article 43 and 56 of the Treaty on the Functioning of the European Union (TFEU) and the Posting of Workers Directive. Accordingly, the right to take collective action could limit the main freedoms of the EU based on proportionality. After the cases, the European Parliament's Committee on Employment and Social Affairs requested a brief from Jonas Malberg. In this brief it is stated that "in the shadow of the internal market a territorial struggle is in progress over where labour law ends and economic rules take over. The Laval and Viking cases are a clear illustration of this struggle" (Malberg, 2008: 17). In this brief, Malberg (2008) also clarifies what proportionality means for the CJEU. Accordingly, protection of the jobs and conditions of employment of member states would justify collective actions, yet collective action should be the last resort (Malmberg, 2008).

The judicial model also reduces the autonomous policy choices in the member states and expands the European competences. The cases trigger the old member states to take some steps to harmonize their legal system with the decisions of the CJEU. Both cases indicate that a solution is required regarding the fear of the workers of old member states. Accordingly, the new member state workers would get the jobs in the old member states because of the free movement of workers

and a race to the bottom of labour standards would occur (Zahn, 2008). So, the cases opened the social dumping up for discussion. In fact, right after the decisions some countries took a step to adopt their systems with the CJEU decisions.

For instance both Denmark and Sweden reviewed their autonomous collective bargaining model in order to comply with the new case law (Directorate-General for Internal Policies, 2010). They accepted the Posting of Workers Directive as a maximum point and amended their domestic law in accordance with protecting collective action against foreign service providers (Directorate-General for Internal Policies, 2010). The CJEU, thus, made member countries adopt their own system. Not all countries have amended their domestic legal system, but the protection that Viking and Laval cases provided has been argued in other member states (Directorate-General for Internal Policies, 2010), which helps to get attention on social policies. The arguments about social policies might also trigger the debate about the relationship between European economic integration and social integration. In general, even if both cases subordinates social policy goals to market integration (Anderson, 2015: 215), the cases indicate that protection of workers against social dumbing would justify to restrict freedoms (the freedom of movement of goods, services, capital and workers) guaranteed by the Treaty. Thus, Viking and Laval cases set off an argument about the struggle between the economic and social dimension of the EU (Davesne, 2009).

The left parties and trade unions took the case of Laval as an indicator of the problems that may occur with the European-wide market, because of the worries of old members about social dumbing (Davesne, 2009: 8). The European Trade Union Confederation (ETUC) said that even if the right to strike is accepted as a fundamental right, the approach of the Court prevents to take a stance to fight social dumping (Barnard, 2008). The cases recognize that Article 43 and 49 have direct horizontal effect on trade unions (Davies, 2008). For instance the ETUC started to lobby about adoption of a social progress clause, in which the priority would be given to the fundamental rights in the case of conflict between fundamental rights and fundamental freedoms (Barnard, 2008: 487). It was obvious that the cases would not be limited with the Viking and Laval cases. So, it would be necessary to take measures for the future. In fact, the EU Charter of Fundamental Rights, which contains some social rights such as "the

right to collective action, but also the right to annually paid, leave etc." became part of the primary legal order of the EU in 2009 (Peonovsky, 2016: 298).

The collective action right has argued in the European Parliament. The Swedish MEP Jan Anderson prepared a draft about "challenges to collective agreements and collective bargaining on the analyses of Laval and Viking rulings". Its final report "shows a clear political commitment to adapt the EC legislation to the specificities of collective agreements regimes. The EP calls on the Commission to "prepare the necessary legislative proposals which would assist in preventing conflicting interpretation in the future" (Davesne, 2009: 9). Thus, social policies get attention both from the EU institutions and the member states.

CONCLUSION

The cases of Viking and Laval, which were analysed here indicate how the CJEU provokes European integration in social policies. Both cases show the struggle between the fundamental rights and fundamental freedoms (Davesne, 2008). The intervention of the CJEU indicates the problem and encourage the EU institutions and nation states to solve this problem. So, the cases have both horizontal and vertical effect. The horizontal effect shows the interaction between judicial level and policymaking at the EU. On the other hand, vertical effect combines the judicial decisions at the CJEU with the national policymaking process.

