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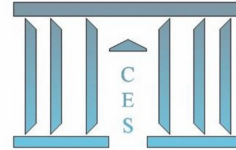

The unbearable foreignness of EU law in social policy, a sociological approach to law-making

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The unbearable foreignness of EU law in social policy, a sociological approach to law-making

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Abstract

The main purpose of the present text is assessing EU law from the perspective of its "impact" on national systems of social protection, social services and labour law: how does EU governance affect "social policy" in the Union? After recalling the main characteristics of EU governance and presenting the relevant actors of the making of EU social law, we systematically compare EU and national law with respect to two essential dimensions: EU law making in general and the special case of "social law". Eventually we arrive at a global comparative assessment of the respective legitimacies of EU law and national legislation. Considered from the point of view of relevant actors interviewed during the research, the dynamics of this interaction emerges as structurally constrained but rather open-ended.

L'insoutenable étrangeté du droit européen en matière de politique sociale. Une approche sociologique de l'élaboration du droit

Résumé

Dans le cadre d'une vaste étude sur la gouvernance européenne, ce texte entend apprécier l'impact du droit européen sur les systèmes nationaux de protection sociale, le droit du travail, les services sociaux et les politiques sociales nationales. Après avoir présenté les principales caractéristiques de la gouvernance européenne et les acteurs impliqués dans la production du « social » européen, on a choisi de comparer systématiquement le « droit social », européen et national, à partir de deux points de vue : la production du droit en général et le cas spécifique du droit social. La comparaison débouche sur une réflexion en matière de légitimité, s'efforçant de dépasser le classique constat d'un « déficit démocratique » au niveau de l'UE, le plus souvent unilatéralement accompagné de l'ignorance de sa contrepartie aux autres niveaux territoriaux. L'étude des positions des acteurs pertinents de la fabrication du droit européen montre que, loin d'être un procès inexorable, l'extension de l'influence du droit européen s'appuie sur des coalitions d'acteurs qui sont parfois inattendues et sur une promotion des droits « individuels » vis-à-vis de droits « collectifs ».

JEL codes: I38, K31, H77

Keywords: Sociology of European law, European social policy, European Integration, Court of justice of the EU, Europeanization.

Mots clés : Sociologie du droit européen, Politique sociale européenne, Intégration européenne, Cour de justice européenne, Européanisation.

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French Constitution (1958)

Art. 2. - La langue de la République est le français, L'emblème national est le drapeau tricolore, bleu, blanc, rouge. L'hymne national est la Marseillaise. La devise de la République est "Liberté, Égalité, Fraternité". Son principe est : gouvernement du peuple, par le peuple et pour le peuple.

Treaty of the European Union (2009) (English version)

Art. 2. - The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Quote from French Union's representative

"Sur le bilan de l'intégration européenne en matière sociale, c'est mitigé. Tout n'est pas à jeter, parce que le fait qu'il y ait un espace de négociation collective au niveau européen est un moyen d'intervention, un espace à occuper pour la création d'un modèle social européen. Il y a aussi un enjeu dans l'interprétation des textes européens souvent contradictoires d'un paragraphe à l'autre. C'est important pour un syndicat d'avoir une certaine lecture des textes pour pouvoir les utiliser conformément à ses propres objectifs syndicaux. Par exemple, il y a un intergroupe sur l'égalité homme-femme : quand l'UE demande aux employeurs et aux États de « traquer les inégalités », on peut se retourner vers les acteurs nationaux en leur demandant ce qu'ils font des textes européens." (Paris, Gusto Seminar, October, 14th, 2010).

Quote from a representative in a French federation of French associations

"Au niveau de l'UE il y a des objectifs en tension : Les objectifs de cohésion économique et sociale et de primauté de l'intérêt général entrent en tension avec l'espace économique intégré et le droit de la concurrence. Cette tension amène le droit européen à contrôler les aides publiques aux acteurs en charge des SSIG. Dans les faits les acteurs économiques sont mieux protégés que ceux qui ont pour mission la cohésion sociale. Nous les associations, on nous voit de plus en plus comme des acteurs économiques comme les autres. C'est une prise de conscience douloureuse : on minimise la finalité d'accès aux droits fondamentaux. L'acteur associatif est considéré comme un prestataire de service comme un autre." (The same Gusto seminar)

Introduction[1]

How is the EU governed? How does this affect "social policy" in the Union? One could say that, basically, it is governed with the help of three main instruments of influence, ideas, money and law. Ideas actually play their role through both other channels, but as is well known little redistribution of money is involved at the EU level. Economic ideas play an overwhelming role, both in the setting up and implementation of macro-economic coordination. But they also play a dominant role in EU law, a type of law that is intimately

[1] The present text was discussed in two seminars in Paris (CES Paris 1) on the 9th of June, 2011, and in Barcelona, on the 6th of September (Universitat Autonoma de Barcelona). Both seminars were held in the context of the FP7 Framework Programme project GUSTO (http://www.gusto-project.eu/).

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married with economic thought. As we will see, however, EU law does not consist only of economic ideas. After recalling the main characteristics of EU governance as we have studied it in the context of the FP7 project GUSTO[2], the main purpose of the present text is assessing EU law from the perspective of its "impact" on national "social policy systems". A systematic comparison will be in the background, between EU law and national law with respect to two essential dimensions: the production of law in general, the special case of social law[3]. Eventually we intend to achieve a global assessment of the relationships existing between EU law and social policies – which, as is well known have remained national ever since the first phases of the European Communities[4] (Barbier, 2008). A distinctive element of the present approach is its use of sociological identification of actors we consider relevant and involved in the process of EU law-making, *beyond the usual formal institutions* (the Council, the Commission, the Parliament, etc.). We start by presenting them before going over to a short presentation of what EU governance is, and to the two sections of the paper, devoted to EU law making and to the special insertion of "social law".

Main relevant actors in the social domain

Long term field-work (Barbier, 2006; 2008; 2011) has allowed us to inductively identify the relevant actors of European social policy. Our surveys are certainly not representative of their entire variety, but through them we have identified the significant types.

We first find the legal community, which is overwhelmingly trans-national[5]. It is composed of the judiciaries of the member states, the legal professions, experts and professors, and, at the EU level, of course includes the Court of Justice and its Tribunal of first instance, (with the "legal services" of the European Commission and the Council). As a very condition of possibility of its strategic position lies the "validity of praetorian law through specialized discourse within the legal profession" (Scharpf, 2000, p. 193). These actors are part of "interpretative communities" (Weiler, 1991, p. 2438), and it is a sociological simplification to assume, as we do here, that these form a *single* community. True, various professional groups are involved (Dezalay, 2007; Vauchez, 2008), and not only differentiated according to national lines. However, there seems to be a consensus in the literature as to the fact that national judiciaries and especially courts have eventually provided the main source of support for the ex-ECJ (Weiler, 1991). True, this support was uneven across countries and across times, and it took a long time to settle down as the accepted legal view. In our interviews, while documenting this support as well as the sustained effort of the Commission to promote EU law and disseminate a common legal culture, especially in the "new" member

[2] This working paper presents results of the research made in the frame of the European project "Gusto" (FP7). We thank the members of the working package for their remarks. This text has been discussed in several seminars of the research project in Paris, Barcelona and Warwick. It has been as well presented during the congress of AFS (Association française de sociologie) in July 2011 in Grenoble.

[3] We mean labour law and social protection law.

[4] The present project has entailed the implementation of a diversified group of interviews, in France, in Germany and in Brussels (more than 50), with persons of many nations: Germany, France, the United Kingdom, Denmark. Interviewees were legal scholars, members of NGOs, of Unions, and officials in the French administration. About half of the interviews were conducted in the European institutions (Commission and Council, Court of Justice of the European Union). Two seminars with practitioners in social services and labour law were organized in Paris in October 2010, and in February 2011 (mainly with lawyers).

[5] There are exceptions of course. In specialized areas of law, some communities have remained mainly national. This is for instance the case of the French labour law community (interview, February, 2010, law professor).

states[6], we also find that this "community" of communities is not insulated from social influences[7]. The mere fact that, with time, the national judiciaries and the legal profession have come to support EU law and act collectively for its propagation and supremacy, does not mean, as we will see, that this supremacy can be actualized without the support of other powerful social actors.

The second main relevant collective actor comprises economic interest groups. It is also well documented in the literature that powerful economic actors have a special influence on EU law, and privileged access to the benefits of the EU through negative integration (Streeck, 1999; Scharpf, 2000; Delmas-Marty, 2004; Schmidt, 2006). In the social policy area, these interests are also present. We meet them for instance in social protection (private pensions providers) and in many areas where competition exists between private and public, or non-profit provision of services. Housing companies, private childcare, healthcare or long-term care providers pursue their interests and try to influence law making and law implementation, in particular by way of litigation. We will see that the "economic" nature of the interests concerned is precisely a legal question in debate, when it comes to public or social services.

Advocacy organizations, generally labeled "NGOs", also abound in the Brussels forums, some of them being directly funded by the EU Commission itself. Their action is aimed at promoting individual rights and the rights of certain groups (for instance the disabled, the poor, the homeless, etc.). In Euro jargon, the notion of non-governmental organization is extremely elastic and sometimes even includes social partners' organizations. NGOs form a third main collective actor.

Finally, in the policy area we explore, there is a fourth important group. It comprises actors that are in charge of the collective interests of employees and manage social protection schemes (of which the trade unions are a typical instance). All these actors act, fight against one another, and strike alliances that can be observed in cross- or trans-national arenas and forums, where decisions (not only legal) are made, and ideas are (often hotly) debated.

EU governance as a complex mesh of relationships and actions

On *governance* in general, existing literature is so huge that we are unable to address it in this paper. We will rather apply the concept in particular to our object, i.e. the European Union that forms a regulatory state-like entity (Majone, 1993, 2006). Governance may be differentiated according to the steering modes (more or less hierarchical), the instruments (Lascoumes and Le Galès, 2007), the decision levels (transnational, regional and local), and the actors involved (public or private, experts or elected representatives…). When characterizing European governance some stress its similarity with management: from this angle, European governance might be seen as minimal regulation aiming at easing the way for market forces. Other literature however prefers not to discard the political dimension, to focus on the involvement of diverse actors and on the autonomy for decision-making at the local level. This plurality of meanings is a counterpart to the diverse dimensions and channels of European governance; it begs the question of the emergence of "new governance" modes.

[6] Interview, magistrate, July 2010.
[7] Interview, former *référendaire*, February, 2011.

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We envisage EU governance as: "The combined *purposive intervention* of relevant *EU level actors*[8], forming a constellation of actors, in the coordination, steering and regulation of a great variety of policy areas." As for the substance of the coordination, steering and regulation always concern public goods. EU governance *is political* in many ways, despite the "non-partisan" appearance it always takes. Unfortunately, this key dimension – the political – is too often underestimated in mainstream social science. As will be illustrated in this paper, EU governance is after all not entirely different from government; because of its political dimension, it can never be seen as politics-free steering, or as the rational management of public choices about public goods: power relationships are always involved (Marginson & Keune, 2011). Nevertheless, politics at the EU level are substantively different from their counterpart at the national one. True, European élites have always contributed to promoting a de-politicized approach of their action: they would like to be seen as taking decisions serving common interests and universal values transcending private and national ones. This strategy contributes to a surface de-politicization visible in the discourse and lexicon used by the EU Commission, especially since the failures of referendums in 2005 (Barbier, 2011). "De-politicization" is a political claim raised by certain actors, and not only a fact *per se*. Some scholars suggest considering EU democracy in terms of "democratic deficit" as utterly irrelevant (see for instance A. Moravcsik, 1998) whereas others argue that they find more and more empirical traces of such a "deficit" in sociological surveys. It would certainly be difficult to deny that European governance faces specific difficulties in its legitimization because of the nature of the EU polity / political system and we will come back to this point. Moreover, the argument according to which such deficits also show in opinion surveys at the national levels is weak and does not change the problem. The EU polity – that has no corresponding political community – is a "consociation" of nation-states (Costa and Magnette, 2003). Legitimacy of the parts stems from national-level democratic procedures. Legitimacy of the whole cannot easily stem from the same origin: there is no homogenous, let alone unique constituency of voters.

