

## Exploring Possible Encounters between New Governance, Law and Constitutionalism in the European Union

PDF (Size: 185KB) PP. 8-19 DOI : 10.4236/blr.2013.41002

### Author(s)

Samantha Velluti

### ABSTRACT

The current European Union (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's governance tool-kit and the variety of 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 jurisprudence of the Court of Justice of the European Union (CJEU) because they occupy an unsettled constitutional space. This space is characterized by a range of possible encounters between constitutionalism and governance. In this context, New Governance 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 and the problems concerning their conceptualization and further understanding. Its main argument is that a stronger dialogue between what are known as "soft" and "hard" regulatory mechanisms may lead to a hybridized EU governance regime in which all governance tools are designed to achieve the same set of goals.

### KEYWORDS

EU Constitutionalism; Law; New Governance; Hybridity; Courts and National Parliaments

### Cite this paper

S. Velluti, "Exploring Possible Encounters between New Governance, Law and Constitutionalism in the European Union," *Beijing Law Review*, Vol. 4 No. 1, 2013, pp. 8-19. doi: 10.4236/blr.2013.41002.

### References

- [1] Andronico, A. & Lo Faro, A. (2005). Defining problems: The open method of coordination, fundamental rights and the theory of governance. In O. De Schutter, & S. Deakin (Eds.), *Social rights and market forces. Is the open coordination of employment and social policies the future of social Europe?* (pp. 41-96). Bruxelles: Bruylant.
- [2] Appadurai, A. (1996). *Modernity at large: Cultural dimensions of globalization*. Minneapolis: University of Minnesota Press.
- [3] Avbelj, M. (2008). Questioning EU constitutionalisms. *German Law Journal*, 9, 1-26.
- [4] Becker, S. (2009). The role of national parliaments in the open method of coordination. Working Paper FG 1, 2009/10, August 2009 SWP Berlin. URL (last checked 20 December 2012). [http://swp-berlin.org/fileadmin/contents/products/arbeitspapiere/national\\_parliaments\\_KS.pdf](http://swp-berlin.org/fileadmin/contents/products/arbeitspapiere/national_parliaments_KS.pdf)
- [5] Benz, A. (2007). Accountable multilevel governance by the open method of coordination? *European Law Journal*, 13, 505-522. doi:10.1111/j.1468-0386.2007.00381.x
- [6] Benz, A., & Papadopoulos, Y. (2006). Actors, institutions and democratic governance: Comparing across levels. In A. Benz, & Y. Papadopoulos (Eds.), *Governance and democracy. Comparing national, European and international experiences* (pp. 273-295). London: Routledge.

[BLR Subscription](#)[Free Newsletter Subscription](#)[Most popular papers in BLR](#)[Publication Ethics Statement](#)[About BLR News](#)[Frequently Asked Questions](#)[Recommend to Peers](#)[Recommend to Library](#)[Contact Us](#)

Downloads: 39,146

Visits: 138,877

[Sponsors, Associates, and Links >>](#)

