New Governance and EU Constitutionalism: Friends or Foes?

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Abstract: The current EU is a highly institutionalized template for integration, equipped with a whole spectrum of different modes of regulation ranging from 'hard' to 'soft' which, particularly in recent years, have been pragmatically combined together to develop a hybrid and multi-tiered EU system.

The dramatic expansion of the EU governance tool-kit and variety of the objectives and internal structures of these EU governance tools have relied on a non-clearly identifiable mix of legal and policy instruments. These changes in EU governance pose a challenge to the rule of law and its main tenets and do not sit well with the European Court of Justice (ECJ) because they occupy an unsettled constitutional space. This space is characterized by a range of possible encounters between constitutionalism and governance. New EU governance, therefore, forces European scholars to rethink the way the EU system operates and the way Europeanization is being pursued.

The paper explores the relationship between New Governance, law and constitutionalism, the problems concerning their conceptualization and further understanding in the context of EU social governance. Its main argument is that a stronger dialogue between 'soft' and 'hard' regulatory mechanisms, that is, between New Governance and constitutionalism, may lead to a hybridized multi-level governance regime in which all governance tools are designed to achieve the same set of goals.

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Introduction

In the last decade the European Union (EU) has seen the emergence of new approaches to governance other than supranational legal regulation in different policy domains, with techniques and enforcement mechanisms ranging from relatively 'hard' to 'soft' (Scott and Trubek 2002). The use of soft law instruments and policy coordination to advance the European integration process is not a new phenomenon (Senden 2004). Soft law encompasses a variety of processes the common feature of which is that "while all have normative content they are not formally binding" (Trubek, Cottrell and Nance 2006: 65). By setting aside the traditionally perceived divide between soft and hard law the paper seeks to interrogate to what extent and in what way legal instruments and processes as well as constitutional values and norms are or may be involved in the operation of "new" modes of governance and what role new approaches to regulation have or may have within the more well-defined structures of law and constitutionalism.

Notwithstanding their intrinsic differences, the paper postulates that New Governance, law and constitutionalism form part of the same *corpus unicum*, each performing a specific role in ensuring the effective functioning of the EU by compensating each other's regulatory deficiencies. In the context of socio-economic and employment policies, Hatzopoulos (2005: 1633) maintains that 'the Lisbon objectives and recourse to the open method of coordination (OMC) – considered to be the paradigm of New Governance - constitute the supplement, in the form of (soft) positive integration, to the (hard) negative integration already achieved by the Community judiciary. […] Seen from this perspective, the lack of legitimacy and the absence of judicial control of the Lisbon process, appears far less dramatic.'

Thus, by drawing on metaconstitutionalism theories [1] (Walker 1999) the aim is to reconsider accepted and fixed understandings of law and constitutionalism that have led to a static and limited juxtaposition of the former and New Governance, failing to grasp their multidimensional meaning and role in the wider European integration process. While their basic differences cannot be denied 'differences in historically shaped "cultural" conditions should not be reified into irremovable obstacles' (Nelken 2008: 306).

The paper, therefore, puts forward an approach to the understanding of law and constitutionalism which is procedural, relational and dialogic (Shaw 2000), that is, one which enables them to accommodate and interact with New Governance. It is posited that such a relationship could then provide the conditions for identifying a more workable resolution of intractable problems about the EU's democracy, legitimacy and efficiency gaps. A strong hybridized system of co-regulation could also reduce the putative weakness of New Governance for its lacking of accountability and judicial scrutiny. In particular, with regard to the field of employment, by strengthening the relationship between New Governance and EU constitutionalism social rights and labour standards could be built into the European Employment Strategy (EES) in order to counterbalance that weakness creating the basis for the justiciability of enacted measures. In this way a space for national

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[1] Metaconstitutionalism is explored in detail in the penultimate section of this chapter. Briefly, metaconstitutional law is open-textured and it is used to consider the dynamic and multi-faceted nature of the EU system. It takes the current post-Westphalian system as a point of departure in which the state is no longer the sole political authority and in which national constitutional law and traditional international public law, both of which constitute the legal and judicial pillars of the Westphalian system, cease to be the central sources of EU public law *lato sensu*.

diversity and experimentation would be preserved and the open method would be maintained intact without incorporating it into the "command and control" regulatory model of EU constitutionalism. Andronico and Lo Faro (2005) identify one main reason for coupling the OMC with fundamental rights. They maintain that while the OMC is said to guarantee diversity, fundamental rights are meant to ensure unity. In other words, 'fundamental rights constitute the element of indispensable hierarchy which corrects the unsustainable heterarchy of an otherwise excessively 'open' method of coordination'.

The challenge attendant upon such enterprise is acknowledged from the outset. Law and constitutionalism are touched upon by an idea of "stateness" (Shaw and Wiener 2000) which we do not find in New Governance processes. There are also a series of other inherent, intertwined and cumulative paradoxes and problems besetting the EU and its present and future existence. Each of these encapsulates a weakness or limitation of the European integration process, and can also be found in part of the copious literature on New Governance. This makes it all the more difficult to establish a relationship between these different modes of regulation and to identify appropriate normative standards against which to assess the operation and efficacy of new and experimentalist modes of regulation in the wider context of EU social governance. This explains why, as Weiler and Wind (2003: 3) have put it elsewhere, this paper is 'not a contribution as to how to do it, but as to how to think about it'.

Putting New Governance in context

In the current post-modern and post-national era and in the context of the EU constitutional reform process New Governance practices and processes have reached a period of consolidation, some obtaining full recognition with the insertion of new provisions in the Treaty. [2] Abstract questions have become practical questions which can no longer be avoided given the place of prominence that New Governance has gained over the last decade in European regulation. Although the ToA has provided a legal basis for the development of a uniform regulation of social policy at European level, a series of questions concerning implementation and compliance have arisen as a consequence of the greater reliance on forms of New Governance, which need to be taken into consideration in order to understand what role they perform in the EU system. An analogy may be drawn between this situation and Vervaele's (1999: 361) metaphor that 'once the house is ready and house rules have been determined, it becomes more and more important that those rules are complied with and that the

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[2] See *e.g.* Arts 2(3), 2(5), 5 and 6 TFEU regarding employment and economic policy coordination and supporting, coordinating and supplementing measures to the actions of the Member States. The Treaty of Lisbon, following the EU Constitution, has a separate category of competence for economic, employment and social matters, Craig (2008:148; see also Craig 2004: 334-340) observes that the existence of this category was controversial in the Convention on the Future of Europe, with some calling for these areas to come within shared competence, while others argued for the inclusion of employment and social policy as well as economic policy within this separate category. This second solution prevailed mainly for political reasons. If these matters had been placed within shared competence, then the general rules of pre-emption would have been applicable and this was regarded as being unacceptable by many. Craig (2008: 148) argues that there may be boundary problems between this category and that of shared competence (compare provisions of Article 4 TFEU and Article 5 TFEU), and that it should be recognized that while this head of competence is framed largely in terms of coordination, the detailed Treaty provisions concerning economic policy nonetheless accord the EU powers to take dispositive and peremptory action in certain circumstances.

house will not be undermined by inferior upkeep or operations that endanger the structure'.