In this paper, our concern is not about bringing about a comprehensive view of EU governance: we are only concerned in identifying the "impact" (a "proxy" of it) of this combined and coordinated action of actors upon two identified areas of social life, the national systems of social protection and the national legal systems in the social domain. In order to analyze this, we have to assume that there is a separation between the "EU level" instruments, and the "national level" ones; this is an analytical simplification because social processes are not, in reality, separated, and because all things "European" (in the sense of what happens by way of activities at the quasi-federal level) are ultimately determined (if not directly made) by *national actors in trans-national situations*. In simplified terms EU governance may have a wide variety of consequences upon national systems. For this influence to materialize, "channels" or" vehicles" are numerous: one is the "application" of law[9]; another one is the coordination of policies by various mechanisms or methods; another again maybe the dissemination of ideas, ideologies, ways of doing, practices (often deemed "best"), templates. We must start from a list of types of vehicles.

[8] Offe (2009) has aptly noted that governance is often seen as a process without a subject: p. 550, "something happens, but nobody has done it and would thus be responsible for the result". This is however not the choice adopted here.

[9] M. Hartlapp has studied in detail the process that goes from the first drafting of legal provisions to the eventual "implementation" on the ground (Hartlapp, 2007). She shows that there is much more to EU law than simple "application".

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Inspired by the literature on governance "instruments", and for the sake of simplifying the present analysis, we suggest that *five main instruments* constitute the core substance of EU governance in the area of social protection and social rights. These are: (1) the role of legislation and formal regulation[10] (here referred to as EU law); because the European Central Bank is a fully-fledged authority with its independence and autonomy, some regulative decisions it takes (for instance, "prudential" regulation) can be considered as part of this first instrument; (2) the second instrument is money redistribution (essentially here, the Structural Funds and the Common Agricultural Policy[11]; (3) the third instrument of coordination acts by way of common standards, strategies, ideas, etc..: here the ideal-typical instrument is what has gradually been known as "open methods of coordination (OMCs)"[12]; one of these organizes macroeconomic and monetary coordination (the example is the "Broad Economic Policy Guidelines"). Another specific coordination has also existed in the area of "sustainable development". Decisions originating from these methods may be transformed into legal instruments of category (1); (4) a fourth instrument of governance is provided by negotiations between social partners at the EU level ("social dialogue", both sectoral and cross-sectoral). It is possible to state that (5) a fifth instrument is also involved, i.e. communication with the general public. To use V. Schmidt's typology, this instrument mainly refers to a "communicative discourse" type of instrument, as opposed to "co-ordinative" (Schmidt, 2006).

All instruments are inserted within systems of actors commanding unequal power resources and "ideas" (values, programmes, cognitive frameworks, theories of action…), and some forms of learning or dissemination are essential for any coordination to happen. In the case of the EU and especially with relationship to the introduction in the late 1990s of the "Open methods of coordination" much literature has emphasized the "newness" of such instruments, and, more often than not, social scientists were fascinated by what they observed to the point of really believing that a kind of Habermassian discursive democracy had suddenly come into reality (Jacobssen & Vifell (2003), Goetschy (1999), Zeitlin & Trubeck (2003)). Empirical work however has shown that this is at best a dream (or perhaps a nightmare) (Barbier (2008), Kröger (2007), Buchs (2007), de la Porte (2008)). Even when scholars were able to precisely identify "learning effects", they had to take into consideration that power relationships were involved in what was learned and by whom.

In the "EU governance of social policy[13]" though, not all instruments are on an equal footing for influence. Some are clearly overarching instruments, namely, *law and macroeconomic coordination,* because of their compulsory nature and the power attached to them. Difficult to objectify in strict causal terms, the impact of macroeconomic coordination will not be at the centre of the present paper. That the coordination by ideas and various methods of coordination is of secondary importance when compared to law and macroeconomic coordination will not be explained either in detail here. Neither will be explained in detail the

[10] We mainly refer here to "*lois et réglementation*". When considered in a cross-national perspective "regulation" in English is bound to be ambiguous. Regulation here may be used in a "theory of regulation" perspective, and not in the limited sense of legal (or quasi-legal) regulations. Regulation is the process by which society regulates itself, from the metaphorically used biological or technical sense (see New Shorter Oxford English Dictionary, vol. 2, 1993, p. 2530). This concept is also widely used in sociology.

[11] It is perhaps also possible to see some of the ECB intervention as comparable with governance by redistribution.

[12] These are formally described as "open" since the Lisbon Council in 2000.

[13] This expression can be taken as a *résumé* of our research object.

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rather obvious facts that the EU has never been a redistributive political entity. We will concentrate on the role of EU law and its peculiar features as an instrument of governance, with a "counterfactual" constantly in mind: national law. The analysis will be conducted in two steps. The first one concerns the EU law making. In a second step we explore the insertion of "social law" in the wider process of EU law.

The comparative angle adopted here has advantages in its capacity to increase the visibility of differences. It has also drawbacks, because it tends to posit EU law and national law as systematically comparable, and even more, the EU level of governance as systematically distinct and comparable to the national ones. Through the present text, the reader should be constantly aware that comparability is valid only to a certain extent.

1. EU law making: asymmetry and democratic legitimisation

National law has a number of features that have been invented over a long period of time in each of the EU polities. Despite similarities, these features are very different from the characteristics of EU law and this brings about key consequences. This is what we explore in this first "stage", the stage of "making"[14]. We start from the classic observation that the EU has been accused of an incapacity to live up to expectations in term of its democratic functioning, and that a "democratic deficit" is the rule. The most obvious overarching criterion is the absence of equivalents of the main institutions that support democratic life at the national level. But can this general observation be empirically related to the question of the making of law? The EU bureaucracy, or rather *oligarchy made of various elites* (Barbier, 2008), is however not alone "in Brussels", and it commands the support of many constituencies. How can one analyze empirically this system of actors that participate in the production of law? Understanding these processes and comparing the EU level with the national counterpart level in general is a first step prior to understanding any influences on social policy.

1. The difficult task of an objective sociological analysis of legitimacy

Objectifying legitimacy from a *wertfrei* (value-free) sociological perspective has always been a difficult conundrum for various reasons. The first one is that objective assessment in the domain is especially difficult for researchers inevitably marked by normative orientations. The second is that the legitimacy of an entity, an institution, a government is difficult to disentangle from its politics and its policies. The third difficulty concerns methods: sociological methods are based on interviews and quantitative surveys. These are very difficult to handle as a tool for evaluating legitimacy, because of the well-known sociological critique according to which surveys are instruments for creating artificial opinions. The outcomes of polls obviously provide at least an indirect measure of government's legitimacy, but only at a certain point in history. Sociologists remain wary of using flawed instruments. In political science, the separation between what is normative and what is strictly analytical is more blurred than in sociology, and political scientists are numerous who give answers to what legitimacy is, while not always acknowledging that their definitions run the risk of normative bias. We can briefly refer to some of this literature.

[14] "*La production du Droit*" in French might not translate as the "production of law "in English.

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F. Scharpf has had a wide and enduring influence on the international analysis of legitimacy, with his telling (and simple) distinction between "output" and "input" democracy (1999[15]; see also 2010). He has brought key dimensions of analysis for the understanding of European governance, which he prefers to see as "multi-level". For Scharpf in the area of social protection and social policies – our key concern in this paper – EU governance has resulted in privatization and liberalization, especially of public services. But this transformation was essentially of the "negative integration" sort, while "positive integration" was always minimal. However, although "output legitimacy" can be effectively achieved, it does not displace the basic role of "input legitimacy". In his conclusions, F. Scharpf precisely stresses this problem. For him, respecting the inevitable limits of the EU's area of legitimacy entails that it enjoys a limited range of decisions, and this can easily be transgressed (as he argues in his 2010 paper). In Scharpf's view, the "limited choice of decisions" available to the EU in order to remain legitimate have to meet three criteria: (a) avoid opposition because they stay beyond political visibility/salience; (b) provide solutions that minimize conflicts and (c) assume that governments will provide support through their own resources of legitimacy. Moreover, in the more focussed area of EU law, Scharpf argues, "output legitimacy" tends to presume the existence of trust "in the internal mechanisms of the judiciary" but also in the "validity of praetorian law through specialized discourse within the legal profession" (2000, p. 193). Finally, the construction of "output" legitimacy is eventually based, Scharpf rightly argues, on the "effective capacity to solve problems" (ibid., 193), a capacity he tends to see with doubt in his recent contributions. In his conclusions, he stresses the empirical absence of three other elements in the European polity (2000, p. 191-207): a) a collective identity b) an effective political debate c) an institutional infrastructure providing for accountability of responsible persons – in the absence of a common electorate. In this respect, "a government can be illegitimate even when it is effective" in the absence of a "demos" (ibid.)[16].

V. Schmidt (2006, p.5) adopted a slightly different approach of legitimacy, using the reference to American institutions. She distinguished four modes of democracy: "by and of the people" roughly corresponds to traditional "input" legitimacy[17]. "W*ith* » stands for the consultation of « organized interests » and « *for* » corresponds to « effective government » i. e., to « ouput legitimacy ». Because she defines the EU as a "regional state", V. Schmidt tends to downplay the problems related to "democratic deficits" and to stress that such deficits are mainly situated at the national level (ibid., p. 9). Additionally, V. Schmidt has argued that at the EU level, there were "policies without politics", while at the national level there were "politics without policies" (ibid.). For all its undeniable attractiveness, the phrase eventually risks being misleading, because European integration cannot but be political throughout. This is a different view from Moravcsik's "pragmatic" stance, proposing a theory along which there is no problem of "democratic deficit" in the EU, when one compares it not with "idealized" or "imaginary" political systems, but instead with "real-world practices of existing governments acting imperfectly under complex constraints" (2004, p. 362). Meny's (2003) is certainly closer to V. Schmidt's, when he writes that "there is certainly a case for emphasizing the weakness of popular support input in European institutions, but the same kind of critique should also be addressed to national systems" (2003, p. 9). Empirically, for him, many formal

[15] I mainly quote from the French translation (2000).
[16] A theme continuously discussed in the literature (Scharpf, 2009), but also by the Courts and legal scholars (see for instance the June 2009 decision by the German *Bundesverfassungsgericht*, about the Lisbon Treaty.
[17] Article 2 of the French Constitution states the principle of the French Republic: « gouvernement du peuple, par le peuple et pour le peuple ».

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institutions at national level have a "weak democratic component", and the "democratic deficit" argument cannot easily be circumvented because "nobody can deny that there is a real problem" (ibid., p. 11), a problem different from the national problem.