- [7] Bermann, G. (2001). Law in the Enlarged European Union. *EUSA Review*, 14, 1-5.
- [8] Beveridge, F., & Velluti, S. (2008), *Gender and the open method of coordination*. Dartmouth: Ashgate.
- [9] Borrás, S., & Radaelli, C. (2010). Recalibrating the open method of coordination: Towards diverse and more effective usages. *Swedish Institute for European Policy Studies*, 7, 43.
- [10] Borrás, S., & Radaelli, C. (2011). The politics of governance architectures: Creation, change and effects of the EU Lisbon strategy. *Journal of European Public Policy*, 18, 463-484. doi:10.1080/13501763.2011.560069
- [11] Bulmer, S. (2012). Governing the Lisbon strategy: Uncertain governance in turbulent economic times. In D. Papadimitriou, & P. Copeland (Eds.), *Ten years of the EU's Lisbon agenda* (pp. 29-49). Basingstoke: Palgrave MacMillan.
- [12] Castellano, G. Jeunemaître, A., & Lange, B. (2012). Reforming European Union financial regulation: Thinking through governance models. *European Business Law Review*, 3, 409-446.
- [13] Chalmers, D. (2009). Gauging the cumbersomeness of EU law. *Current legal problems*, 62, 405-439. doi:10.1093/clp/62.1.405
- [14] Cohen, J., & Sabel, C. (1997). Directly-deliberative polyarchy. *European Law Journal*, 3, 313-342. doi:10.1111/1468-0386.00034
- [15] Cotterell, R. (2007). Is it bad to be different? Comparative law and the appreciation of diversity. In E. Orucu, & D. Nelsen (Eds.), *Comparative law: A handbook* (pp. 133-154). Oxford: Hart Publishing.
- [16] Craig, P. (2008). The treaty of Lisbon, process, architecture and substance. *European Law Review*, 33, 137-166.
- [17] Dawson, M. (2009). Soft law and the rule of law in the European Union: Revision or redundancy? *EU Working Papers*, RSCAS 2009/24.
- [18] Dawson, M. (2010). Transforming into what? New governance in the EU and the "managerial sensibility" in modern law. *Wisconsin Law Review Symposium Issue on New Governance and the Transformation of Law*, 2, 390-440. doi:10.1017/CBO9781139017442
- [19] Dawson, M. (2011). *New governance and the transformation of European law. Coordinating EU social law and policy*. Cambridge: Cambridge University Press.
- [20] Dawson, M. (2011). Three waves of new governance in the European Union. *European Law Review*, 36, 208-226.
- [21] De Búrca, G. (2000). Differentiation within the "core"? The case of the internal market. In G. De Búrca, & J. Scott (Eds.), *Constitutional change in the EU: From uniformity to flexibility?* (pp. 133-171). Oxford: Hart Publishing.
- [22] De Búrca, G. (2003). The constitutional challenge of new governance in the European Union. *European Law Review*, 28, 814-839.
- [23] De Búrca, G. (2006). EU race discrimination law: A hybrid model? In G. de Búrca, & J. Scott (Eds.), *Law and new governance in the EU and US* (pp. 97-120). Oxford: Hart Publishing.
- [24] De Búrca, G. (2010). New governance and experimentalism: An introduction. *Wisconsin Law Review Symposium Issue on New Governance and the Transformation of Law*, 2, 227-238.
- [25] De Búrca, G., & Scott, J. (2000). *Constitutional change in the EU: From uniformity to flexibility?* Oxford: Hart.
- [26] De Búrca, G., & Scott, J. (2007). Introduction. Narrowing the gap? Law and new approaches to governance in the European Union. *Columbia Journal of European Law*, 13, 513-518.
- [27] De Ruijter, A., & Hervey, T. (2012). Healthcare and the Lisbon strategy. In D. Papadimitriou, & P. Copeland (Eds.), *The EU's Lisbon strategy. Evaluating Success, understanding failure* (pp. 130-148). Basingstoke: Palgrave Macmillan.
- [28] De Witte, B. (2012). The European union as an international legal experiment. In G. de Búrca, & J. H. H. Weiler (Eds.), *The Worlds of European Constitutionalism* (pp. 19-56). Cambridge: CUP.
- [29] Dougan, M. (2006). "And some fell on stony ground ????" —A critical reading of G. Majone's

