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Introduction: EU Law, Governance and Social Policy

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Introduction

The aim of this special issue is to contribute to the overall assessment of the “impact” of all forms of EU Governance on social policy (considered as a multi-level construction).

This aim has been part of a collective research effort which started in 2009 in the context of the FP 7 GUSTO (Governance of Uncertainty and Sustainability, Tensions and Opportunities)

project¹. Envisaged here in its widest sense, “social policy” includes social protection and social services, but also labour law. Modes of governance considered are seen as “instruments” (Lascoumes and Le Galès 2007). The authors build on the analysis of selected policy cases and countries, and certainly do not claim to implement a comprehensive analysis of EU governance in the social domain, a daunting if not impossible task indeed. In this introduction we first present rapidly how the governance theme runs across all four papers. Then we go on to a short presentation of the content of the papers and how they contribute to articulating the authors’ collective and common contribution.

EU governance of social policy and EU law

On governance in general, existing literature is huge. We concentrate on applying the concept to the European Union as a regulatory state-like entity (Majone 1993; 2006). Governance may be differentiated according to the steering modes (more or less hierarchical), the instruments, the decision levels (transnational, regional and local), and the actors involved (public or private, experts or elected representatives ...). We envisage EU governance as the combined purposive intervention of relevant EU level actors, forming a constellation in the coordination, steering and regulation of a great variety of policy areas. EU governance is political in many ways, despite the “non-partisan” appearance it always takes at the EU level. Moreover, EU governance is after all not entirely different from government: Smith (2006) explains that the European Union has already gained a “de facto government”. Hence, because of this political dimension, EU governance can never be equated with the rational management of public choices about public goods: power relationships are always involved, as Marginson and Keune illustrate in their article. The political aspect of social policy coordination is also illustrated by Barbier and Colomb when they show that the Commission makes political choices for instance by promoting social housing as a safety net in contradiction with the Dutch universal conception of the housing corporations. More generally, the intrinsic asymmetry of EU law (Hartlapp; Barbier and Colomb) conveys a political bias in favour of economic freedoms vis-à-vis social collective entitlements.

Politics at the EU level are substantively different from their counterpart at the national one. European élites have always contributed to promoting a de-politicized approach of their action and they would like to be seen as taking decisions serving common interests and universal values transcending private and national ones: the Court of the Justice of the European Union is a case in point of this attitude. This strategy contributes to a surface de-politicization visible in the discourse and lexicon used by the EU Commission (Barbier 2011). But as the handling of the 2008-2012 crisis has amply demonstrated, when not on top of the

¹ The present set of papers are one of the outcomes of the project, coordinated by prof. Colin Crouch (Warwick Business School). Jean-Claude Barbier is coordinator of the so-called “Working Package” n°5 devoted to “EU Governance and Social Policy” within the project.

explicit agenda, distributional issues are always in the background. Hence, “de-politicization” should be seen as a political claim raised by certain actors, and not an empirical fact *per se*.

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 regulation² (here referred to as EU law: it is the main focus of the special issue); 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 (at the EU level, the Structural Funds and the Common Agricultural Policy³); (3) the third instrument acts by way of devising, promoting and disseminating common standards, strategies, ideas, etc.: here the ideal-typical instrument is what has gradually been known as “methods of coordination”⁴; one of these organizes macroeconomic and monetary coordination (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 or at sector level (“social dialogue”). (5) A fifth instrument is also involved, i.e. communication with the general public. To use V. Schmidt’s typology, this latter 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 various “ideas” (values, programmes, cognitive frameworks, theories of action...), and forms of learning and dissemination are essential for any coordination to materialize.

A consensual view prevails in the literature over the importance of macro-economic coordination which will not be directly addressed in the present issue, but will remain in its background. Only law compares in importance with macro-economic governance. In this issue, the focus is on some instruments only: law (Barbier and Colomb; Hartlapp; Koukiadaki), the open methods of coordination (Hartlapp) and social dialogue (Marginson and Keune). The papers reveal how these different governance instruments involve differing relationships between the European and national levels, in terms of autonomy and dependency. The paper by Barbier and Colomb demonstrates how the key institution responsible for upholding EU law, the ECJ has, if anything strengthened its autonomy in relation to the Member States over the recent period. Under the ‘open method of

² We refer here to “*lois et réglementation*”. When considered in a cross-national perspective “regulation” in English is bound to be ambiguous. Regulation 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 acceptance of the term is also common in sociology.