Finally, scholars who deny the empirical relevance of legitimacy and of "democratic deficits", whether at the national or at the EU level, seems not to be disturbed by the fact that European democracy tends to be closer to a form of oligarchy (Castoriadis, 2005, p. 157). Obviously this does not bother scholars who claim to analyse democracy « as it exists » (Moravcsik, 2005) and think that, as it is, Europe is protected from the excesses of "direct democracy" (Moravcsik, 2002). However scholars do not all think that this second best position is satisfying, not only from a normative standpoint, but also for analysis: the increasing politicization of some EU debates at the national level (Barbier, 2008) has increasingly shown that real problems cannot be easily circumvented. Main referendums, from the 1992 Danish to the French and Dutch in 2005, and then to the Irish in 2008 (and later, 2009) have clearly demonstrated that the people of Europe are not convinced by the "outcomes" that the EU elites seem increasingly desperate to sell them. One does not have to go as far as Jürgen Habermas and invite European elites to "jump over their shadows" (« *über ihren Schatten springen* »[18]) (= to go against their own will), in order to allow the citizens of Europe expressing their votes in referendums about EU institutions. Still, the legitimacy of many European level choices cannot but be questioned. Finally, the assessment of EU governance only in terms of "output" legitimacy– however consensual it might be among social scientists – cannot conceal the fact that this view first and foremost prevails among certain political actors in the EU institutions. These actors comprise EU politicians themselves, who claim to be "rational" and "disinterested", by opposition to national politicians (among them "populist" anti-Europeans, or "unreliable" citizens in this respect. Tomaso Padoa-Schioppa, a former director of various international financial institutions has illustrated the most explicit argument in favour of what one can interpret as "enlightened despotism" at the EU level[19]. He goes as far as writing that "*il est absolument impropre de parler de déficit de démocratie, comme si nous étions en présence d'un gouvernement basé sur autre chose que la volonté du peuple* » (2010, p.105). He attributes the fact that « *le peuple est mécontent, déserte les urnes ou rejette l'Europe par référendum* » to the insufficient powers given to the EU (what he calls a lack of « kratos", ibid., p. 105). Funnily enough the high level official's favourite image of Europe is one of the owners in a condominium, who, because they are in a "forced cohabitation" have to be "reasonable". As we will see in the following sections, these views are shared not only by the spin doctors of the Commission and the political aides who interpret Eurobarometer results in order to present the "rosiest picture" possible of the EU: key supporters of this view are to be also found among judges, not only but especially in the Court of Justice of the European Union (CJEU). What indeed could better encapsulate the essence of "output" legitimacy, if not EU law? This is what we will discuss thereafter.

Consequently, and irrespective of their own normative views about the legitimacy of the Union, an honourable task for empirical sociologists remains: can "democratic deficits" be compared between the EU and the national levels, in terms of social policy? Is it possible to

[18] *Die Zeit*, November, 29 2007.
[19] A form of enlightened despotism is also the general tone adopted – consciously or not – in most of the writings of the Judges and Advocates General of the CJEU (for this, see Mancini, and Arnull in the reference list).

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compare the "output" performances of national oligarchies and the EU oligarchy with the help of objective criteria? This is what we attempt in the following sections of the paper.

2. *Essential features of national law for the stage of law making: input legitimacy is the general rule, within an oligarchic functioning*

What do we mean by the making of EU law? We intend to capture the chain of actions performed by a host of actors who participate in the process that, in EU forums and arenas (Jobert, 2003), starts with the drafting of EU legislation (Directives or Regulations), but also of the Commission's decisions (that are legally binding) and the drafting of the CJEU's decisions. Through a very long chain of actions, this process can be followed up to the point when enforceable legal decisions have legal binding effects. By comparison, in the member states, the process generally starts by proposals for legislation put before their parliaments, to be eventually implemented through decisions by tribunals and by their administrations. In both cases, national and quasi-federal, a legal discourse is created, and legitimated, and, after this process, as the French saying goes, "*nul n'est censé ignorer la loi* ». At least in theory: as of principle, all the language versions of EU legislation are equally authentic and can be read by any EU citizen in their own language, while, in most cases, legislation which was not published in their language is not *applicable* to them (Kjaer and Adamo, 2011).

How describe the national process of the making of law in EU democracies *in the most simplified terms*? Law is made and passed by parliaments and by governments. Parliaments consist of elected members and, like governments they are accountable to voters according to the specific institutional rules of the country[20]. Law is "implemented" by the administration and, in case of litigation by the courts. Judges "implement" the law, and create case-law (the role of this jurisprudence being different according to law systems). Generally, a supreme court or a functional equivalent of a constitutional court is in charge of deciding whether laws passed by the legislative and the executive are compatible with the Constitution of the country. Apart from ultra centralized countries like the UK in this matter, when it comes to social law, substantive input is also often made by social partners. Social partners also often steer and manage social protection institutions, and their decisions can be legally binding. Last but not least, an essential ingredient of the making of law is the public debate. The public discussion of law happens in the public spaces (*nazionale Öffentlichkeiten, ekklesiai* and sometimes *agorai*[21]): the media (press and TV, internet), parliaments, and it extensively relies on political communication. A special form of political communication – spin – is organized by politicians for marketing their ideas and persons to potential voters.

In such *Öffentlichkeiten* and *ekklesiai*, debate is generally conducted in one national language (Van Parijs, 2010), the rule is "input legitimacy", with voters directly electing the law makers (parliaments) and a government generally accountable before parliament. With the help of complex processes of socialization, citizens learn at least some fragments of law during their education: such socialization is highly unequal in EU societies and undeniably pertains to national democratic deficits, if one takes effective participation of citizens as a key ingredient of democracy (which some obviously don't think necessary, Moravcsik, 2002). In principle "*nul n'est censé ignorer la loi*", but, in actuality it is often the case that only snippets

[20] Comparing nations from this point of view may lead to identifying systems that are more or less democratic than others. This matter is often hotly debated in the national political "spaces".

[21] As Castoriadis (2005) aptly noted, we should not confuse into one single "public space" what is happening in public-public space (the *ekklesia*) and public-private spaces (that constitute the *agora*).

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of the arcane legal discourse are known by the majority of citizens. Nevertheless, educated groups[22] share a "legal consciousness" as part of their citizenship at national level. Accordingly, only specialised technicians and lawyers master the legal mysteries, and the length of the chain that goes from the drafting of law to its "implementation" is generally very tortuous and tricky. In certain countries, citizens, and most often interest groups, enjoy more rights of access to litigation than others. Entire sections of the populations are de facto excluded from the legal systems. Constitutional courts play an important role in the democratic life of member states, but they are not equivalent to one another: it is for instance well known that the French *Conseil constitutionnel* has many characteristics that mar its standing and independence, not to mention its legal expertise, when compared for instance to the German *Bundesverfassungsgericht*.

All in all, however, one can admit that a second-best system of democracy is the rule at the national level, with significant accountability of the oligarchic elites, with a significant degree of participation in elections, a significant legitimacy derived by politicians from their elections, and a wide spate of legal rights that are upheld and defended, including before the European Court for Human Rights. Active debate happens in the public space, and directly challenges the choices made by politicians, who, in some countries live permanently under the scrutiny of a confrontational press (for instance in the UK). Nevertheless, national systems are all marred by democratic deficits of some sort, if one compares them with the ideals of democracy that Moravcsik prefers to banish in the country of illusions.

3. *Counterpart features of EU law*

What do we learn now when we systematically compare the features of the national systems sketchily described above to their counterparts at the EU level?

Consociation, a transitory (?) form of democracy

With an exclusive right for the Commission for presenting draft texts, law is made and passed by compromises between governments, on a consociational basis, in cooperation, in most of cases now with the European Parliament. This parliament consists of elected members who are accountable to voters. However, the link between elected representatives and their constituency is notably weaker than in the member states. Moreover, classic right/left divides are blurred in the European Parliament, where consensus politics prevail. This does not help of course to trigger impassioned debate in the national forums or public spaces. Additionally politicians in the Council and in the Commission are not elected and their nomination is the outcome of non public horse trading. Commission's and Council's officials, although they are strictly controlled by financial procedures, are not accountable in the national sense of the term, because they are not elected, and because no genuinely public debate takes place at the EU level. The public space at the EU level is actually fragmented into a myriad of forums and arenas, where actors with unverifiable legitimacy and obscure and changing networks have their say in influencing the final substantive compromises which are transformed in draft legislation proposed to the Council (lobbyists, big companies, experts, academics, associations and charities…). Social partners at the EU level are bound to be only one among these interest groups and so-called NGOs, although they enjoy special institutional recognition (Hyman, 2001; Marginson and Keune, forthcoming). Their position in this

[22] Educated groups in western societies make up for the majority of societies (more than 80%). However, entire groups are excluded from the knowledge of law: this is for example the case of the young lower qualified people.

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respect is in entire contrast with the national counterpart situations, and most strongly in the Scandinavian countries where they are not only "partners" but they are "parts" (*parter* in Danish, for instance) of the labour market, traditionally meaning that they are the exclusive and legitimate "owners" and contestants of this market[23]. This is one of the areas where the democratic deficit of the supranational level is immensely greater than its counterpart at the national level. This fact is consistent with the overall asymmetry existing between social and economic rights which we will analyze in the next section. When Arend Lijphart was advising the South African government (at the time, the racist National Party, led by Fredrick de Klerk) in favour of a form of "power-sharing" (between Blacks and Whites), and when Nelson Mandela was still in prison, consociationalism had its day in South Africa during the transition from apartheid, but now a majoritarian principle prevails and South Africans have equated this situation with democracy *tout court*. Consociationalism at the EU level has not certainly more chances in the EU than in former South Africa, to pass as fully democratic.

Implementation of law

Law is monitored by the administration of the Commission - which is also entitled to issue legally binding decisions - , but, essentially, it is "implemented" by national administrations and, in case of litigation, by the national courts, since, as of principle, it is supposed to be integrally part of national law. Additionally, national courts are always susceptible to ask preliminary rulings from the CJEU, or its tribunal of first instance. "Implementing" EU law, the Court's Judges constantly create new case-law. Hence, when comparing national and EU law, one of the trickiest aspects lies in the fact that domestic law systems do not equally value the role of case-law, as against "statutory" law, adopted in Parliaments. As far as "implementation" of law is concerned, its process at the EU level is decidedly more arcane, obscure, uncertain and risky than the already obscure, specialized and uncertain process at the national level. This situation is, *inter alia*, the outcome of the length of the chain of actions that take place from the initial drafting to the eventual binding legal rule (Hartlapp, 2007; Falkner et al., 2005). A situation can easily prevail whereby, unless explicit litigation is started, EU law may remains a "dead letter" as Falkner and her colleagues (2008) have observed for Central and Eastern European countries[24]. On the other hand, because of the dominant role played by the CJEU – a dominant role, by the way, which the Court created by and for itself, seizing the power at hand (Weiler, 1991)– all kinds of strategic moves from powerful actors may influence the actual consequences of EU law. It is interesting to learn for instance, that in order to counteract the counterpart moves by member states or by the Commission, EU-level Union representatives are obliged to develop strategies of litigation in the hope of achieving a better, more balanced consideration of social rights as against economic freedoms[25].

Whether ekklesia or agora no unified public space

As has been often remarked, there is no possibility for European citizens, or, for that matter, for parties, interest groups, unions, NGOs, etc.., to discuss with one another, except in English, the only lingua franca. Contrary to the national situations, this has the immediate

[23] It is precisely under the influence of the Court of Justice, but not only, that this situation has recently tended to be affected (see the Laval, Viking, Rüffert cases, and next section). For the case of Denmark, see Jørgensen and Schultz, 2011).
[24] This is confirmed entirely by one of our case studies, (Tomas Sirovatka, forthcoming, on the Czech case).
[25] Interview, ETUC, march, 29th, 2011.

consequence of excluding from *direct discussion* of EU law more than 85% of the population of the European Union which are not proficient in English[26]. Because they take for granted the rosy and false picture organized by the Commission[27], superficial analysts contend that this is not a problem. N. Fligstein, (2008, p. 138-158) is typical of this superficiality (Streeck, 2009), but he is certainly not the only one (by contrast, see Calhoun, 2007).