The emergence of new or experimentalist approaches to EU governance [3] may be first explained as a manifestation of wider international processes and phenomena. As global trends dismantle barriers, bring about destabilization and in certain ways impose changes at domestic level -which will eventually lead to social, economic and cultural similarities transnationally- this will bring pressure on law to follow suit. As with globalization, so with Europeanization, it makes less and less sense to think of "domestic" norms as forming part of distinct national jurisdictions that subsequently interact with transnational norms (Nelken 2008: 307). Legal fields are increasingly internationalized, even if this process does not affect all fields to the same extent and varies by different areas of legal and social regulation. The "denationalization" of rulemaking means that transnational public and semi-public networks substitute, to an increasing extent, for national fora (Nelken 2008: 307).

As a consequence the state and public bodies have started to "mimic" the practices of private organizational models and to apply market-based management theories to achieve the same degree of efficiency of the private sector. Under the heterogeneous and complex realities of globally fast advancements, states have come to realize that the more flexible and adaptable structure of the private sector should be configured into their legal system. In particular, new modes of governance have already started relying on the use of private sector techniques such as information pooling, learning by self-monitoring and peer review, knowledge networks and benchmarks for best practices. Lobel (2004: 366) notes that 'in many contexts, the interconnections between the object of regulation (the economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere.' This overarching change has established a link between contemporary problems in the organization of the economy to innovative legal theory on regulation and governance to react to increasing heterogeneity. For Cotterell (2007: 147) 'law is faced with representing or managing difference in legal aspirations no less than with promoting similarity in legal experience. Questions about national sentiment and diversity of cultural allegiances are also becoming legally significant, (as matters bearing on law's practical claims to authority) in a far more obvious way than in past decades. In a culturally complex world, allegiances (to law as to most other embodiments of authority), become complex and multiple'.

Hence, rule-formulation and settlement increasingly takes place within new forms of transnational governance. It follows that the governance paradigm is a natural successor to the classic regulatory model. Lobel (2004: 365) explains that the reason for this is that the governance model 'addresses the changes in both the goals and capabilities of legal regulation, and avoids the central deficiencies of substantive law. [It] fundamentally transforms legal control into a dynamic, reflexive, and flexible regime.' This in turn has led to a scenario whereby not only legal techniques have become outmoded and the need for change become conspicuously true but also and significantly the aspirations of law and policy have themselves undergone transformation (Lobel 2004: 364).

Moreover, the EU forms an integral part of a post-modern trend in international capitalism which has reduced the traditional framework of government, increasing processes of privatization of the law and promoting a stronger legal culture of

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[3] See also Symposium on UCLA Law Review (2002) and Lobel (2004) for comment and analysis of new approaches to governance in the United States (US), which shows that there are evident similarities between the EU and the US.

contract. In this context the EU has acquired a unique role acting, on the one hand, as a liberalizing force for international capitalism, while on the other it acts as a regulator of capitalist economic forces. It has therefore followed the tendency for transnational systems of governance to experiment with new, less prescriptive and less hierarchical ways of regulating. In this context New Governance therefore should be seen as a product of the contingencies of history and transnationalism with multiple overlapping and conflicting juridiscapes (Appadurai 1996). The blurring of the public-private divide within New Governance has significant implications in relation to the question of the EU's polity identity question as it raises questions on whether government is public, private or a combination of the two. In this broad and fluid "fusion zone" the public sector becomes more open to the dynamics, techniques, and language of the market, whereas private actors have to deal with conditions set by public authority or integrate broader citizen concerns, on their own initiative and to improve their market position often under the banner of corporate social responsibility (Smismans 2007: 619-620).

These systemic changes have significant implications for regulation in the EU and the way we study it. They bring to the fore how positivistic images of law based on the unity of the nation-state say little about the multi-faceted processes by which EU law is formed or the actors involved in decision and policy-making. It follows that regulation in the EU can no longer be reduced to mere dichotomies between a supranational and a domestic level of rule-making but rather it should be constructed and analyzed as being differentiated and multi-level. As Armstrong (1998: 169-170) aptly puts it 'this more complex picture of governance raises practical and normative problems for law in constitutional and administrative law terms. In short as governance evolves and as actors within different governance regimes or networks seek to recast their conflicts in legal terms, how ought law, as an institution, to approach such issues?'.

Within the EU context, some of the specific reasons for the way in which New Governance has emerged and spread can be related to features of the EU's economic constitutional framework and the rigidities of traditional constitutionalism (de Búrca 2003). With the series of enlargements the EU can no longer 'sustain the degree of homogeneity, commonality and unity of purpose and method which seemed to characterise the earlier Community' (de Búrca and Scott 2000: 2). Further, the initial model and ideal of European integration aimed at developing a uniform and harmonized legal system has gradually started to exhibit vulnerability as it has exacerbated and polarized differences between Member States, resulting in various degrees of disintegration (Shaw 1996). The constitutionalization of differentiated integration [4] with the Treaty of Maastricht and the manifold path to integration that it has fostered rather than leading to a 'Europe of Bits and Pieces' (Curtin, 1993) has strengthened rather than weakened the ability of the EU to constantly evolve in response to changing pressures and new priorities.

More specifically, New Governance is part of the ongoing search for new forms and methodologies of integrative policy-making and rule-setting (Dorf and Sabel 1998; Lobel 2004; Sabel and Zeitlin 2008) and, in broader terms, it represents one of the many answers to external and internal challenges which the EU is confronted with and the outcome of a complex mix of strategic and sectoral politics. Borrowing a phrase by Walker (2000: 12) in relation to flexibility, New Governance may be

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[4] Differentiated integration is a term which encompasses 'variations in the application of European policies or variations in the level and intensity of participation in European policy regimes' (Wallace 1998: 137).

described as being 'an ubiquitous device which can serve quite different- even diametrically opposed- end games'. In some ways, New Governance may be seen as the offspring of all the contradictory urges and pains of the Europeanization process and of the EU's constitutional self-understanding. In this sense, de Búrca (2003: 814) talks about the paradoxical nature of the EU's constitutional system: a fundamental tension between EU constitutionalism based on limited EU powers, clarity in the division of competences between States and the EU, on the one hand and the reality of a highly reflexive and pragmatic form of governance entailing the expansion of EU activity into virtually all policy fields (which critics define as "creeping competences" or "Europeanization by stealth"), a profound degree of competence and power sharing between levels and sites of decision-making on the other.

In particular, the birth of New Governance processes and practices may be explained by several reasons which may be summarized as follows: the reluctance of Member States to grant the Union further powers or similarly to concede powers in very narrow terms. Linked to this and at the same time, various economic pressures brought about by globalization, together with the constraints of the EMU and the Internal Market projects have led Member States to rely more heavily on the use of coordination in sensitive policy areas where they wanted to maintain their decision-making powers. Thus, New Governance appeared to provide pragmatic solutions to common and complex socio-economic problems by de-politicizing them and by sidestepping obstacles at national level represented by domestic constitutional structures and methods.