As neofunctionalism suggests, the cases show the interaction between the national system and the EU system. The Viking and Laval cases are not limited with its pertinent. Its impact spills over European Parliament, European Commission, unions, left parties and domestic politics of member States. The CJEU affects European integration through three interrelated ways. First of all, the Court interprets the Articles of the EU Treaties. In the Case of Laval and Viking, the Court argued that the freedom of establishment" (Article 43 EC), "the freedom of movement" (Article 39 EC) and "freedom to provide services" (Article 49 could be restricted on behalf of collective action. However, the collective action should have a legitimate interest and even in this case, the collective act should not go beyond the necessary

measures. So, the Court tries to create an internal market that was combined with a degree of social protection (Davies, 2008).

Secondly, the cases force the member states to adopt their system, which creates more coherent social policies at the EU level. Thanks to the cases not only the countries that were part of the cases, but also other Nordic countries have adopted their system in order to avoid social dumping. Governments in Sweden and Germany, as mentioned above, started to regulate a minimum wage to protect their workers.

The last but not the least impact of the cases of Viking and Laval is to trigger the arguments in other European institutions. The European Parliament, the unions and left parties indicate that the problem is not solved permanently. So, they endeavour to take necessary steps to solve the problem at the EU level. Not only the national governments but also the European institutions and the relevant parties started to focus on the threat of social dumping. As argued above, left parties and unions lobbied in order to make the EU to take some measures to protect the workers' rights. In fact, the European Parliament had a brief about what the Laval and Viking cases indicate and this report ends up calling upon the Commission to "prepare the necessary legislative proposals which would assist in preventing conflicting interpretation in the future" (Davesne, 2009: 11).

However, it should be bared in mind the critics of Scharpf (2010); the judge-made law on European integration is liberalizing. In this case, rather than a social market economy that is closer to the Scandinavian model, a liberal market economy that is close to the system of Anglo-Saxon model would be more likely to be accepted (Scharpf, 2010). Considering the general approach of the EU regarding social policies, further research could be done about the impact of the CJEU regarding other social policies. Even if the decisions of the CJEU in the Viking and Laval could be criticised by many actors, rather than the decisions, its impact afterwards on the EU and national policies are more important for this research.

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ÖZET

Sosyal politika refah devletinin bir konusu olarak çoğunlukla yurttaşlık hakları bağlamında çalışılmıştır. Fakat Avrupa Birliği seviyesinde giderek daha fazla düzenlenen sosyal politika, zamanla Avrupa bütünleşmesi araştırmalarının da önemli bir konusunu oluşturmuştur. Bu nedenle ulusal politikaların temel düzenleme alanı olarak algılanan bir konunun nasıl olup da Avrupa mevzuatının bir parçası olduğu cevap aranması gereken bir sorudur.

Bu çalışmanın amacı bu soruya cevap aramaktır. Çalışma, sosyal politika ve Avrupa Bütünleşmesi arasındaki ilişkinin değerlendirilmesinin yanısıra, Avrupa Birliği Adalet Divanı (ABAD)'nın kararlarını açıklayıcı bir faktör olarak kullanılmaktadır. Böylelikle farklı refah devletleri sistemleriyle bütünleşmiş bir Avrupa Birliği (AB) sosyal politikası arasında bir köprü kurulacaktır. Seçilmiş örnek vakalar olan Viking ve Laval yargılamalarının da gösterdiği gibi, ABAD sosyal politikaların AB düzeyinde geliştirilmesi için önemli bir aktördür. Bu vakalar ABAD'nin yalnızca varolan sosyal politika sorunlarını çözmediğini, aynı zamanda AB düzeyinde sosyal politikaların gelişimini desteklediğini göstermektedir.