³ It is also possible to see some of the ECB intervention as comparable with governance by redistribution.

⁴ Formally described as “open” since the Lisbon Council in 2000.

coordination’ and the ‘social dialogue’, on which the papers by Hartlapp and Marginson & Keune focus, the European actors, including the European social partners are, in comparison, more dependent on the respective national actors – either governments or social partners – for regulation to take effect. This changes, however, should decisions under these instruments be transformed into legal instruments, with the European actors becoming less dependent on the national level but more so on the European institutions. The extent of dependence on national governments and social actors, or the degree of scope to act autonomously from them at the EU level, are, it seems, contingent on the instrument of governance under consideration, with steering modes which are more hierarchical in character entailing less dependence on the national level, and more autonomy at the EU level, than those which are less hierarchical

The period is probably over when “Open methods of coordination” brought with them interesting innovations for exchange, potential learning under the shadow of power struggles, and partial reallocation of power resources among national actors (Hartlapp 2007). With their passing out of fashion, scholarly interest has come back to considering law, a domain where decisive insights were already achieved in the 1990s (Leibfried & Pierson 1995). The paper by Hartlapp in this issue, with the hindsight of more than 15 years, is precisely devoted to exploring the interaction between hard and soft law: to her, the latter should not be overestimated vis-à-vis the powerful constraints of the former. The conclusion is consistent with what we have learnt about the Europeanization of healthcare (Martinsen 2009).

Empirical sociological research is useful to complement a view that is often focused on the “structural constraints” that law brings (Scharpf 2010). Each with their own angle, Barbier and Colomb (sociological) and Hartlapp (political science) are following up here on pioneer studies that have addressed the topic of “compliance” and “implementation” of EU *law in empirical terms* (Falkner *et al.* 2005). True, just enacting directives (the Council and the European Parliament) and making decisions (the Court of Justice of the European Union with its case-law, and the Commission’s legal decisions), does not translate automatically in reality. Here the world of “dead letters” (Falkner and Treib 2008) provides an extreme case in point: in countries like the Czech Republic, studied in the context of the GUSTO project (Sirovatka 2012), the actual application of law in social matters is so defective that its influence on social policy is hardly visible.

Overview of the four articles

The four contributions in this special issue are part of an interdisciplinary endeavour (law, sociology, industrial relations and political science) to take on this question empirically. In all four papers, EU law is contrasted with other multi-level instruments of governance, national or supranational. The analysis of “EU-law making” is present throughout the project, which takes very seriously the phases of making, implementing, enforcing and potentially applying forms of EU governance. Drawing from the view of actors and following their actions in resistance to and in support of EU law, the first paper compares how social policy is crafted and implemented, at national and supranational levels, with what consequences, and how the

multiple asymmetries of the process eventually promote individual rights at the expense of “collective” entitlements. It identifies relevant groups of actors that are engaged in building coalitions and alliances, promoting or, alternatively, fighting, the extension of the reach of EU law. Taking the example of “old-age policies”, the second paper addresses the question of the relative influence of governance instruments, contrasting the OMC pension with EU law deriving from the promotion of freedoms of movement and anti-discrimination. Especially focusing on a systematic review of autonomous framework agreements, the third paper challenges the conventional view according to which social dialogue has evolved from dependency to more autonomy, and stresses the importance of Directives, while discussing governance in terms of power relationships within the multilevel polity (or polities). The last paper focuses on the influence of EU law on the creation, implementation and delivery of social (and public) services in Britain, a country which, because of its state of liberalization, would, *a priori*, be considered as the least affected by the 2006 Directive on services, and EU law on competition, state aid and public procurement. The paper shows that it is certainly not the case.