It is also important to emphasize the different functions that European law has had within the fifty years of existence of the European Community. In the 1950s since European law was conceived chiefly as a means of attaining largely economic objectives, the law was conceived as 'law that *emerged from* the Community's legislative, administrative and judicial processes rather than law that *accounted for* and *explained* those processes' (Bermann 2001). European law has since then gradually evolved into being more than merely instrumental to the pursuit of the Internal Market and to Europeanization and increasingly seen as exemplifying the various processes and phases of European integration and governance. Post Maastricht, the legal debates have focused mainly on constitutionalism issues, democratic deficit, European citizenship, transparency, subsidiarity and human rights. What is striking about recent enlargements (and chiefly the 2004 enlargement) is that the very same factors, political, economic and social, which make it in many ways unprecedented, have not only re-focused attention on debates over the EU's constitutional project but also emphasized law as an institution with an important capacity-building function re-assigning a renewed instrumental role to European law in order to enable it to perform problem-solving tasks and to shape the EU's rule-making processes rather than being merely a positivistic manifestation of formal legitimacy. Recourse to a single process of integration, based on a single structure, has been made untenable by several waves of enlargement and typology of new competencies which have required an increase in the diversity and flexibility of both policy and legal responses.

The reasons for its emergence offer sustenance to the view that the term "New Governance" is a misnomer [5] and rather than constituting an alternative process to the Common Market "core" it operates within the "constitutional embrace" of the

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[5] Scott and Trubek (2002) look at different modes of regulation pre-dating New Governance such as Comitology and the institutionalization of the European Social Dialogue.

Treaties.[6] The provisions on enhanced cooperation inserted by the Treaty of Maastricht, the ToA and the Treaty of Nice [7] and much earlier in origin scholarly notions such as that of "Europe of concentric circles", "variable geometry Europe", "multi-speed Europe" or "Europe à la carte" [8] all refer to the idea of a non-uniform form of European integration and implicitly recognize the limitations of classic European government. Recourse to minimum standards and harmonization, framework legislation and mutual recognition has proved to be an effective method of accommodating diversity among Member States and has had a key role in the completion of the Single Market. Dougan (2006: 873-874) posits that the growth of alternatives to total harmonization while being a clear indication of a growing resistance to centralization are 'all phenomena which have grown from within the "Community method", and represent equally valid manifestations of it, rather than evidencing its outright rejection or innate weakness'. In particular, the revolutionary and *avanguard* principle of mutual recognition - an ingenious creation of the ECJ's judicial activism and devise to promote European legal (negative) integration- are clear examples of alternative forms of regulation to the classic Community Method. According to Schimdt (2007) mutual recognition embodies many of the claimed benefits of New Governance as it allows for more voluntary acts by the Member States than other forms of hard law, more flexibility, decentralization and increased public-private horizontal forms of cooperation. Hence, as in the case of New Governance, mutual recognition responds to the limits of hierarchical government and enables to accommodate national diversity and respect institutional integrity and political autonomy of its Member States in all matters where uniformity and centralization are not necessary or not possible (Scharpf 2001: 13). 'Mutual recognition often leads to ex-post harmonization and what changes is not so much the degree of sovereignty transferred but more how it is transferred, [..] in a decentralized manner by regulatory competition…[Mutual recognition] could perhaps be better identified as a form of horizontal deliberation' (Poiares Maduro: 2007: 819; see also Armstrong 2002a).

The EU is constantly searching for new ideas on how to "re-dress" its own political identity and image and New Governance may be said to represent one of the answers to the EU's democratic deficit/legitimacy crisis. And yet the practices, processes and tools which are part of New Governance, *the way* they operate and *the extent to which* they may be said to be effective and, if so, *in what way* and *in relation to what* are still far from being settled issues. New Governance, therefore, forces European scholars to rethink the concept(s) and the role(s) of law, the theories and models of EU constitutionalism, their relationship with "new" modes of regulation and, *a fortiori*, to re-examine the way the EU system operates and the way Europeanization is being pursued.

Despite the growing importance of the New Governance phenomenon in the EU, being the focus in the last decade of a considerable volume of investigation and analysis (see for example the NEWGOV and CONNEX projects and the database of the European Centre of Excellence of the University of Wisconsin on the OMC),[9] the legal dimension remains partially under-explored having been examined more thoroughly and in a more structured manner only in the last few years (see for

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[6] Both expressions are borrowed from de Búrca (2000).

[7] See Title VII TEU, Articles 11 and 11a EC.

[8] For some examples of the use of flexibility in the social field see Barnard (2000) and Sciarra (2005).

[9] More information about these projects is available at: <http://www.eu-newgov.org> and <http://www.connex-network.org>; <http://eucenter.wisc.edu/OMC>.

example, Barbera 2006; De Schutter and Deakin 2005; de Búrca and Scott 2006; de Búrca and Scott 2007). The reduced interest in the legal literature can be explained *prima facie* by the fact that most legal scholars *sic et simpliciter* fail to recognize the relevance of New Governance in the Community legal and judicial system.

New Governance as a threat to the founding pillars of the Community Method

A reason why many lawyers object to placing greater reliance on the processes and practices of New Governance is a more or less explicit concern that "new" or experimentalist approaches to regulation based on horizontal forms of cooperative or collaborative governance may undermine the foundations of the Community Method[10] in that they operate in the shadow of the law and its hierarchy evading the democratic controls of parliamentary and judicial scrutiny. In particular, the perceived perniciousness of New Governance would result in a reduction of the 'capacity of law to steer, to inform the normative direction of policy, and to secure accountability in governance…by virtue of the mismatch between the fundamental premises of law and the premises of New Governance' (de Búrca and Scott, 2006: 5; Walker 2000: 12). In this sense, Sbragia (2002) says that governance in the EU may be described as "government minus". In many ways this comes with no surprise as it is easily noticeable how New Governance practices and processes (combined with interrogatory postnationalism discourses of the EU) erode the comfortable relationship between law, constitutionalism and European integration. This "orthodoxy of hostility" [11] towards New Governance propounded by those who envisage only a form of integration through law based on the "solid ground" of traditional constitutionalism is associated with the fear that experimentalism may circumvent pivotal political commitments and constitutional safeguards given that it eschews traditional legal mechanisms of accountability, alongside transparency, its *alter ego* which could further alienate an already disinterested and distrustful populace. Moreover, there is a concern that there may be a trade off between democratic accountability and policy efficiency (the input-output dilemma) (Papadopoulous 2007: 484). However, as stressed by Weiler (1995: 232), democracy and legitimacy are not "co-terminus". Legitimacy may be preserved by other values other than representative democracy and by substantive policy outcomes rather than process (Scott 1998: 176). On this point, Esty (2006: 1515-1523) explores various types of legitimacy aside democratic legitimacy -results-based, order-derived, systemic, deliberative, and procedural- which may equally guarantee a legitimate government or better-said provide a logic for the acceptance of political authority, including supranational policy-making even though democratic underpinnings may be absent. Moreover, the sources of legitimacy interact in complex ways—reinforcing and substituting for each other and at other times being in tension.