Elinizdeki çalışma öncelikle kısa bir literatür taraması yaparak, sosyal politika ile Avrupa bütünleşmesi arasındaki ilişkiyi analiz etmektedir. Bu bölümde Avrupa Birliği'nin gelişim süreci ve bu gelişim süreci içerisinde başlangıçta üye ülkelere bırakılan sosyal politika alanının zaman içerisinde giderek Avrupa Birliği'nin düzenlediği politika alanları içerisinde kendisine yer bulduğundan bahsedilmektedir. Başlangıçtaki kurucu 6 üyenin benzer bir refah devleti sistemi olan Bismarck modeli zaman içerisinde yeni ülkelerin üye olması ve refah devletleri arası farklılaşmaların yaratabileceği sorunlar nedeniyle AB düzeyinde ortak bir sosyal politikayı mecbur kılmıştır.

Farklı refah devleti modelleri üye ülkeler arasında bir uyumlaştırmayı ve ortak bir sosyal politika oluşturmayı mecbur kılmış olsa da, AB düzeyinde ortak politika oluşturmanın önünde bazı engeller vardır. Bu engellerin en başında gelen ise AB'nin sahip olduğu yetki ikamesi (subsidiarity) ilkesidir. Sözkonusu ilke, herhangi bir politika alanında yetkinin öncelikle üye devlete ait olduğunu, sadece açıkça belirtilen konularda AB'nin karar alma yetkisinin olduğunu belirtir. Sosyal politika açıkça AB'ne devredilen bir yetki olmadığı için normal şartlar altında AB'nin Yetki ikamesi ilkesi sosyal politikanın iç hukukun bir parçası olarak kalmasını teşvik etmektedir.

Fakat Avrupalılaşma, sadece yasal kurallar boyutuyla ilerlemez. Neofonksiyonalizmin tanımladığı gibi Avrupalılaşma aynı zamanda bir taşma etkisi yaratır (Haas,1958). Bu taşma etkisi politik aktörlerin

beklentilerinin değiştiği, ortaya eskisinden farklı bir politik etkileşimin çıktığı yeni bir durumu ifade eder. Sözkonusu taşma etkisi, karar alma mekanizması arasındaki etkileşimi ve farklı AB kurumları arasında ortaya çıkan ve 'taşan' bütünleşme etkisini analiz eder.

AB kurumları arasındaki taşma etkisinin en elverişli gözlem alanı ABAD kararlarının AB'nin diğer kurumlarını aldığı kararlar doğrultusunda harekete geçmeye zorlamasıdır. Bu araştırmada ABAD'nın sosyal politika alanında vermis olduğu 2 önemli dava incelenmektedir. Viking ve Laval davalarında ABAD, mal ve hizmetlerin serbest dolaşımı ile işçilerin korunması arasında kalmış ve her ne kadar mal ve hizmetlerin korunmasına öncelik verse de, işçilerin korunması ve grev hakkını temel bir hak olarak kabul etmiştir. Davanın göstermiş olduğu temel özgürlükler ve temel haklar arasındaki ikilem sonrasında da AB düzeyinde ve üye ülkeler düzeyinde sosyal politikaların uyumlaştırılmasının gerektiğine dair bir tartışmayı alevlendirmiştir. Göze çarpan bir diğer konu ise sözkonusu davalarda alınan kararların sadece dava kapsamıyla sınırlı kalmadığı, aksine AB'nin sorun yaşadığı sosyal politika alanında düzenleyici bir mekanizma halini aldığıdır. Ayrıca, bahsigeçen davalar sosyal politikalara ilişkin sorunların AB'nin diğer kurumlarında tartışılmasına yol açmaktadır. Sözkonusu davaların bir diğer etkisi ise üye ülkelerin ulusal politikalarını AB ile uyumlu hale getirmeye teşvik etmektir.

Sözkonusu davalara geniş bir çerçevede bakmak, sosyal politikaların AB düzeyindeki analizini gerçekleştirme imkanının yanı sıra, Avrupalılaşmanın AB kurumları arasında gayrıresmi bir şekilde nasıl gerçekleştirildiğini de anlamamızı sağlayacaktır.