- [30] Dougan, M. (2011). What are we to make of the citizens. Initiative? *Common Market Law Review*, 48, 1807-1848.
- [31] Duina, F., & Raunio, T. (2007). The open method of coordination and national parliaments: Further marginalization or new opportunities? *Journal of European Public Policy*, 14, 489-506. doi: 10.1080/13501760701314318
- [32] Erlanger, H. et al. (2005). Foreword. Is it time for a new legal realism? *Wisconsin Law Review*, 2005, 335-363.
- [33] Esty, C. D. (2006). Good governance at the supranational scale: Globalizing administrative law. *Yale Law Journal*, 115, 1490-1562.
- [34] Everson, M. (1998). Administering Europe. *Journal of Common Market Studies*, 36, 195-215.
- [35] Gardner, J. (2001). Legal Positivism: Myths. *American Journal of Jurisprudence*, 199-227.
- [36] Harlow, C. (2002). *Accountability in the European Union* (p. 171). Oxford: Oxford University Press.
- [37] Harlow, C., & Rawlings, R. (2007). Promoting accountability in multilevel governance: A network approach. *European Law Journal*, 13, 542-562.
- [38] Hatzopoulos, V. (2012). *Regulating services in the European Union* (p. 346). Oxford: Oxford University Press.
- [39] Hervey, T. (2010). Adjudicating in the shadow of the informal settlement? The court of justice of the European Union, "new governance" and social welfare. *Current Legal Problems*, 63, 92-152. doi: 10.1093/clp/63.1.92
- [40] Holder, J., & Scott, J. (2006). Law and new environmental governance in the European Union. In G. De Búrca, & J. Scott (Eds.), *Law and new governance in the EU and the US* (pp. 211-242). Oxford: Hart.
- [41] Hood, C. (1986). The hidden public sector: The "quangocratization" of the world. In F.-X., Kaufman, G., Majone, & V. Ostrom (Eds.), *Guidance, control and evaluation in the public sector* (pp. 183-207). New York: De Gruyter.
- [42] Joerges, C., & R?dl, F. (2009). Informal politics, formalised law and the "social deficit" of European integration: Reflections after the judgments of the ECJ in Viking and Laval. *European Law Journal*, 15, 1-19. doi: 10.1111/j.1468-0386.2008.00448.x
- [43] Kilpatrick, C. (2006). New EU employment governance and constitutionalism. In G. de Búrca, & J. Scott (Eds.), *Law and New Governance in the EU and the US*, pp. 121-152.
- [44] Kingsbury, B., Krisch, N., Stewart, B. R., & Wiener, B. J. (2005). Foreword: Global governance as administration—National and transnational approaches to global administrative law. *Law and Contemporary Problems*, 68, 1-13.
- [45] Klabbbers, J. (1998). The undesirability of soft law. *Nordic Journal of International Law*, 67, 381-391. doi: 10.1163/15718109820295741
- [46] Koutakalis, C., Buzogany A., & B?rzel, T. (2010). When soft regulation is not enough: The integrated pollution prevention and control directive of the European Union. *Regulation & Governance*, 4, 329-344. doi: 10.1111/j.1748-5991.2010.01084.x
- [47] Krisch, N., & Kingsbury, B. (2006). Introduction: Global governance and global administrative law in the international legal order. *European Journal of International Law*, 17, 1-13. doi: 10.1093/ejil/chi170
- [48] Ladeur, K.-H. (1997). The integration of scientific and technological expertise into the process of standard—Setting according to German law. In C. Joerges et al. (Eds.), *Integrating Scientific Expertise into Regulatory Decision-Making* (pp. 141-167). Baden-Baden: Nomos.
- [49] Lindahl, H. (2010). A-Legality: Postnationalism and the question of legal boundaries. *Modern Law Review*, 73, 30-56. doi: 10.1111/j.1468-2230.2009.00783.x
- [50] Lobel, O. (2004). The renew deal: The fall of regulation and the rise of governance in contemporary legal thought. *Minnesota Law Review*, 89, 342-470.