It should also be noted that from a management point of view the EU has grown too fast. As Harlow (2002: 171) posits, the peculiar problems of welding together a transnational bureaucracy have made it hard to develop an ethos of management appropriate to the Community Method and, more broadly, to the multi-tiered policy-

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[10] In a similar vein, see Klabbers (1998) on the undesirability of soft law. He maintains that: 'By creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system. Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing else but a fig leaf for power' (at p. 391).

[11] I have borrowed this term from Shaw (2000: 339).

making system of the EU. [12] By the same token Everson (1998: 196, 201; 214-215) argues that operating under peculiar EU conditions of constitutional and political uncertainty administrative law's traditional role of ensuring the accountability and fidelity of delegated legislation is obsolete: accountable to whom, faithful to what? Under present conditions EU administrative law is forced to reassess its underlying constitutional logic and long-standing normative reference points. In particular, it must explicitly move away form its idealized view of "legitimate" administration that is predicated upon a narrow vision of current world politics and on the existence of a pre-existing and unitary political will (of the state). In turn this requires the development of a new set of administrative rules and structures which are sensitive to the complex realities of the pluralist and composite European system, reflecting a general phenomenon, that is, the crumbling away of the central state at national level and the involvement of a multiplicity of both public and private actors. [13]

A quick glance to the present EU will suffice to see that within the European Community and precisely in the context of the Community Method there are different levels or layers of accountability, be it *ex ante* or *ex post*, and different degrees of judicial scrutiny both at European and national levels. This system of accountability and judicial scrutiny is far from being perfect. The scope of the Commission's relationships with advisory committees and the role which the latter play in national governance are already problematic because informal interplay and influence between Commission staff and national civil servants or experts are much harder to regulate or control. Similarly, the way the Committee of Permanent Representatives (COREPER) operates has also been the subject of much debate in terms of transparency particularly given that most decisions are actually taken by the COREPER before they even reach ministerial level. In addition, the Council is not subject to any real form of political *ex ante* accountability at European level but only to *ex post* judicial accountability, for example through actions for annulment brought before the ECJ under Article 230 EC. Although there is a degree of Council responsibility to the European Parliament arising out of the co-decision procedure (Article 251 EC), no corresponding accountability exists with regard to pillars two and three. In addition, even though Council members are politically accountable to their national parliaments the Council is not accountable as a single body in the same way that the Commission is to the European Parliament whose supervisory functions have increased significantly throughout the years (Articles 192-193 EC, 197 EC, 200-201EC, 214 EC). Moreover, the comitology process under Article 202 EC, through which highly technical and complex implementing measures concerning the Internal Market are agreed in specialist committees composed of technocrat representatives from Member States and chaired by a Commission official, has been the subject of much controversy for lacking transparency and accountability (Brandsma *et al* 2008). As co-legislator it has been rather difficult for the European Parliament to accept implementing measures to be decided in a Council-Commission setting only. Hence, further to the introduction of the "regulatory procedure with scrutiny" [14] the European Parliament may oppose to the adoption of a Commission decision prepared in Committee where it is felt that the matter should be dealt with through co-decision (Schusterschitz and Kotz 2007). It follows that if it is difficult to accomplish an

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[12] More generally Grant and Keohane (2005: 30) posit that in the international context "even the minimal types of constraints [on power] found in domestic governments are absent".

[13] See also Esty (2006: 1537) who identifies parallels between supranational and domestic administrative law structures.

[14] Council Decision 2006/512/EC, OJ 2006, L 200/11.

efficient system of accountability within the more traditional mode of regulation it becomes even more challenging to develop a model of accountability, be it legal or political, that is appropriate to the less formal and less structured processes of New Governance.

On accountability, Mulgan (2000: 555) notes, 'the word crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic "governance"' (see also Bovens 2007). It is invariably equated with a strong system of judicial review, the mechanics of law enforcement or the principles of procedural due process (legal accountability) and set of procedures of governments' public control and censure through elected institutions (political accountability): all elements which seem to be absent in New Governance. The Commission's response to public concern over the extensive and growing use of soft law instruments has been to promote democratic self-management in the rule-making and standard-setting processes, delegating wherever possible to agencies, committees or social partners in that the rules are made either by those directly interested or by representatives of civil society by way of delegation. The delegation of power to various independent bodies and agencies ("agencification") has been justified by the need to ensure the credibility of those entrusted with decision making, and this credibility is deemed to be primarily safeguarded through the independence and expertise according to the "fiduciary" principle (Majone 2002). The main criticism voiced by many lawyers is that it adds confusion as to who should be held accountable as well as raising doubts about its participatory democracy element given the limited and piecemeal involvement of certain actors and stakeholders of civil society. These new actors are, for the most part, excluded from the decision-making sphere and are given a more important role in the implementation side of policy-making. In this sense, these actors may clearly be seen as being regulatory and legitimacy resources of the EU.

While the Commission together with the European Economic and Social Committee has been an advocate and promoter of developing a discourse on participation in European policy-making beyond the traditional route of parliamentary politics, a careful reading of the Commission's White Paper on *European Governance* and its follow-up initiatives shows that there is a focus on participation through functional intermediaries and an absence of the concept of citizenship (Smismans 2007). In particular, in the White Paper participatory governance has mainly been defined in relation to the Community Method thus confirming the view that civil society consultation is used only insofar as it acts as a form of legitimacy token to strengthen the Commission's institutional position (Armstrong 2002) as well as the claim that the Commission is clearly restricting the scope of action and intervention of participatory 'new' governance (Velluti 2003). Moreover, these top-down deliberative modes of governance promoted by the Commission have been criticized for reducing associative pluralism and intra-organisational diversity, either by imposing an official policy paradigm, or by failing to co-opt in governance actors who do not comply or fit with it (Wälti and Kübler 2003).

An additional criticism to participation has been its association with a narrow conceptualization of Union citizenship. Since its introduction by the Maastricht Treaty, the participatory dimension of EU citizenship has mainly been thought of in terms of electoral participation. Further, while subsequent Treaty reforms have highlighted the nature of participation as a constitutional practice, it seems more apt to talk about "activated citizenship" in the sense that European decision-makers are

trying to activate civil society top-down to sell the product, than with real active citizenship (Smismans 2007: 600-601).

In relation to the EES, Smismans (2005: 116-117) observes that the EES both in its constitutional and institutional set-up and in its actual working stands far from both the standard democratic narrative of representative democracy as well as from the democratic ideal of directly deliberative polyarchy (Cohen and Sabel 1997). In particular, 'it does not provide the coherent institutional framework that can encourage decentralized self-regulation in an accountable and democratic way and that can ensure interaction between subsystems without subordination of one to the other' (Smismans 2005: 135).