The Commission's "spin" (or "communicative discourse") has indeed taken new forms since the first White Paper on communication in 2006, and it was reinforced during the second term of the Commission (Barbier 2011). Since the first significant failure in a referendum (1992, rejection of the Maastricht treaty by Danes), the Commission has been desperate to bridge the large gap existing with the voters in member states, starting by trying to make EU legislation clearer and leaner (Piris, 2006, p. 483), and trying to increase "ownership" of the EU by its citizens (Barbier, 2008). The basic argument of this manipulative "political communication" is that the Commission only works, without any partisanship, for the general interest of European citizens. Precisely, this discourse, in a simplified form – at times verging towards a simplistic narrative for purportedly stupid voters[28] - is most often using politicized Barometer surveys to make half truths pass for what is supposed to be an "European opinion[29]". Even this simplistic translation of political issues and topics posted on the website of the Commission and its Directorate Generals, is only known of a tiny elite. Dominantly, the national quality press ignores the debates happening in what they call "Brussels" and only report about problems that have direct echo in the national public spaces: one such topic has long been the question of immigration. And it has clearly accentuated its visibility since the beginnings of the economic crisis. Even in this case, as was illustrated for instance by the rows erupting about French policy about the Roma people, or Italian policy about the refugees from Africa and Romania, and more recently, about Danish projects to re-establish border controls in 2011, debates are never held in a cross-national manner. They remain confined and imprisoned in national places, and only a tiny elite can discuss these questions, provided it knows and uses English as the *lingua franca*. With respect to the debate about EU politics, and notwithstanding the national democratic deficits, the situation at the EU level is empirically leading to an ever more conspicuous absence of conditions for the possibility of legitimation processes. At the end of the day, even "output legitimacy" can only be ambiguous and dubious, because it is also influenced by spin doctors who actively interfere.

Moreover, when one analyses empirical networks and forums as they really function "in Brussels", one is struck by the extreme fragmentation of these "spaces" for debate, not to

[26] Eurostat (2010, Stat/10/139) shows that only 13% of the working age population is proficient in a foreign language, which means: ability to understand and produce a wide range of demanding texts and use the language flexibly. On top of this, 15% consider themselves "good", i.e., are able to describe experiences and events fairly fluently and able to produce a simple text.

[27] By contrast with Eurostat figures, the European Commission and N. Fligstein take for granted that more than 50% speak more than one language – English in their majority – just because these people are able to watch English speaking TV and find their way in broken English when they travel abroad. This is not proficiency however (Barbier, 2008, p. 253-257). See also Kraus (2008 & 2011).

[28] See the website of the Commission; especially DG Employment's pages which have represented social policy as a circus.

[29] An interesting example was the publication, by the Commission, of a memorandum on the 26th of August, 2010 (IP/10/1071). The title of the memo proclaimed that Europeans were in favour of a stronger economic governance, and the figure was 75% of them. Hidden in the memo was the essential fact however, that a dramatic fall was registered by this spring 2010: only 49% of citizens did now think that Europe was a good thing for their country, a figure which had not been so low since 2004.

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mention that most social actors participating in them are financially dependent on the Commission's funding to an extent. As we will stress again later in this paper, alliances are explicitly made by certain sectors of the Commission' administration with certain groups advocating certain causes[30].

Supremacy in practice

As we have noted, arcane language for a small community is the rule for national law; this situation is even more marked at the EU level for various reasons. Whereas for instance, a common meaning is attributed by publics in many countries to the essential notion of "public services", its "equivalent" of "services of general interest" is not known of in many countries[31]. The possibility of an existing "common legal culture" is extremely more improbable with regard to EU law, which as of principle is *not grounded in any of the legal systems* of the member states. In this respect, EU law appears as de-contextualised and privileging de-territorialised universal rights (for instance, fundamental rights vis-à-vis traditional social rights). Indeed the very fact that EU law is formulated and translated in many languages implies that texts are written in a language cut from the ordinary legal consciousness of citizens. As our interviewees in the European institutions[32] explain, words used in the national language versions of legal texts – 95% of which are drafted now in English[33] – are actually intended to convey meanings different from the ordinary meaning the same words have in the national language (see also Kjaer and Adamo, 2011; Piris, 2006). A case in point here is the term "*workers*", which is used in chapter 1 of Title IV of the Treaty (TFEU) (freedom of movement of workers), which means something different from the British legal term "worker"; accordingly the French version has "les *travailleurs*" a word which is to contrast with the mainstream French "*salariés*"; the German version, for its part, has "*die Arbeitskräfte*" instead of the German classic "*Arbeitsnehmer*". Numerous other expressions could be quoted here, as, for instance the notion of "undertaking" used instead of the ordinary "enterprises", "firms" or "companies". In a guide for the adequate writing of EU legal texts, one of the guidelines prescribes authors (notably lawyer-linguists and reviser lawyer-linguists) to avoid terms which are too closely linked to the national legal orders (Piris, 2006)[34]. As a consequence, EU law appears as even more distant from ordinary citizens than national law, whereas EU institutions can rightly claim that theirs is the richest legal system of translations in the world with the aim of offering all citizens access to the letter of the EU law in all official languages. In the early 90s, Judge Mancini was congratulating himself and saying that the former ECJ was considered important by one out of five European citizens, because, he said, "visibility is the first precondition of legitimacy" (Mancini and Keeling, 1994, p. 185). Nearly twenty years later, visibility has indeed not been achieved. When one consults the regular Eurobarometer publications that monitor the EU citizens' "knowledge" of EU institutions[35], one is not surprised that, relatively rarer than

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[30] Examples are EU NGOs such as EAPN and FEANTSA (our empirical interviews).

[31] In certain member states, the « EU concept is still studied » (Czech expert, Copenhagen conference, May, 2011).

[32] Interviews, March, 2011, with lawyer-linguists.

[33] Interview at the Council, March, 2011.

[34] "En ce qui concerne la terminologie proprement juridique, il faut éviter les termes trop étroitement liés aux ordres juridiques nationaux", Guideline 5.3.2, p. 19 of the *Guide pratique commun du Parlement européen, du Conseil et de la Commission à l'intention des personnes qui contribuent à la rédaction des textes législatifs au sein des institutions communautaires* (French version, 2003).

[35] What kind of "knowledge" does one have when one has "heard of" something? This remains to be assessed.

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for the corresponding national institutions, this (extremely uneven) knowledge has to be first interpreted in the context of corresponding national institutions (Cautrès, 2007). Moreover, increased knowledge does not entail increased trust, as the example of the CJEU shows[36]. The European Commission is extremely proud of fighting for "Human Rights" (we will come back to that in the following section, because this stance appears as the ultimate way of legitimizing its fight for the common good). However, ordinary citizens are left in the ignorance of what the new Lisbon treaty brings out for them, in matters of rights and entitlements. A good example of this can be read from the Commission's 2010 Report on the Application of the EU Charter of Fundamental Rights[37]: the report tells that more than 4.000 letters were sent to the Commission by citizens who believed wrongly that the "new" position of the Charter of Fundamental Rights (as now referred to in article 6 of the Treaty of Lisbon) would bring them new rights. When reviewing the various groups of rights that figure in the list of this Charter, the Commission only found relevance in the area of human rights but no example whatsoever for the group of rights pertaining to "Solidarity". On the other hand, more than 3 quarters of European citizens are ignoring the rights they can claim[38].

A special role for the CJEU

In every aspect, the role of the CJEU is certainly essential to assess with comparison to apparently equivalent national institutions. Apart from the adoption of EU legislation by mostly consociational arrangements, EU law comes from a praetorian source. And this, as Scharpf noted, is clearly linked to an "output legitimacy" that tends to presume the existence of trust "in the internal mechanisms of the judiciary" but also in the "validity of praetorian law through specialized discourse within the legal profession" (2000, p. 193). Trust in the validity however is not illustrated by surveys of EU citizens, and on the opposite, it has been challenged to the point that most of the recent referendums organized have failed to produce significant majorities. Uncertainty about the position of the CJEU, with regard to the respect of national constitutions is still a matter of debate (Viala, 2006, p. 149) although official doctrine contends that EU law *prevails also* over national constitutions. Whereas this hierarchy is seldom openly challenged, the possibility of conflicts of hierarchy has remained present, especially in the case of the German constitutional court. Moreover, the fact that an "interpretative community" (to use J. J. Weiler's expression) has now existed for a long time, linking together networks of national judges and the legal profession, hardly means that "output legitimacy" for praetorian law is actually realized in the general public across the EU. Numerous, although indirect, evidence of this situation has piled up in the recent years in many member states. Leaving aside the ever special case of the United Kingdom, so-called "populist" parties have increased their following and electorate, whether in Denmark, where the Dansk Folkeparti is now pivotal in Danish political life, or in France, where the Front national is contemplating a second position in presidential elections in 2012, not to mention the Lega Nord in Italy or the group of far-right parties in Hungary, etc.. With their appeal to more than a fifth of the electorate, a theme that seems to link them together is an explicit denial of the legitimacy to the European Union. For sociologists, this brings empirical facts to consider.

[36] At the end of 2010 (Eurobarometer 73) 69% of interviewees had "heard of" the CJEU, but 50% declared they had trust, whereas persons that distrusted the Court were increasing sharply since 2007 (from 21 to 28%).
[37] COM (2011) 160 final, 30.3.2011
[38] Ibid. (see the 2010 Report of the European Ombudsman).

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Differences as to the possible access of ordinary citizens to the Courts oppose national courts and EU level courts, where the possibility of litigation has remained extremely limited for individuals in exceptional cases. In an article devoted to the hagiographic and *pro domo* praise of the former ECJ, Judge Mancini was obliged to admit that, with regard to the possibility of ordinary individuals to challenge EU law before its courts, the ECJ had "let the individual down" (Mancini & Kieling, 1994, p. 188). More largely, the sentiment that, because the CJEU rules by way of case-law, the possibility of the reversal of existing jurisprudence – despite the a priori conservative bias of case-law - brings an important touch of uncertainty to the whole edifice of EU law, especially in social law, as we will see. Another important aspect pertaining to the CJEU's role is the fact that its case law is decided in last instance, and cannot be challenged, except by a different decision – often unanimous – of the Council of the European Union (Ferrera, 2005). This situation may change when negotiations – started in 2010 – to make the EU accede to the European Convention of Human Rights will be completed. The unilateral Commission's control of the agenda for proposals of legal instruments will on the other hand be slightly mitigated by the possibility of referendums promoted by a certain number of citizens, introduced in the Lisbon treaty.