The findings brought about by the papers all concur to a serious qualifying of the principle of *subsidiarity* as it is still widely considered (and often promoted by national actors and governments): the general reach of the EU legal order thus appears with its far-reaching consequences, including in the area of social dialogue. This finding – based on a selected number of policy areas and countries is not considered as representative of the entire situation across the Union, but it brings about a consistent number of observations that confirm political science and legal literature as to the profound transformation EU law favours, especially in the older member states.

References

Barbier, J.-C. (2008) *La longue marche vers l'Europe sociale*. Paris: PUF.

Barbier, J.-C. (2011) ‘Changes in political discourse from the Lisbon Strategy to Europe 2020: tracing the fate of ‘social policy’’, ETUI Working Papers, 2011(01), Brussels: ETUI aisbl. Available at: <http://www.etui.org/Publications2/Working-Papers/Changes-in-political-discourse-from-the-Lisbon-Strategy-to-Europe-2020>

Falkner, G., Treib, O., Hartlapp, M. and Leiber, S. (2005) *Complying with Europe: EU Harmonization and Soft Law in the Member States*, Cambridge: Cambridge University Press.

Falkner, G. and Treib, O. (2008) ‘Three worlds of compliance or four? The EU-15 compared to new Member States’, *Journal of Common Market Studies*, 46(2): 293-313.

Hartlapp, M. (2007) ‘On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO’, *Journal of Common Market Studies*, 45(3): 653-674.

Lascoumes, P. and Le Gales, P. (2007) 'Introduction: Public Policy through its Instruments – from the Nature of Instruments to the Sociology of Public Policy Instrumentation', *Governance*, 20(1):1-21.

Leibfried, S. and Pierson, P. (eds.) (1995) *European Social Policy between Fragmentation and Integration*, Washington: Brookings Institution.

Majone, G. (1993) 'The European Community between Social Policy and Social Regulation', *Journal of Common Market Studies*, 31(2): 153-170.

Majone, G. (2006) 'The Common Sense of European Integration', *Journal of European Public Policy*, 13(5): 607-626.

Martinsen, D. S. (2009) "The Europeanization of Healthcare Governance: Implementing the Market Imperatives of Europe", *Public Administration*, 86(1): 169-184.

Moravcsik, A. (2004) 'Is there a 'democratic deficit' in world politics? A framework for analysis', *Government and Opposition*, 39(2): 336-363.

Scharpf, F. (2010) 'The asymmetry of European Integration, or why the EU cannot be a social market economy', *Socio-Economic Review*, 8(2): 211-250.

Schmidt, V. A. (2006) *Democracy in Europe, EU and National Politics*, Oxford: Oxford University Press.

Sirovatka, T. (2012) 'Social services in general interest in the Czech Republic: poorly regulated markets, dead letters of law', in Barbier J.-C., Rogowski, R. and Colomb, F. (eds), *The Sustainability of the European Social Model and Social Rights in Europe*, Cheltenham: Edward Elgar (forthcoming).

Smith, A. (2006) "Le gouvernement de l'Union européenne et une France qui change", in Culpepper, P. D., Hall, P., and Palier, B. (eds) *La France en mutation, 1980-2005*, Paris: FNSP: 343-72.

Moravcsik, A. (2004) 'Is there a 'democratic deficit' in world politics? A framework for analysis', *Government and Opposition*, 39(2): 336-363.

Scharpf, F. (2010) 'The asymmetry of European Integration, or why the EU cannot be a social market economy', *Socio-Economic Review*, 8(2): 211-250.

Schmidt, V. A. (2006) *Democracy in Europe, EU and National Politics*, Oxford: Oxford University Press.

Sirovatka, T. (2012) 'Social services in general interest in the Czech Republic: poorly regulated markets, dead letters of law', in Barbier J.-C., Rogowski, R. and Colomb, F. (eds), *The Sustainability of the European Social Model and Social Rights in Europe*, Cheltenham: Edward Elgar (forthcoming).

Smith, A. (2006) “Le gouvernement de l’Union européenne et une France qui change”, in Culpepper, P. D., Hall, P., and Palier, B. (eds) *La France en mutation, 1980-2005*, Paris: FNSP: 343-72.

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