While these concerns cannot be brushed aside, the issues identified are not insuperable, particularly if the aim is not at achieving fully-fledged democratic legitimacy but, more modestly, at achieving a better functioning of supranational global governance bodies with improved legitimacy (Esty 2006: 1537). Indeed, notwithstanding these limitations to experimentalist modes of regulation, it is posited here that the extent to which the departure from the procedures of legal and political accountability may represent a serious weakness of New Governance will be determined by the extent to which classical modes of accountability are considered as being necessary elements of "new" modes of governance and, more broadly, of a given transnational polity or system. The answer to this is necessarily linked to the vision one has about what constitutes adequate democratic governance in the context of European integration and how we conceive of the EU which remains an unsettled and vexed issue. In discussing the international rule of law Peerenboom (2009: 4-5) neatly summarizes the nature of the problem and the pitfalls one should avoid. He observes that 'most attempts to conceptualize international rule of law are based on an analogy to domestic rule of law. Given the many differences between sovereign nation states and the international legal order, the results have been fairly disappointing.' 'Rather than trying to fit square pegs into round holes, it may be better to try a radically different approach that does not begin with domestic rule of law as the model. […] It may provide a more realistic framework for pursuing the possibilities and limits of international rule of law.'

The statal approach would tempt us to prioritize the traditional, statal forms of accountability through traditional representative parliamentary institutions and *ex post* control by the courts (Harlow 2002: 3). Conversely, the post-national approach would lead us to consider the EU as being chiefly a system of transnational governance and thus one in which there are "multi-polar" systems of accountability coexisting within the EU (Hood 1986; Scott, 2000: 50). This is not to say that actors involved in governance networks are not accountable at all. They are subject to peer or professional accountability, to reputational and market accountability, to fiscal/financial, administrative or legal accountability. There is no guarantee, however, that such diffuse or composite control mechanisms can be effective, as they operate in a fragmentary and uncoordinated way without forming a coherent system. Also, the problem of a lack of political and democratic accountability remains: only some network actors are subject to it, and control over them can be merely indirect or partial.

In this model of accountability forms of institutional balance are less closely rooted into the institutional arrangements of a nation state which the Community Method partially conforms to. According to Scott's "interdependence model" the actors are 'dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to

bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition for action'. However, the problem with this model, as mentioned earlier, is that it relies too heavily on behavioural pressures (for example, through moral commitments and social or peer pressure) as a substitute for classical accountability (Harlow and Rawlings 2007: 545). This is because mutual accountability networks tend to be more concerned with policy input and long-term relationships than retrospective evaluation, rendering accountability difficult.

If we combine mutual accountability with classical democratic and political accountability it may be possible to develop a model of accountability which may improve the democratic accountability of the EU's multilevel system. [15] The model suggested is largely drawn from the work by Benz and Papadopoulous (2006) and Benz (2007). The model is based on a decisional pattern characterized by a functional separation of power between policy formulation in networks, and by constituent and veto power dedicated to institutions that are authorized and accountable to citizens. Formally authorized institutions could first set the "meta-governance" (the governance of governance networks) procedural rules and administrative tools that provide checks and balances ensuring *inter alia* for fair participation and for accountability in network forms of governance such as for example conflict of interest rules, monitoring and audits and lobbying disclosure to avoid clusters of authority (see further Esty 2006). Although the formalization of networks (provisions about selection of participants, modes of operation, etc.) may be questionable to some, assigning explicitly the design function to the democratically authorized institutions may reinforce at the same time neo-Weberian expertise-based legitimacy, Habermasian deliberation and Fullerian principles of legality.

Hence, formally authorized institutions could also have the final say on policy outcomes and outputs, by being an effective locus of critical scrutiny over proposals formulated by governance networks, which have for their part the advantage of pooling expertise and of facilitating acceptance by stakeholders. What is being put forward is nothing new and we can already find this pattern at both national and EU level. Benz and Papadopoulos (2006) suggest increasing the availability of resources in terms of legal instruments as well as time, information intelligence and organization. Hence, at national and regional levels, the constituent and veto functions could be performed by national parliaments or elected governments. Actors participating in New Governance processes could then have to convince veto players about their policy proposals, while veto players would be forced to supervise participation and policy making in governance effectively.

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[15] See also Kingsbury et al (2005) and Krisch and Kingsbury (2006) who develop the notions of "global administrative space" and "global administrative law". The first term refers to a multiplicity of actors including international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects. In this transnationalized context "global administrative law" refers to the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make. This is described as "global" rather than "international" to emphasize that this is not part of the accepted existing law (*lex lata*), and to include informal institutional arrangements and other normative practices and sources that are not encompassed within standard conceptions of "international law". Both notions mark a departure from orthodox understandings of international law, in which the "international" is largely conceived as being inter-governmental, and there is a strict separation of the domestic and the international.

Within this metagovernance frame we could include what Everson (1998: 214) defines as a 'rule of reasons provision' which could serve as a basis for judicial review. In particular, European administrative law *lato sensu* could be built upon Article 190 EC which provides that decision-making be well reasoned. This provision could require that all committees, agencies, private standardization bodies and fixed actors within more informal regulatory networks, maintain and make public detailed records of the processes of decision-making and give access to information and documents thus ensuring transparency. In turn judicial review proceedings could be triggered by the standing of impartial bodies such as parliamentary committees rather than merely by individual locus standi (which would be less likely to succeed given the multi-level and heterarchical setting of the EU system). [16]

This model could ensure a loose coupling of New Governance with democratically legitimate representative structures creating interfaces that can be beneficial for mutual learning. Hence, while departing from the classical models of accountability, it would nevertheless enable the more nebulous New Governance practices and processes to operate in a way which may be held more democratically accountable and responsive whilst ensuring governability, policy efficiency and remaining more representative of public needs and values (Benz and Papadopoulous 2006; Benz 2007; see also Everson 1998). Moreover, this model of accountability would not lead to a return of the same substantive regulatory rationality of *command* and *control* of the classical forms of regulation. On the contrary, it would preserve and strengthen the structure and mechanisms of both classical and experimental forms of governance.

In this context law would retain an important and renewed role. As Walker observes, 'the very circumstances that challenge and dilute the problem-solving capacity and symbolic authority of law guarantee that it remains a precious currency. The problems of coordination and legitimacy of the new flexible order are on such a scale that law, with its traditionally vast regulatory potential, will inevitably continue to be invoked as a means of containing and resolving crises. Moreover, as a deeply-layered and richly-resourced repository of traditional and cultural meanings, the legal form retains a "legitimacy credit" and a versatility even in the face of new and apparently discontinuous contexts of political organization and regulation' (Walker 2000: 12). In a similar vein, Röben (2003) maintains that the Union's constitutionalism is stable even if its positive constitutional manifestations are not. This is achieved through a specific constitutionalism of the EU as a three-level system of government that works through an inverse hierarchy between centre and periphery.