EU Law compared

All in all, when one interviews officials in the national administrations[39] who are especially and directly concerned with the application of EU law, and EU litigation, one often gets the impression that the whole process is beyond the grasp of *any of its direct actors*. Somehow deterministic reading of recent jurisprudence in social matters (Scharpf, 2010; Supiot, 2009, see next section) brings support to a view of EU law as a complex social process without identifiable authors (the case of "*un procès sans sujet*") (see also Offe, 2009). This impression is also reinforced when careful analysis of the production of legal texts show that it is extremely difficult, if possible at all, to identify anything equivalent to the "legislator's will" that exists at the national level (Kjaer and Adamo, p. 104; 109). Empirically, and despite the continually increasing powers of the European parliament, debate about EU law is immensely more distant from ordinary citizens than national debates that, however biased and twisted, are rather openly accessible to them, and linked to the possible direct sanction of politicians via regular elections. In this respect, the importance, variety and overall unaccountability of lobbies and all sorts of actors sharing access to influencing eventual EU legal norms, does not uphold the mainstream view of EU law as participating in "output legitimacy". As a key normative orientation of the EU level processes of governance, the fiction of "general interest" is widely questioned by a number of social actors, and more easily than it is also challenged at the national level. Finally, the history of the European Union in the domain of law can be seen as bifurcated and biased: the best way to document this situation is certainly to consult the writings of lawyers and, most of all, of EU Judges[40].

EU law as Janus bifrons

Certainly more distant from ordinary citizens, EU law is even further from any "legal consciousness" that is already shaky with respect to national law. Comparatively less "democratic" (or legitimate) in this respect, EU law nevertheless has acquired undeniable "output" legitimacy because of its *substantive* characteristics: the main one in this regard is

[39] Interviews over 2011 in the social ministries and the Foreign affairs ministry in France.
[40] The ways Judges are nominated to Supreme Court and can hold their tenures is also an empirical source of divergence for their legitimacy.

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the fact that supranational law brings with it better resistance to "*la raison d'État*", by opening potential access to additional individual rights to citizens. In this potential and not always direct access lies, according to our research, the main reason for which EU law has made its quiet progression in the Union. Indeed the development was, until very recently, quiet, if not secret. As specialists have told, the process was made by stealth: "the process itself went largely unnoticed when it occurred; its far-reaching consequences and significance were not appreciated at the time" (Weiler, 1991, p. 2436). Additionally, far from being a deterministic development, logically originating in the letter of the Treaties, the gradual importance, and supremacy of EU law was the outcome of deliberately political moves aptly made by the former ECJ over the course of its history.

"Activism" was the rule, especially when sensitive situations happened, that the Judges aptly seized as opportunities for extending the reach of EU Law, in inventing the principles of "supremacy", of "direct effect" among the most important ones. Such an assessment is not only made by Bourdieusian critique (Vauchez, 2007 and 2008). It is also explicitly accounted for by Judges themselves (Mancini, 2000; Weiler, 1991) and accepted by political scientists (Scharpf, 2010, Schmidt, 2006). A key reference, for instance, was the invention of the notion of "direct effect", which is very widely considered as one of a few essential pillars of the validity of EU law (Weiler, 1991, p. 2413-2413 among many others). By their very contrast, the words "self-restraint" and "activism", commonly used by legal scholars and judges indicate that the Court's stance has systematically been political – and that it has always needed, and acquired fresh resources for its legitimization. Take for example the introduction of the "fundamental rights" doctrine (Weiler, 1991): it was a trade-off, strategic at that, for the Court to be accepted, in exchange with the introduction of "supremacy" – which, by the way happened in the midst of strong political controversies (de Gaulle's contestation of the role played by the Commission). As Davies showed (1996, p. 124-125) the German court for instance was not to accept "direct effect" without something in exchange that could mitigate the absence of constitutional rights in the Treaty: the court responded by the doctrine of "fundamental rights" (cases Defrenne I in 1976 and III in 1978). In this respect, it is essential to stress that the introduction of the doctrine of "fundamental rights" plays a key role for the potential legitimacy of the Court of Justice, and much more importantly for the EU political system as a whole. The resort to "fundamental rights" was much later formalized in the Charter of Fundamental Rights of the European Union (now referred to in article 6 of the Treaty, and considered by some Judges as autonomous and self-sufficient for the EU legal order[41]) the reference was precisely a politically intended move by the Court to counter existing critiques by national courts (Weiler, 1991; Mancini, 2000, p. 12-14).

This is why it is important to come back to Max Weber's conception of legitimacy. In *Economy and Society*, Weber stresses an initial basic distinction between sociological and legal perspectives. For the former, what is important is "*ce qui advient en fait dans la communauté*" (volume 2, p. 11, French translation, Agora Pocket) ; there is a probability (*une chance*) that participants to economic activity "*considèrent subjectivement que certaines prescriptions doivent être observées et se comportent en conséquence, c'est-à-dire qu'ils orientent leur activité conformément à ces prescriptions. C'est ainsi que s'établit la relation fondamentale entre le droit et l'économie*" (id., p.11). Law is part of the process of rationalization[42] of society and, among forms of domination (*Herrschaft*) that generate

[41] Interview, Court of Justice, September 2010.
[42] Originating in the revelation of early religions and prophets.

legitimation, the modern form is precisely based on law, as opposed to tradition and to charisma. As a result, in the "legal-rational" form (*legale Herrschaft*), a key role is played by individuals' *beliefs in the legitimate order*. The force of the legal order does not lie in the physical but in these beliefs, as to the validity of *Herrschaft* (see also Supiot (2005) for an anthropological analysis). In his *Sociologie du droit* (p. 29), M. Weber stressed two key elements of legitimacy for modern government: "*Le gouvernement peut être lié à des normes juridiques et être limité par des droits subjectifs acquis (..) sa propre compétence reçoit un fondement en légitimité, un gouvernement moderne déploie son activité en vertu d'une « compétence légitime » qui juridiquement est toujours conçue comme reposant en dernière analyse sur le pouvoir (Ermächtigung) donné par les normes « constitutionnelles » de l'institution étatique. En deuxième lieu, cet assujettissement à du droit en vigueur et à des droits acquis conduit à un élément négatif qui consiste pour le gouvernement à devoir composer avec des limites opposées à sa liberté de manœuvre*".

Inspired by Max Weber, Bourdieu (1986) has conspicuously omitted from his analysis to take into account the ultimate and substantial reasons for the justification of what is, in his view, pure domination power exercised in a "field". His followers do similarly (Vauchez, 2007, 2008). Nevertheless, the validity/legitimacy of law cannot be reduced to an illusion (*illusio* is Bourdieu's term, 1986, p.7). Additionally, Bourdieu's approach is deterministic[43], because it underestimates the fact that law is made by actors who are unable to impose their legal views in any circumstances. This is all the more empirically observable at the EU level, where all sorts of interest groups compete for participating in the making of EU law, and where legal scholars, lawyers and judges enjoy a privileged position, but certainly not an unchallenged one. Characteristics of law stressed by Weber (*Economy and Society*) are still relevant for the interpretation of EU law: (1) the multiple nature of norms from habit/customs/conventions and written law that all have their validity; (2) the fact that not only economic interests are safeguarded by the legal order, but also variegated interests, as for instance, the security of individuals; (3) the key part played in the making of law by organized economic interests; (4) the fact that extremely different legal systems can be reconciled with some universal form of economic activity[44]; (5) the fact that "*même les moyens de coercition et de sanction les plus énergiques échouent quand les personnes en cause refusent de les reconnaître*". Additionally, among important characteristics stressed by Bourdieu, some are especially relevant for the study of EU law: (1) language/the power of nomination as a key factor; (2) the fact that the making of law happens on a specific scene with specific rules and actors; (3) the fact that there exists a "*chaîne de légitimité*" among actors: whereas it is empirically documented in the national context, this "chain" raises specific problems of identification in the context of the EU. To a certain extent, in each national context, and in very variable proportions, a kind of "common knowledge" of law exist, shared among legitimate actors who have at least some participation in its public debate and its negotiation, within a bounded (national) and bounding framework of solidarity/reciprocity (Ferrera, 2005; Barbier, 2008).

Deciding whether a functional equivalent of this "chain of legitimacy" exists at the EU level is not an easy empirical task however. This is where it becomes essential to understand what the forces are that support the legitimacy of EU law in its ordinary functioning. A wealth of literature has insisted on the well documented fact that economic interests, big firms and

[43] Especially with the concept of 'symbolic violence' which is deemed to be literally incorporated into individuals.
[44] Some universal legal 'lingua franca' may be considered as a form of de-contextualised hyper-rationalization.

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capitalist organisations are at the forefront of this support, and play a key role (Scharpf, 1999; Streeck, 1998, to quote only two). But what is less stressed in general, is that, apart from the overall liberalization development in the economy, perfectly consistent with the promotion of powerful economic interests, EU law has also decidedly promoted and safeguarded some rights of individuals from a liberal equality point of view: hence the prominent position of the "anti-discrimination" principle in EU law, which features, along with the principle of equality between men and women in the Treaty on the same level as European citizenship (article 2 of the TEU and part two, articles 18 and following of the TFEU). This is certainly not by chance then that a passionate defence of this claim is part of all the texts written by former judges of the ex-ECJ. And this is not either a surprise to see how the European Commission has eagerly attached its political communication (and the spin accompanying it) to this aspect of EU law and policies: just take the example of the extremely vivacious exchange in 2010 between the Commission and the French government over the fate of the Roma people in France. This is also not by chance that the first Report on Fundamental Rights established by the Commission enumerates a list of individual situations that EU law is especially organized to fight for: the rights of women to equality, the special situation of the Roma people, the rights of the disabled. In the same line of thought, it is also extremely logical that the Court (and the Commission with it) concur in the defending of marginal and excluded people: people asking for assistance, irrespective of their citizenship rights (on this see in particular Ferrera, 2005), poor people, homeless people, and so on and so forth. The otherwise uncertain legitimacy of EU law, conspicuously privileging powerful economic interests has found there a key basis for indispensable support. We just have to read Judge Mancini's plea (2000, p. 193) to understand the logic of this support, when he drew a list of individuals that had nominally benefited from the implementation of EU law – all chosen, note, in the realm of anti-discrimination: "they will do well to look closely at the Court's case law and remember how many of Europe's citizens have benefited directly of the Court's rulings. They will for example remember the Belgian air hostess who claimed the right to the same rate of pay as her male colleagues [Defrenne –case 43/775, (1976)], the British nurse who objected to being compelled to retire several years earlier than a male [Marshall – cases 152/84 (1996)], the German woman who was prevented from getting a job as a canteen assistant at Cagliari university by a practice of discriminating against non-Italians [Scholz – case 419/92 (1994)], the French student who wanted to study cartoon-drawing at an academy of fine arts in Belgium and was required to pay a fee not imposed on Belgian students [Gravier – case 293/83 (1985)], the Greek hydrotherapist who asked only that his name should not be distorted beyond recognition, when transliterated by an over-zealous German registrar of marriages [Konstantinidis – case 168/91 (1993)] and above all the millions of consumers who are the direct beneficiaries of a common market founded on the principles of free trade and undistorted competition. What citizen of Europe has not been assisted in some way by the rulings of the European Court in Luxembourg? (2000, p. 193). Support and legitimacy is thus called for by the ECJ from the Defrennes, the Graviers, and the Konstantinidis. This brings forward the existence of a rarely stressed alliance in favour of active support for EU law's legitimacy: on the one hand, large economic interests motivated by the extension of the frontiers of the market, and, on the other, groups of citizens who have a particular stake, and pursue the particular advocacy of a cause; as we have constantly checked in our interviews for the present research, NGOs representing these advocacy coalitions provide one of the main pillars for empirical support for the EU, the European Commission ["an imperative in the daily action of the Commission" (Tizzano, 2008, p. 133)], and the European Court of Justice and its network of counterparts across the Union. For

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instance, an objective alliance exists between the EU Commission, presently promoting the interests of the homeless people, the NGO which leads this advocacy coalition in Brussels (FEANTS), and the private providers of housing across the member states. This coalition stands directly against the interests of the owners of social housing in the Netherlands – who, according to statistics and to the Commission's view – are abnormally rich or middle class[45]. Similarly, NGOs promoting a better recognition of extremely rare diseases were very active in the coalition of actors that eventually achieved the adoption of the 2010 directive on cross-border healthcare[46]. What also strikes the researcher who reviews a very complex legal practice and tries to make sense of it from a sociological point of view is how "de-contextualised" these individual or small groups' causes appear when they are dealt with by the Court of Justice. This is all the more striking that, at the same time, international law seems to be more and more attentive to the plurality of values across the world (Delmas-Marty, 2011, p. 14; 21; 198, in particular).