The state is placed both at the lowest and at the highest level of this system, with the Union/Communities at the middle level of government. In the first process, the Union forms a hierarchical centre with the Member States acting at the "lowest level" to the extent the Community enacts policies in areas such as the Internal Market and the Member States carry them out. But the periphery also inverts this hierarchy with the Member States acting at the "highest level" to the extent that they inspire and determine the action of the centre. At this level of the hierarchy, the Member States act through the heads of States and governments assembled in the European Council, the national constitutional courts and national parliaments in their treaty-making capacity, while at the "lowest" level, they act through their executive organs and their courts. According to Röben this three-level system of government ensures that EU constitutionalism may be more capable of resolving the paradox of

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[16] See also Ladeur (1997).

the deliberate choice for a union of constitutional nations states rather than a federal state.

Röben's model is exemplified by the operation of the OMC, chiefly in the EES. The legitimacy to act of the Member States is bestowed upon them by the European Institutions, chiefly the European Council, the Council and the Commission via the adoption of Employment Guidelines and Member States have to give account for their actions (or inaction) to them upon receipt of recommendations. Governments may also have to give account for measures adopted pursuant to the EES to their national parliaments.

There are now sufficient empirical studies showing that OMC processes, and namely the EES, return the responsibility of any adopted measure to the Member States. The process of (legal) harmonization or convergence takes place at national level rather than at supranational or European level even though the Commission clearly acts as a propeller. This is a rather different scenario from the one depicted by the Commission which places much emphasis on the alleged association of accountability with citizenship and participatory democracy whereby accountability is part of a continual process of 'giving an account' to an informed and active civic society. Democratic accountability of this type and more broadly participatory democracy within the EES has been said to be designed to control policy outcomes being prospective in character rather than solely retrospective. However, as I show elsewhere (Velluti 2009), the EES has been rather disappointing in relation to its much acclaimed bottom-to-top participatory democracy and democratic accountability. If we conceive of the EES as being largely intergovernmental as opposed to supranational, we may argue *a fortiori* that Member States may be held accountable (that is, within the framework of classical legal and political accountability) for measures taken pursuant to the Employment Guidelines to their parliaments, irrespective of whether EC law is "soft" in nature. In other words, national measures adopted in the context of the EES would take a life of their own and become justiciable through domestic judicial procedures.

Problems and paradoxes of European legal integration

European legal integration as a set of dynamic and contradictory processes

The challenges described above are accentuated by the existence of a series of inherent, intertwined and cumulative paradoxes and problems besetting the EU and its present and future existence. Each of these encapsulates a weakness or limitation of the European integration process, and can be found in part of the copious literature on New Governance. Depending on the 'lens' we use to analyze and interpret them and on the 'solution' employed to resolving these tensions and problems we may have different understandings of the strengths, limitations and role of experimentalist forms of governance in the EU.

The underlying claim is that 'the complexity of European legal integration processes can be understood neither by static concepts and descriptions nor by simply following the prescriptions offered by the legal categorizations of Europe issued from the ever-changing political agenda of European integration' (Madsen et al 2008: 1). This is even more compelling when we think about the dramatic expansion of competences of the EU institutions through the dynamic and expansive approach of the ECJ and of the Commission towards Articles 28 and 30 EC.

I therefore suggest rethinking European legal integration as a set of dynamic and even somewhat contradictory processes or put simply as being paradox-laden.

Paradoxes may be defined as a set of tensions or conflicting forces which are important drivers in the making of the EU (Madsen et al 2008: 1). In this section I focus mainly on two set of tensions and problems besetting the EU which I consider as providing a good ground for understanding and analyzing some of the major processes making up European legal integration.

European legal integration as disintegration of national law

The objective here is to go beyond a narrow focus on harmonization and diversity in order to better understand and assess the implementation of and compliance with EU law. The first step in studying the processes by which law produces integration is to break the question down into a number of distinct enquiries (Nelken 2008). For example, what are we studying when we explore legal culture as an object, vector or outcome of integration? Legal culture, in its most general meaning can be defined as 'one way of describing relatively stable patterns of legally oriented social behaviour and attitudes' (Nelken 2004). In the specific legal culture embraces the body of laws, jurisprudence, principles and values, procedures and practices of a given polity. Culture is marked by hybridity and creolization rather than uniformity or consistency. Local systems are analyzed in the context of national and transnational processes and are understood as the result of particular historical trajectories. It follows that legal culture is a concept *in fieri* (Nelken 2008: 3003).

Once we have taken into consideration legal culture it is necessary to look at integration and thus another set of questions must be addressed. What is being integrated, by whom, in what way, for which reasons and to achieve which results? It is also necessary to distinguish between national and transnational jurisdictions and common and civil law traditions. Further, what type of changes does integration (both as a means and as an end in itself) entail? And who or what does it affect? To what extent do institutions, constitutions, codes, principles and values, procedures, norms and practices change? How do we evaluate the degree of change? It is also interesting to note that differences between legal cultures are either considered as being irreducible or on the contrary that they are not particularly deep, but contingent on practice or a given situation and that they may consequently change. In this latter context, some are of the view that legal cultures are discursively constructed or imagined and used only as a convenient excuse for avoiding changes in the way law is practiced within domestic legal systems (Nelken 2008: 300).

In the current framework of postnational politics and relations, boundaries of law do not coincide with national jurisdictions and therefore laws will be contingent and vary on the basis of variations in the wider culture. Equally, the degree of legal integration will depend on what is being integrated and the reasons for such harmonization. In this context, much of the literature has centred mainly on the implementation of European Directives or Decisions. The focus of analysis has been on compliance in terms of new legislative or administrative measures or lack of them at domestic level and chiefly from the perspective of the European Commission. Within this framework Member States have been categorized and subdivided into different groups depending on the degree of compliance with EU law.

However, as argued by Nelken (2008: 302), integration is not always the result of deliberate design on the part of the European Commission, or a Member State or any other agent. Moreover, just as efforts by design can succeed or fail, other processes that proceed independently, or even in opposition to these efforts, can have varying or unexpected outcomes. The language of "implementation" and

"compliance" is likely to be less conceptually adequate for tracing these processes. Other terms or metaphors therefore such as "interaction", "collision", "dialogue conflicts", "convergence" or "diffusion" may be more apt to describe larger and more various processes taking place between law and other "sites". In referring to the complex relationship between law and other sub-systems such as economics and politics Teubner (1998) talks about "irritation" to describe the difficulty law has in communicating with practices of these other sub-systems of society and he argues that law may "irritate" them into unpredictable changes.

Moreover, in relation to the implementation of and compliance with soft modes of governance there are methodological problems in assessing compliance and in particular to evaluate whether there is a causal link between the adoption of domestic measures and European soft law.

In the light of this complex picture it seems unrealistic first to claim that legal systems merely represent a coherent set of formal legal norms and second to assume that state, group or individual behaviour could ever completely conform to international commitments, especially as global pressures are ongoing and changeable. Indeed, to cite Henkin's (1968) classic observation: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'. Further, we also need to keep in mind that there can be disagreement about what is meant by and who should define integration and compliance and thus it may be difficult or even inappropriate to theorize a generalized model of either harmonization and compliance. There would always have to be a certain degree of relativity and flexibility in measuring conformity and again take into account what is being integrated and for what purpose. In particular, outside the economic sphere of the European integration project and in situations where Member States see the requirements of integration as challenging features of their sovereignty or identity, they are going to be less prone to accept change. For example, candidate countries have been more willing to accept the terms of 'conditionality' and tolerate diversity. But this then raises the further difficult question of what sort of diversity the EU is pursuing.

Finally, we have to consider "symbolic" change. At times it may receive wide acceptance provided it remains what it is, that is, symbolic, and does not encroach upon the constitutional values and principles and, more broadly, beliefs and lives of citizens. At other times it is precisely the symbolic nature of the changes being proposed which is being rejected – which may explain why the proposed defunct European Constitutional Treaty or European "Constitution" failed and why a European "Treaty", [17] that is, the Lisbon Treaty may be more acceptable.

The touch of 'stateness'

In the literature on European integration there are a plethora of definitions of the EU such as 'supranational federation' (von Bogdandy 1999), 'layered international organisation' (Curtin and Dekker 1999), 'European Commonwealth' (MacCormick 1999), system of 'multilevel constitutionalism' (Pernice 1999) and 'multilevel governance' (Hooghe and Marks 2001). All of these terms to a different degree effectively capture the *sui generis* nature of the EU as an ever-changing, dynamic, multi-tiered and hybrid post-national polity and its paradoxical relationship with the state. The EU is simultaneously both 'near-state' and antithetical to 'stateness' (Shaw

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[17] For a critique on the symbolism of the European Constitutional Treaty see Ladeur (2008).

and Wiener, 2000); the Union is clearly less than a state but also clearly more than a classical international organization (Weiler 1995). As Shaw and Wiener (2000) illustrate EU law reflects this "betweenness": while "the letter of the law" has never made explicit reference to the concept of stateness, the "spirit of the law" which has guided the generation of the leading constitutional principles of direct effect and supremacy of EU law is shaped by it. As Nicolaïdis (2007: 683) eloquently puts it: the 'EU is built on the quicksand of archetypes, the construct of lawyers and political scientists fighting the twin perils of a post-modern Napoleonic vision of a harmonized continent and a Westphalian nostalgia for absolute sovereign autonomy'. It follows that EU law cannot be fully analyzed using the tools of either international law or national law, but only with a combination of the two. On this point Ladeur (2008: 159) notes that while the concept of "supranationality" has been conceived as being open-ended and entailing experimentalism it has gradually been revisited in a more "state-centred perspective" 'on a kind of "super-state" in spite of the fact that this runs counter to the new relational logic of societal self-organization and its open dynamic of self-transformation'. Member States too have been witnessing deep changes in their systems of governance taking into consideration diversity. And yet it seems that the 'EU is associated with more centralization, more hierarchy and more harmonization'. Ladeur uses the example of subsidiarity as illustrating this state of affairs: rather than being a principle for preserving Member States' sovereignty it is used as an instrument for ensuring efficiency of problem-solving strategies. Hence for this scholar 'new "constitutionalism" returns to the traditional state logic of the nineteenth century'. [18]

The afore-mentioned "betweenness" translates into further complex conundrums. For instance, with regard to the long-standing debate about the democratic deficit of the EU, the "No Demos" thesis accentuates and aggravates the problem since it means that even the modest gains in the power of the European Parliament over the decisional process cannot contribute to resolving the democratic dilemma since absent a "European Demos" the European Parliament cannot enjoy full independent authority or legitimacy as a rule making body in the EU system. In this strict sense, the 'fundamental paradox of constitutionalism is that a constituting "demos" is needed in order to produce a constitution that will in turn consolidate (if not create) the constituted "demos"' (Philippopoulos-Mihalopoulos 2008: 32 and 40; see also Weiler 2002). However, as Weiler (1995) points out in the EU "demos" should not be equated exclusively to "volk" nor should the EU be considered to be in some statal form as the terms "Staat" and "Staatentruct" express or that it is a state in the making. Weiler (1995) invites us to rethink the analytical tools for studying the EU in order to depart from the organic cultural homogeneous terms of the unity of "Volk-Nation-State-Citizenship" and consider other understandings of "demos" which may lead to different conceptualizations and potentialities for the EU envisioning a "European civic, value-driven demos" co-existing side by side with a national organic-cultural one. 'It would be more than ironic if a polity set up as a means to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state. It would be equally ironic if the ethos which rejected the boundary abuse of the nation-state, gave birth to a polity with the same potential for abuse. The problem with this "Unity vision" is that its very realization entails its negation' (Weiler 1995). Note, too, that decoupling volk from demos and demos from state, in whole or in part,

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[18] See also the critique of the White Paper on European Governance by Joerges, Mény and Weiler (2001).

does not entail a rejection of the values of nationality. The decoupling of nationality and citizenship opens the possibility, instead, of thinking of co-existing "multiple demoi" enabling people to aspire and live both as nationals of a Member State and European citizens particularly in cases where there are affinities to shared values which transcend the ethno-national diversity and have a more European dimension (Weiler 1995).

Linked to this there is also another problem concerning the increase in power of the European Parliament. Members of the European Parliament are directly elected in their Member States, and large Member States are represented by more members than small Member States. Therefore, from the point of view of the EU as a whole, more power to the European Parliament does seem to be a step in a more democratic direction. Viewed from a more national angle, however, at least when it comes to the smaller Member States, increased power to the European Parliament might not be seen as a democratic development. The alleged democratic deficit of the EU has been addressed in different ways: a. with the setting up and further development of coordination processes such as the EES (thus focusing on more putatively deliberative forms of democracy); b. with the so-called "citizens' initiative" provided for by the defunct Constitutional Treaty (Article I-47(4)) and maintained by the Reform Treaty (Article 11(4) TEU and Article 24 TFEU) (introducing a form of direct democracy at European level), c. and with the setting up of an "Early Warning system" which gives an important role to national parliaments in the rule-making process of the EU (supposedly strengthening representative democracy). [19] The citizens' initiative and the early warning system could breathe new life into the democratic functioning of the EU. However, it is unclear what their 'added value' may be as the Reform Treaty provisions do not offer much clarity in terms of their operation in practice and some commentators have already emphasized the type of problems which we may be faced with (Ippolito 2007; Dougan 2008). In referring to the provisions on the citizens' initiative Dougan (2008: 940) argues that the 'Court could also find itself playing a crucial role in defining the political quality and democratic potential of these new provisions' and that 'judicial engagement with the novelty of direct democracy within the Union might well build new synergies in the Court's conceptions of participation and citizenship – and thereby enrich its own distinctive contribution to the ongoing debate about how to enhance the Union's frail popular legitimacy'.