What remains to be seen however, in the following section, is how this is articulated with the way EU law that deals with social rights, social rights that are dominantly *collective* and not individual (Camaji, 2008, see also Tizzano, 2008, p. 134). As we will see, in the social domain, as well as in EU law in general, an important distinction has to be made between citizens who are mobile and citizens who are not.

2. <u>The insertion of social law in the broader legal architecture: room for solidarity?</u>

In this section we continue our systematic comparison between EU law and national law, in order to understand more precisely the impact of EU governance on social policies in member states. We concentrate on EU law, and ignore, for the moment, other mechanisms, as for instance social dialogue or open methods of coordination. We proceed in three steps for each level: first, we assess the insertion of social law in the broader legal framework; second, we look at the relationship of social law with public debate and politics; finally, we assess the outcome of social policy.

1. Social law at the national level

<u>*The central political role of social protection and social rights*</u>

Since the late 1960s, and as an outcome of historic class struggles (in matters of labour law) but also of innovations and new ideas by enlightened elites (in matters of social protection, Merrien, 2007) social law in Europe is integral part of law; admittedly the situation in Eastern and Central European countries is different, but these new member states have caught up at least partly, since the fall of the socialist system. What is more, across the EU, issues dealing with labour law and social protection (another way of saying "social justice") provide an essential – if not *the* essential – part of the public debate, of public controversies about redistribution and labour markets. This means that the debates about the "social" is a key element of democracies in Europe and a key factor explaining what cohesion there is in societies. On paper at least this hard fact is routinely acknowledged by the EU institutions (Jepsen and Serrano Pascual, 2006). This has an important consequence: despite imbalances

[45] We refer here to the case, pending (in 2011) before the CJEU, that opposes the Dutch government and the Commission, with regard to what the Commission sees as a "manifest error" of the Dutch government in defining what is "general interest" in the area of social housing.
[46] Interview, March, 2011, French ministry of social affairs.

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between the interests of groups in societies, and the always unequal and imperfect application of law in reality, social law and other branches of law have acquired a common legitimacy over the last century (Supiot, 2005). Social rights were even explicitly recognized internationally at the highest level of cross-national conventions (Supiot, 2009). This means that, at the national level, social law (social protection and social rights) is part of the general architecture of law, submitted to the common development of checks and balances and to "judicial review" (or its equivalents) by relevant institutions and courts.

Social law is at the heart of society (Schnapper, 1991), because, along with fiscal rules, it is able to identify deserving individuals (Van Oorschot, 2006), to organize redistribution on a legitimate basis, with effective procedures for consultation and publicity. As we have shown in more detail (Barbier, 2008) processes of solidarity today are still essentially organized at the national level (sometimes, at the infra-national one). This is not by chance. Some *characteristics of nationhood (le fait national)* are indispensable for the definition of social protection and the solidarity that accompanies it. The pioneering work of Maurizio Ferrera (2005) is a precious guide in this regard. He demonstrates that, throughout its history, social protection has always presupposed two social mechanisms: first, the "bounding" of a territory, linked to the existence of nation-state boundaries, and second, "bonding", the creation of a bond of solidarity or sharing within the boundaries of the national community, which may temporarily include immigrants. As a consequence, social protection systems are marked by numerous dimensions linked to the nation, the nation-state and the national community: territory, nationality, residence, language, citizenship, a sense of belonging to the community (one of the forms of identification), etc. One of the key elements of this relationship lies in individual and collective willingness to *share resources within a given political community*. This aspect has been studied especially by Scandinavian researchers in an effort to ascertain whether their system can endure in the face of contemporary trends of individualisation and globalisation (Rothstein, 1998; Svallfors, 2002; Goul Andersen, 2008; see also Van Oorschot et al., 2008). The category of the nation (Leca, 1992) covers both subjective phenomena – affective, normative, imaginary (Anderson, 1983) and cognitive, individual as well as collective – and objective practical and institutional aspects, which are all relevant to social protection. One can present them in three steps. First of all, social protection in democratic societies, which involves interconnected political, economic and family relations, is based on social conditions of legitimacy and solidarity. Second, the primary vehicles allowing individuals to access social protection and participate in its construction are *citizenship* and *identity/identification*. Finally, the entire system of social protection rests on formal institutions and practical arrangements that are profoundly marked by their national roots (Barbier, 2008).

As a consequence, national legal systems derive their consistency from the fact that under an autonomous constitutional order, they are covering all areas of law. Additionally, since the second World War, national law – at least in the older member states of the EU - has been interconnected with international legal instruments (ex: the Human Rights convention of the Council of Europe) (Roman, 2010). This process took place prior to the existence of EU law, and independently. In matters of social law, an important – although partially implemented[47], legal instrument – has been in force since the 1960s, and a special *Comité des droits sociaux* is in charge of ruling over cases presented not by individuals, but by

[47] Akandji-Kombé & Leclerc (2001) show that the instrument is adapted to the various ratification processes decided by the member states, and that is has very different legal consequences across them.

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organisations. Consequently, because of their long history, and embeddedness into the social reality in member states' legislation, social rights are fully recognized by the courts of the country and are a constitutive part of the legal system. These rights have legally binding effects, they are fully "justiciable" at the national level. The substance of social rights is mainly enjoyed by citizens at the national level, whatever the importance of systems of coordination we will allude to later.

The pivotal role of social law in public debate

Moreover, social law and social policy provide a great part of the substance of what is discussed in the public and in daily politics: this is the case for pensions, healthcare, benefits for the poor and the taxes that are needed to fund them, sharing or not sharing these benefits with foreigners, immigrants (Barbier, 2008). Governments often stumble on reforms that the publics (or the *Öffentlichkeit*) do not like, and they have to draw back their reforms, as was for instance the case in France when then Prime Minister D. de Villepin had to resign because unions and students refused the introduction of a special contract for the young in 2006. Another example occurred in Germany when the *Grosse Koalition* government had to withdraw the reform of unemployment assistance for the older unemployed in 2007. Apart from discussions about security (internal and external security) and, less often, the environment, these issues account for the essential substance of public debate, accompanying debates in the national parliaments and decisions by governments (often compromises between parties). Law in general, but social law in particular is accordingly changed according to the coalitions (Left- or Right-wing) that are in place, and these issues are highly politicized. In some cases, social law (and the budgets accompanying it) is fought against in the streets. (By comparison, only tiny and de-territorialised demonstrations happen in Brussels.)

When the national social law order enters into contradiction with the EU legal order

Thirdly, apart from the active promotion of human rights in general and anti-discrimination in particular, national social law has increasingly emerged as in contradiction with EU law. This is noted by an increasing number of scholars in the recent years (Höpner, 2008; Ferrera, 2005 and 2009; Barbier, 2011; Scharpf, 2010). An important point should be stressed at this point: the concept and interpretation of "subsidiarity". The subsidiarity principle had now been part of a special Protocol of the Treaty for some time (since the Maastricht Treaty). On the face of it, social competences are still the preserve of member states, and as will be seen more in detail, social policies definitely belong to the national level. However, this does not mean that national sovereignty has been completely preserved in this domain. This happened for two main reasons: the first one is that, because of the general principle of the supremacy of EU law (applicable at the EU level, but also in the national legal orders) social rights have become increasingly challenged by the implementation of legislation on free movement (free movement of workers, of capital, of services, of goods, and the right to free establishment in another member state). The special realm of labour law, which is dominantly a part of the national legal orders, is constantly challenged, to the point that practically no domain of this law can be considered as really exempt of EU influence[48]. The other reason for this ever

[48] In interviews, we are told by legal experts belonging to EU institutions that the EU legal order is a whole that practically leaves no area of national legislation unaffected by EU law (except certain domains like criminal law). Doctrinal differences however exist about the actual consistency of the EU legal order.

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increasing influence of EU law on national social law is due to the privilege that EU institutions have gradually acquired on many domains linked to the functioning of the economy. A case in point here is the question of social services of general (economic) interest (Krajewski et al., 2009). Superficially, a common view of "subsidiarity" equates the notion with the defence of sovereignty: this view was shared by the large majority of our interviewees who spoke of "subsidiarity" when they wanted to support arguments against what they thought was undue and illegitimate action from the Commission in areas that have remained within national jurisdiction[49]. The same applies, de facto to labour law (Rodière, 2008). Some scholars even talk of "usurpation of competences" (Höpner, 2008, p. 30). In reality, on the example of social services of general interest, subsidiarity also means that EU law is ultimately the reference as to assessing whether member states do not make "manifest errors" in declaring such and such an activity of "general interest", as we have noted for the controversial question of social housing (Guinard, 2009). Once a service is deemed to be of "economic" nature, EU law is competent – despite the "wide discretion" remaining for member states – and prevails in this case as in others over national law.

A double legitimacy for social law at the national level

Finally, national statistics are telling: between one third and one half of GDPs are currently spent in member states for redistribution and social policy in general (including of course education) (Barbier, 2008). This brings about undeniable output legitimacy to national social policies and to national social law. The national level thus enjoys a double process of legitimation, first by participation to the discussion of law, and the election of members of Parliament (input) and second, by the result that the very fabric of national societies is linked to this huge process of redistribution taking place through education, healthcare, pensions and other social services – not to mention the funding of public services in general. Parliament and government legislate about redistribution and substantial redistribution happens at the national (sometimes infra-national) level. In this respect solidarity[50] mainly belongs to the national level. Against this substantial and substantive solidarity, that is even protected as we will see by case-law, the promises of other forms of solidarity have remained elusive. As is well known, and despite Judge Mancini's praise of the benefits of the EU for its consumers, there is no such thing as solidarity between consumers. The rationale of expecting something from the EU level in terms of solidarity rests entirely on the prospect of more efficient services, if they were organized at the EU level, and systematically submitted to the competition in markets. However empirical substantiation of this economic theory claim that the markets will ever provide more quality and more efficiency has yet to be made. Nevertheless, in the economic thought favoured by the CJEU (Neergaard, 2009), the provision of social services is always a priori seen as a best outcome of the markets: in the words of one of the Commission's specialists of law, the best and most efficient way of providing social services is resorting to "vouchers", that allow the consumers to buy their

[49] This view is constantly used for instance by our interviewees when they describe the resistance of German representatives for the EU legislation in matters of poverty.

[50] We see "solidarity" as a socio-economic principle, with the ability exercised (and politically legitimated) to share collective resources (taxes and benefits) among citizens or individuals, as they are part of a community: such communities maybe national, regional, occupational, etc. and obviously also include families. Solidarity can also happen at cross-national level: it is illustrated when natural catastrophes trigger the sending of relief and aid across the world.

services from whatever providers[51]. How then is it possible to compare social policy at the EU level with the national level, this is what we shall see in the following section.

2. *Social law at the EU level*

<u>Social law: marginal and asymmetrically treated</u>

If, as we saw in the previous section, a crucial turn was deliberately made by the former ECJ in the domain of human rights, the same cannot be said of social law, which, since the early treaties, has remained marginal in the wider architecture of EU law, and is treated asymmetrically, in direct relationship to the EU's overarching mission, i.e., building a market and unleashing the economic freedoms that were deemed to produce efficiency and satisfaction for European consumers.