Bridging the Gaps between New Governance, Law and Constitutionalism

At this juncture we need to return to the initial question posed by and included in the title of this paper: are New Governance and constitutionalism friends or foes? To some this may be a rhetorical question carrying no great weight the answer being unequivocally that they are friends. This is either because as shown in part in this paper experimental modes of regulation are not an entirely new phenomenon and also because as argued here the reason for their existence is the same as that of hard/classical modes of regulation, that is, the furthering of European integration

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[19] Under the Lisbon Treaty, national parliaments have been given an important role in the safeguard of the subsidiarity principle and have been involved in the EU's decision-making process when draft legislative proposals concern areas of shared competence. National parliaments may receive draft legislative proposals directly from EU institutions and, if an infringement of subsidiarity is detected, they may send a "reasoned opinion" to the Commission, the European Parliament, or the Council. This triggers the "early warning mechanism" aimed at the review of such a proposal. If ultimately circumvented, a national parliament or its chamber may initiate proceedings before the ECJ.

independently of whether there is a clearly designed integrationist *telos*. In this context there is growing empirical research which shows that hybridity has already been applied to different policy domains in the EU for quite some time and that in some instances this regulatory mix has also borne fruits (*e.g.* Sabel and Zeitlin 2008; de Búrca and Scott 2007).

At the same time, the paper has shown throughout that New Governance presents significant practical and conceptual challenges for the Community legal order, for our understanding of law and legal processes and ideas such as that of democracy and self-government which are embedded in the concept of constitutionalism. The very existence of these problems explains why New Governance is a phenomenon that can no longer be disregarded by legal scholars who are called to rethink in a meaningful way the roles of law and constitutionalism in the wider EU context. In addition, we have seen that there are a series of paradoxes and tensions with which the EU is constantly confronted. It may also be argued that the challenges posed by New Governance mirror or reflect inherent problems concerning constitutionalism and law both at European and national levels. The se problems to a certain extent may be explained by globalization processes but may also be seen as the result of dynamic and evolving trajectories of history and international relations.

The above should not lead us to the conclusion that New Governance is a foe of EU constitutionalism either. However, this situation does invite us to rethink current understandings of the nature of these problems and challenges and to reconsider how hybridity may be used as a workable regulatory model. Embarking upon this exercise is not an easy task as there is no one-size-fits-all solution to the challenges facing the EU. As Poiares Maduro (2003: 76) states 'the paradoxical character of constitutional concepts determines that there are no ideal solutions and that different polities and/or institutions may come closer to constitutional ideals in different real-life settings'. No standard regulations can effectively govern the multiplicity of sites in which the multi-tiered system of the EU operates. The transnationalization of governance requires legal institutions themselves to be multiple and diverse. One advantage of hybridization is that rather than focusing on legislation, implementation, enforcement, and adjudication as separate stages it conceives them in a more holistic manner, that is, as being part of the same process and it thus seeks to establish dynamic interactions between them.

The firs step is therefore the eschewal of onedirectional positivist and statal approaches to law and constitutionalism based on unity and hierarchy. In particular, we should start from the premise that new modes of governance reflect a deep transformation of the nation-state, a shift towards a postnational era in which the EU has emerged as the nation-states' changing self. Ladeur (1997: 43) argues that conceptions of hierarchical, centralized and unitary states ignore the extent to which processes of differentiation and pluralization in decision-making have transformed the "state from within". There is a need, therefore, to develop a model of regulation which takes into account the peculiarities and realities of the EU system. In this context, metaconstitutionalism enables us to assign law with a renewed role. On this point Armstrong (1998) rightly posits that law has generally been conceived of as being mainly instrumentalist, particularly as a medium by which the ECJ has pursued a pro-integrationist agenda. 'Allied to this instrumentalist images of law is an assumption of law's ability to deliver integration both in terms of the integration of the national and the Community legal orders and in respect of law's ability to deliver social, political and economic integration' (Armstrong 1998: 156). The most enduring

manifestation of this view has been the image of the "constitutionalized Treaty". [20] It is therefore necessary to revisit the concept of law in order to combine the use of law as a "medium" with that of law as an "institution" encompassing the organizational, procedural, substantive and normative elements of law. As already observed above law retains an important problem-solving capacity and symbolic authority and the problems of coordination and legitimacy of the current multifarious and multi-tiered EU system are on such a scale that law, with its traditionally vast regulatory potential, continues to be an invaluable means of containing and resolving crises (Walker 2000: 12). Hence, law's function is not solely prescriptive but also becomes facilitative and reconstitutive (Stewart 1986) providing for a set of rules about the procedure, organization, and constitution of other social fields and subsystems. In this sense law should enable a 'harmonious fit' between institutional structures and social structures rather than influence the social structures themselves (Teubner 1988). Law, therefore, continues to play a significant role through its capacity to coordinate among different social institutions (e.g., political, economic etc.) but it is no longer based on the narrow and traditional conception of law as top-down, prescriptive and universal. Law's coordinating function is based on its retained **"Kompetenz-Kompetenz"** role ("competence competency"), that is, the competence to determine other actors' competencies. The legal system discerns the capacities of different actors, arenas and subsystems, defines and allocates responsibilities among them and their self-regulatory institutional processes. Its jurisdictional role should be seen in this reconstitutive context, one which also gives voice to the different actors who actively participate in the multi-tiered system of the EU. This approach would also bring representation and participation closer to one another giving a renewed and strengthened value to Union citizenship. The hybrid model of governance broadly outlined here follows a very similar theoretical pattern as the one that Poiares Maduro (2003) has termed as "counterpunctual law" which aims at preserving the identity of national legal orders while at the same time promoting their inclusiveness within the EU system.

While this model has clear advantages from the perspective of regulation and democracy the growth in legal pluralism and experimental approaches to EU governance, however, has destabilizing effects and creates a series of problems to law as an institution. National and European courts are forced to adjudicate conflicts between a broader range of actors engaged in rule-making processes. It remains to be seen what the role of the judiciary will be given that New Governance processes often operate beyond formal structures (Scott and Sturm 2007; Cichowski 2007). Moreover, and linked to this, the quests for the recognition of practices and processes taking place outside or beside the classic Community Method re-bring to surface the issue of standing before the ECJ in actions of annulment of Community legislation and in the future the ECJ may be forced to adapt or develop procedural rules on legal standing and constitutional norms in respect of representation to deal with these problems. Hence, once again the ECJ is forced to confront itself with the evolving political realities of EU governance (Armstrong 1998: 171).[21]

Hence, whilst hybridity models enable the EU to coexist within a multi-tiered structure and to live with paradox they also leave us with the difficulty of reconciling

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[20] See the language used by the ECJ in Case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339; Opinion 1/91, *Draft Agreement on a European Economic Area* [1991] ECR I-6084.

[21] This has already happened with the inclusion of the CoR among the applicants who have standing under a Article 230 EC action.

the often opposing needs of economic efficiency with democracy and accountability, expert knowledge with public involvement and representation with participation across different policy domains. However, the challenge of this enterprise could be used productively insofar as we do not search for overarching solutions which often fail to grasp the whole picture of a problem and engage instead with the reality of EU decision-making.

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