The role of social law (labour law and social protection) has remained marginal because it always was to remain, at least officially, the preserve of member states' jurisdiction. The initial, *economic* logic of the founding act has continuously informed subsequent developments. Even if we admit that the social dimension has, since 1957, been addressed more extensively[52], as the ECJ's evolving jurisprudence demonstrate (de Schutter 2004), economic and social rights are still not treated in an equivalent way in EU law, notwithstanding the formal adoption of texts establishing social rights.[53] While freedoms of circulation and the freedom of establishment constitute a hierarchically superior legal base for the Union, because they are supposed to permit better competition and improved functioning of the single market, social rights are only taken into consideration to the extent that they might be affected by the functioning of the market (or, conversely, affect the market's functioning). Strictly speaking, and with few exceptions, application "for their own sake" does not constitute an explicit political task for the EU. To cite but one example, indirectly linked to social protection: if the EU is concerned with languages, this is *primarily and legally justified* by the fact that language education may have consequences on individual mobility and freedom of circulation, and not because of the cultural value of languages *per se*.

A second principle applied to social protection as a whole concerns the supremacy (if not the exclusivity) of national jurisdictions over Community ones. In the core areas of social protection, member states have resisted quite well until now, even if highly important rules (notably those established by the former ECJ) constrain national decisions (Ferrera 2005; Leibfried and Pierson, 1995). This resistance has been greater in the field of education; the difficulties encountered for adopting the Erasmus programme in 1987 is probably a good

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[51] Professor Julio Baquero Cruz, seminar on social services, Copenhagen, May, 13, 2011, Faculty of Law.

[52] For instance: in the important domain of discrimination legislation.

[53] E.g., the Community Charter of Fundamental Social Rights for Workers, adopted in 1989, and the European Charter of Fundamental Rights, which deals with social rights in Chapter IV (Solidarity), adopted at the Nice Summit in December 2000. The right to education and vocational and continuing training appears in article 14, in the chapter 'Freedoms', and the right to cultural, religious and linguistic diversity is found in the 'Equality' chapter, article 22.

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example of this (Corbett 2003).[54] In the area of social protection as elsewhere, three principles prevail: the *direct effect* of Community law; the *supremacy* of EU law over domestic laws; and the principles concerning economic *freedoms*, associated with the principle of fair competition. These principles, which have gradually been consolidated, directly or indirectly "command" the whole apparatus of member states' law in all areas. When an affair is submitted to the CJEU, they provide the basis for all legal interpretations. Admittedly, these may be overturned, but this requires a decision of the Council of Ministers, which is not easy to arrive at, as is demonstrated by the lengthy battle, probably just getting under way, over the free circulation of services, which, to a great extent, should be seen as essential for the future of social protection in the EU.

Social law at the EU level is thus often considered – especially in the founding members of the EU, as marginal, and sometimes, futile. It mainly looks as if it concentrated on general principles with little consequences, and no actual *justiciability*, as in the case of the long list of rights that feature in the chapter "Solidarity" of the European Charter of Fundamental rights. All these rights are de-contextualised, de-territorialized and, so far at least, have never constituted serious legal basis for defending the social rights of a majority of European citizens, who are covered by their own national legislation. To make it simple: social law will come into the scope of EU law essentially in two main cases: one is when it contradicts the complete development of economic freedoms; the other one is when it is – as an auxiliary – associated with one of these economic freedoms, and more often, with the freedom of circulation for "workers". Historically, the main domain where European influence was exerted was the "coordination of social security" systems for migrant employees – a very small group indeed. The main legal instrument used was Regulation 1408/71[55]: in a nutshell, its objective was to open up national systems in such a way that "workers" (and their families) could be eligible to benefits even when they worked in another member state: for instance, family benefits were paid to the family of a Portuguese worker employed in France by way of a mechanism coordinating family funds in France and Portugal[56]. Thirdly, the 'hard-law' influence of the EU-level over national legislation was at its highest in the domain of health and safety at work on one hand and in the domain of equal opportunities for men and women (equality and anti-discrimination in general) on the other. However, apart from this variegated influence upon national systems, it can be argued that their essential substance and regulation, as well as the social justice and solidarity principles upon which they have rested were consistently left to the national competence during the period.

Perhaps more generally, sociologists inquiring about EU law are bound to be struck by the fact that the main corpus of thought, the backbone of this type of law is founded on economic theory. "Economization" of law is stressed by many lawyers. When it comes to "public goods", for instance, among which social protection traditionally features, the mode of reasoning of the CJEU is strictly arranged according to economics, and marked by the influence of one school in the legal discipline, "Law and Economics" (Supiot, 2005; 2009, Neergaard , 2009, p. 44-47; Prosser, 2005). What strikes observers even more, by contrast to national law, is

[54] The success of Erasmus is often cited, but by its twentieth anniversary, if more than 1.5 million students had participated in it, they represented only about 1 percent of the potential flows. At the end of the 1980s, the Commission aimed at much higher figures, around 10 percent.
[55] Now replaced by Regulation 2004/883.
[56] I refer here to the matter discussed in the Judgement of the Court "Pinna vs Caisse d'allocations familiales de la Savoie" in 1989 (March, 2, 1989), a judgement which started a controversy and an updating of the Regulation 1408.

that, in spite of the rhetorical presence of "solidarity" as a legal notion, there is little if any, substantive "solidarity" going on at the EU level. More, "solidarity" is the essential category that allows for exceptions to the law of the market. The famous 1993 Poucet-Pistre rulings constitute the key reference in this respect, because this case-law has historically established (actually, created) the characteristics of what can be seen as a typical social programme that is exempted from complying with the competition of the market. Ironically, far from being sheltered by the market, social protection is thus "protected from the market" (Borgetto & Lafore, 2010). This tells a lot and encapsulates the crucial *de facto* opposition that exists in EU law between individual and collective rights. Admittedly, legal doctrine often tells that case-law is a vehicle for path-dependency and conservatism. However, the fact should be stressed that two crucial pillars of social security, two essential tenets of the classic welfare state, namely "state" pensions and "state" healthcare are depending not on any provision of primary law, but on the possibly fragile ground of a 1993 ruling that could be reversed (Driguez, 2010[57]).

When social law is hardly debated about

A situation prevails in the EU whereby the only forums where social law is debated are the European Parliament – the accountability and visibility of which has already been seen here as shaky[58] – and the institutional mechanisms that organize the consultation of social partners, especially since J. Delors established the Social Dialogue, in the 1980s (Barbier, 2008). The outcome of this situation is that national legal arrangements prevail, not only in practice, but also in fact. At the most, as the endless discussion about the revision of the Working time directive have illustrated for the last 10 years or so[59], EU social law is about "minimum standards" – which, in the case of many countries of the EU, are even hardly implemented (Falkner et al., 2008)[60]. At the worst, debate would happen only because a case emerges, as in the Laval and Viking cases or in the Commission versus Germany case[61] where national arrangements struck between social partners are threatened by the application of EU legislation about economic freedoms. "Negative" notoriety of EU law has thus provided the only opportunity for debate recently across the Union. The European Commission and its agents – who are (sometimes painfully) conscious of this situation – have been trying to compensate this absence or aloofness of the debate with superficial political communication through websites and rhetorical repetition of the importance of solidarity within the European Union. Jose Manuel Barroso has been especially active in this latter respect. In 2006, he talked for instance about fighting illegal immigration: "It is of the utmost importance that all Member States of the Union work together in a spirit of solidarity, not least to assist those southern Member States most affected by illegal migration from Africa. Current joint efforts to help Spain, Italy and Malta constitute a concrete example of this European solidarity."[62] In another similar instance, during the "Greek crisis" first phase, the President declared to the Financial Times: "There is no stability without solidarity and no solidarity without stability"[63]. Especially during the first stages of the "bail out" (as the vague political concept goes) of Greece, and later of Ireland, the project was not supposed to have a

[57] This author noted that it could well happen.
[58] See *Eurobarometer*, 74, autumn 2010 for precise figures of "trust".
[59] See case study, France, F. Colomb.
[60] See also case study, Sirovatka, the Czech Republic.
[61] See ETUI reference about collective agreements and complementary pensions/social security.
[62] http://www.eu-un.europa.eu/articles/en/article_6224_en.htm

[63] March 22, 2010, "Barroso demands solidarity on Greece".

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direct impact on the member states' budgets. Nevertheless, in Greece and in Germany public debate immediately touched upon the point. But both debates remained separate: separated from one another because of the absence of a common language (Barbier, 2008; Kraus, 2011; Grin, 2011).

Ouptut legitimacy? Minuscule solidarity and legal uncertainty

How then could EU "social policy" contribute to the formation of output legitimacy for the European Union in the social domain? Citizens of Europe are often painfully conscious – as the Greek citizens and the Irish at the moment of writing – that the only real security they can fall back on lies in existing national programmes – notwithstanding their overall threatening through austerity strategies (Barbier, 2011). As anyone knowing the EU is well aware of, the EU budget is tiny with comparison to member states' budgets – a large part of which is devoted to "social expenditure" earmarked for social protection in general (including education). Because member states roughly spend between one third and one half of their revenues for a "social purpose", it is no wonder that the EU budget is dwarfed by the national ones, with its 1% of GDP current limit. Nevertheless there exists a form of financial solidarity at the EU level, implemented through the Structural Funds, and also the Common Agricultural Policy – which has always been centred on sustaining farmers' incomes since the beginning of the Communities. These two dominant items in the EU budget make for about 80% of the 1%. This figure offers a realistic measure of EU solidarity. Hence, the common goods that can substantiate output legitimacy obviously originate in the national organisation of solidarity: no Greek unemployed contributes to pay for the German unemployed…and vice versa, although European elites are now considering more and more unacceptable the alleged discrepancies between social justice principles among EU countries[64].

Again, President Barroso's political campaigning illustrated this recently. In the run-up to the second referendum about the Treaty of Lisbon, in October 2009, he suddenly made the trip to Limerick in Ireland to advertise the contribution of the EU to Ireland, especially in the form of a special grant attributed to redundant workers in Limerick: "Solidarity is one of the defining hall marks of the EU. We all know that Ireland has benefited hugely from its 37 years of EU membership. To the envy of many, Ireland showed that it was able to take the opportunities given with both hands and to use the good educational levels and strong creative instincts of the Irish to turn a country of emigration and low living standards into the success story that it is today."[65] The particular grant came from the "European Globalisation Adjustment Fund (EGF)". The fund is perhaps the best incarnation of the dire limits of solidarity at the EU level: it was decided by the EU Council in December 2006, with the aim of enabling "the EU to show solidarity with and provide support to workers made redundant as a result of major structural changes in world trade patterns" [EFG Regulation, SEC (2008, 16.12.2008), p. 2]. In May 2009, the number of workers concerned by the EU measures was less than 15000 people. The European Commission later presented an updating of the EFG regulation as a major contribution to the fight against the economic crisis. At the time, the sheer number of persons concerned and the tiny amount of budget earmarked for their support (500 million euro, of which about 10% had been spent) vividly illustrated the true

[64] Undeniably, German politicians are at the forefront of such a debate. One among a hundred examples was E. Stoiber, the former minister president of Bayern, who, in the *Süddeutsche Zeitung* recently declared: "*Es kann doch nicht sein, dass andere mit 59 in die Rente gehen und wir in Deustchland diskutieren die Rente mit 67.*" (21-22 Mai, 2011, p.6)
[65] Speech on the 19th of October, 2009,, see http://ec.europa.eu/ireland/press_office/speeches-press_releases/barroso-limerick-city-council_en.htm

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balance between the national level and the EU level of governance. While this text is being written, in the midst of an unending crisis with redundancies and extremely high level of unemployment, persisting poverty rates, the EFG has not even been spent entirely[66]. In terms of redistribution, proper solidarity happens mainly at the national and sometimes infra-national levels, not to mention family solidarity (Van Oorschot et al., 2008).

Could however one claim that, with the advent of "European citizenship" introduced in the Maastricht Treaty, substantive solidarity has been making progress? What of the role played by the European Charter of Fundamental Rights, which has an entire chapter devoted to "Solidarity"? Unfortunately, as the latest (2010) Commission Report about Human Rights has shown, little justification for output legitimacy has so far come from this side.

Since the enactment of the Treaty of Lisbon from the first of January 2009, legal scholars have been announcing that the reference now made explicit to the Charter by article 6 of the Treaty on European Union (TEU) was good news for European citizens. However, this has meant very little so far in terms of new references to the Treaty by the CJEU, and extremely few, if any, good news for the support given to social rights. Nevertheless, general principles of the Charter, in its chapter "Solidarity" include: workers' rights to information and consultation in the undertaking; collective bargaining and action; access to placement services; fair and just working conditions; prohibition of child labour and protection of the young; family and professional life; social security and social assistance; healthcare; access to social services of general interest (SSGIs); environmental protection; consumer protection. All these rights however only materialize (=are justiciable) at the national level. Moreover, the Court's brief is with economic freedoms, and more and more, its case-law has contradicted the preservation of national systems of social protection (Barbier, 2008; Scharpf, 2009; Ferrera, 2009). Given that the general principles of the Charter were drawn from already existing international conventions and national legal traditions, the prospects of solidarity extending through EU law have remained extremely limited so far[67].

Additionally, at the EU level, unlike at the national level, citizenship – particularly social citizenship – is "framed" or effectively "embedded" into the freedom of movement of persons, a right which could equally be said economic or "fundamental" (a civil right if we use Marshall's classification). This is why, since its inclusion in the Maastricht Treaty, European citizenship has unfortunately remained, *de facto,* the full preserve of only a limited number of citizens in Europe: those *who are able to move*. This is very clearly illustrated in the formulation of the treaty: the only classic social rights presented in it are those of migrants (art. 21.3). In fact, one dimension that is perhaps difficult to understand for non-specialists, and citizens themselves, is that EU law in the area of citizenship targets situations of movement between member states (Rodière, 2008, p.195; 265). A paradoxical situation may arise when, for instance, a citizen does not exercise his or her freedom of movement. Then, for instance, he or she will not be able to claim the application of EU law in the area of family reunification (ibid.) nor could he or she, if the movement took place within the territory of the member state of which they enjoy citizenship. In both cases, citizens are not really deemed to have "moved" and they will be subject to national legislation in the domain of family reunification.

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[66] 380 million euro were spent by March 2011 and 76,000 people supported.
[67] 2010 Commission's report on the charter: page 8-9: Women, the Roma, and mobile people are the main people mentioned, with regard to their right to translation, right to know where to file a complaint in another country, etc.

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The only dimension of EU citizenship which is not directly or indirectly linked to movement is that citizens have the right to vote for the European parliament. To this, protection against discrimination established in the same part of the treaty (in Part two, articles 18 and 19 deal with discrimination, just before article 20 deals with EU citizenship) may also be added – although this is not a citizenship right in the strict sense. One aspect of this discrimination is linked directly to movement – that is the prohibition of discrimination on “grounds of nationality”. However, the other aspect is much broader, because it concerns (article 19) all the most common grounds for discrimination (“sex, gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation”). Here again, the ambiguous and “Janus-faced” nature of EU citizenship appears: on the one hand, it belongs to fundamental rights (also present in the list of the Charter of Fundamental rights of the EU, the ones former Judges of the Commission like to say they are proud to have contributed to, as Judge Mancini did, and rightly so), and, on the other hand, it is a consequence of the freedom of movement. Freedom of movement is also a “Janus-faced” right. All the major components of EU citizenship concern citizens who are keen on moving and do actually move: they enjoy diplomatic protection in other member states, and they enjoy the right – under certain limited conditions – to reside in any member state of their choice. The right to vote in another member state, in either municipal or European parliament elections, is also strictly linked to free movement. All in all, the major dimensions of EU citizenship, except the right to vote for the European parliament in reality concern the tiny number of people who work or reside in another member state[68]. As was already mentioned, the main exception in terms of significant European influence on social and labour rights has been equality between men and women, because of the unexpected spill-over effects of the initial provisions in the Treaty of Rome (namely, ex-article 119, see Davies et al., 1996). The great majority of legal experts we have been interviewing since the 2009 implementation of the Lisbon Treaty share the view that the reference to the Charter of Fundamental Rights (its article 6) will not substantially modify this situation in the future. As was already the case before the adoption and the reference to the Charter, in matters of Human Rights the Court of Justice’s case-law referred to legal sources originating in Member states’ legislation and constitutions, as well as to the European Convention of Human Rights (Council of Europe). Thus it is not in the small amount of funds devoted to correcting minuscule imbalances across the Union, nor in the protection of the rights of the European citizens that one will easily find substantive solidarity in Europe.

Finally, because the very rationale of the impact expected from EU law is to destabilize existing arrangements (with negative integration) in order to expand the realm of the market forces, along with this very limited scope available for solidarity at the EU level, legal uncertainty is the other, complementary, character of the impact of EU law: uncertainty for the future sustainability of healthcare systems, of pension systems, of labour law and collective agreements, of social services of general interest, i. e. public services. Uncertain benefits – despite their certain expectation in mainstream economic theory – are also the order of the day, when it comes to future efficiency and quality outcomes deriving from better administered programmes and systems.

[68] Currently estimated at between 1 and 2% of the working age population.

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3. EU law as a crucial innovation in the social field: individual and "collective"[69] social rights, supported by diverse coalitions of actors

One may claim that, in the area of labour law and social protection, the main innovation that was introduced in the 1990s is EU law. Given the well documented fact that social "competences" have remained the preserve of nations, the affirmation may seem paradoxical. However, the EU legal system is Janus-faced, like the former Latin god of doors. In the social domain, on one hand it has introduced new *individual rights* (including for firms) and new legal accesses to rights: this was done first by way of the CJEU's bold borrowing from the constitutional orders of member states and, very importantly, from the Human Rights reference. Hence, rights pertaining to the category of fundamental rights are extremely important. They are too often overlooked when analyses only focus on social protection and solidarity programmes. However, social protection rights seem not to be fully considered at the EU level.

In this respect, EU law has increasingly jeopardized "collective" social rights (such as "corporatist" arrangements), sometimes destabilized existing systems of social protection, even contributed to their demise, without providing alternative solutions at the EU level. Fundamental rights are envisaged at the EU level also with a double face: on the first face of Janus, is the attractive defence of fundamental rights, like for instance equality between men and women, or, for that matter, the principles of prohibiting discrimination between them. On the other face of the coin, is the "economic" dimension of these rights, which tend to be de-contextualized and implemented via case-law without heeding the existing solidaristic systems that took so much time to build over the two last centuries in Europe. Because of an asymmetrical dominance of the freedoms of movement, potentially all other rights are in jeopardy, and the principle of subsidiarity seems to be relegated to a token principle, seldom used in the CJEU's case law. Because of an asymmetrical system of law, citizens who are on the move do enjoy additional rights with comparison with the majority of European citizens who do not move, more often than not because of their lack of resources and linguistic skills. Because of the asymmetrical European legal system, essential functions of law in the social domain, that have been cherished by unions and sometimes also employers' organisations in certain countries, are seen as mere exceptions to the mainstream situation of the production of goods and services, deemed to be inevitably the best when it happens on the market in the context of free competition. At the end of the day, the global impact of EU law on social protection and social rights appears as mixed. The uncertainty it has brought to EU "national social models" can certainly not be presented as blissful progress, and further uncertainties are piling up when one takes into consideration the way EU law is produced.

The social process that we have been considering in the present paper however should not be considered as determined. We met social actors who fight for or against the promotion of EU law or its change. When one sees evolutions of labour law and social protection in Europe with the hindsight of the last 40 years, many developments were not forecasted. In the early 90s the talk of the day was predicting the final crisis of the welfare states. But this never materialized. Despite forming a particularly privileged group[70], "de facto oligarchy", existing

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[69] Our notion of "collective" certainly does not claim to be an adequate legal category: the rights involved stem from the organization of various forms of solidarity, within communities, professions, populations, and so on. This includes for instance rights which are exercised collectively, as the right for industrial action. For an extensive legal discussion, see Camaji (2008).
[70] Interview, March, 2011, former *référendaire* at the ECJ.

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besides the oligarchies of states (Delmas-Marty, 2004, p. 187), the dominant actors who today craft EU law are not isolated from the rest of European societies. Judges are part of cross-national networks including national lawyers and courts that are bound to register direct reactions in their national legal orders. NGOs and lobbies, interest groups, may have held the dominant positions in the Brussels arenas and forums, but they probably have controlled the process so far and influenced it in an asymmetric manner because much of the process of creating and implementing EU law was happening by stealth. As Viala (2006, p. 141) rightly noted, the stance taken so far by the makers of EU law cannot easily go on like it has thus far, as if following "*Un volontarisme qui semblerait n'avoir cure des contraintes de l'enracinement linguistique. Tout se passe comme si les États européens avaient fourni la preuve qu'il existe, en état d'apesanteur, une rationalité juridique formelle qui puisse se laisser découvrir et se répandre (…)" ce serait "l'idéal de la modernité juridique fondé sur l'universalisme anhistorique du droit.*"

In sociological terms, the gradual progress of EU law cannot be seen as if it were a process without actors. Now the era for a "permissive consensus" attitude from the part of electorates in member states is definitely over. Key milestones testify for the changing times: the failure of referendums in the Netherlands, in Ireland and in France; the discarding of the infamous "Bolkestein" directive; recent alarm raised by the Monti Report commissioned by J.M. D. Barroso in 2010 about the single market. New awareness was triggered by decisions of the CJEU in 2007, and an increasing attention seems to develop – not only in Belgium, France and Germany, with regard to public services, the so-called social services of general (economic) interest. The mounting pressure of parties that are characterised by elites as "populist" demonstrate to national governments and to EU elites that their populations are to be convinced, as the German minister, Wolfgang Schäuble, recently remarked, with regard to the German voters[71]. Certainly the resilience of national languages (Orwell, 1946) is a hard fact of politics in Europe, too often forgotten especially by elitist "cosmopolitan" views (Beck & Grande, 2004) that ignore the politics of everyday life and the limits of the English language *as lingua franca* (Ostler, 2011).

The assumption is increasingly made by legal scholars (including in the ranks of the Commission's administration) and by legitimate stakeholders, that fresh innovation is needed in the area of social law. Demands are made in the forums in Brussels, and this might herald unexpected developments, especially in times of deep economic crisis. In the meantime, far-reaching legal uncertainty is however here to stay for quite a long time in the future.

[71] "*Es sei möglich, dass als Lehre aus der Euro-Schuldenkrise die Notwendigkeit einer weiteren Integration hin zu einer politischen Union erkannt werde. Davon müsste dann aber erst die Bevölkerung überzeugt werden.*" *Süddeutsche Zeitung*, (8. Dezember, 2010).

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