- [51] Maher, I. (2007). Economic governance: Hybridity, accountability and control. In G. de Búrca, & J. Scott (Eds.), *Narrowing the gap? Law and new approaches to governance in the European Union*. *Columbia Journal of European Law*, 13, 679-704.
- [52] Majone, G. (2002). Delegation of regulatory powers in a mixed polity. *European Law Journal*, 8, 319-339. doi: 10.1111/1468-0386.00156
- [53] Mendes, J. (2011). Participation and the role of law after Lisbon: A legal view on article 11 TEU. *Common Market Law Review*, 48, 1849-1877.
- [54] Millers, C. (2006). European governance: Meaning and value of a concept. *Common Market Law Review*, 43, 313-336.
- [55] Mulgan, R. (2000). "Accountability" : An ever-expanding concept? *Public Administration*, 78, 555-574.
- [56] Nelken, D. (2008). Normalizing time: European integration and court delays in Italy. In A. Petersen et al. (Eds.), *Paradoxes of European Legal Integration* (pp. 299-324). Aldershot: Ashgate.
- [57] Papadopoulos, Y. (2007). Problems of democratic accountability in network and multilevel governance. *European Law Journal*, 13, 469-486. doi: 10.1111/j.1468-0386.2007.00379.x
- [58] Pisani-Ferry, J., & Sapir, A. (2006). Last exit to Lisbon. *Bruegel Policy Brief 2006/02*. URL (last checked 20 December 2012). <http://www.bruegel.org/index.php?pid=73>
- [59] Poiares Maduro, M. (2003). Europe and the constitution: What if this is as good as it gets? In J. H. H. Weiler, & M. Wind (Eds.), *European Constitutionalism beyond the State* (pp. 74-102). Cambridge: Cambridge University Press.
- [60] Sabel, C. F., & Zeitlin, J. (2008). Learning from difference: The new architecture of experimentalist governance in the EU. *European Law Journal*, 14, 271-327. doi:10.1111/j.1468-0386.2008.00415.x
- [61] Scott, C. (2000). Accountability in the regulatory state. *Journal of Law and Society*, 27, 38-60. doi: 10.1111/1467-6478.00146
- [62] Scott, J. (1998). Law, Legitimacy and EC governance: Prospects for "partnership" . *Journal of Common Market Studies*, 36, 175-194.
- [63] Scott, J. (1998). Law, legitimacy and EC governance: Prospects for "partnership" . *Journal of Common Market Studies*, 36, 175-194.
- [64] Scott, J., & Sturm S. (2007). Courts as catalysts: Rethinking the judicial role in new governance. *Columbia Journal of European Law*, 13, 565-594.
- [65] Scott, J., & Trubek D. (2002). Mind the gap: Law and new approaches to governance in the European Union. *European Law Journal*, 8, 1-18. doi:10.1111/1468-0386.00139
- [66] Shaw, J. (1996). European Union legal studies in crisis? Towards a new dynamic. *Oxford Journal of Legal Studies*, 16, 231-253. doi:10.1093/ojls/16.2.231
- [67] Shaw, J. (2000). Constitutionalism and flexibility in the EU: Developing a relational approach. In G. de Búrca, & J. Scott (Eds.), *Constitutional change in the EU: From uniformity to flexibility?* (pp. 331-358). Oxford: Hart Publishing.
- [68] Shaw, J., & Wiener, A. (2000). The paradox of the European polity. In M. G. Cowles, & M. Smith (Eds.), *The state of the European Union Vol. 5: Risks, reform, resistance and revival*. Oxford: Oxford University Press.
- [69] Simon, W. (2004). Solving problems vs. claiming rights: The pragmatist challenge to legal liberalism. *William and Mary Law Review*, 46, 127-212.
- [70] Smismans, S. (2007). New governance—The solution for active European citizenship, or the end of citizenship. *Columbia Journal of European Law*, 13, 595-622.
- [71] Stewart, B. R. (1986). Reconstitutive law. *Maryland Law Review*, 46, 86-114.
- [72] Szyszczak, E. (2006). Experimental governance: The open method of coordination. *European Law Journal*, 12, 486-502. doi: 10.1111/j.1468-0386.2006.00329.x
- [73] Szyszczak, E. (2012). Soft law and safe havens. In U. Neergaard, E. Szyszczak, & J. W. van de Gronden (Eds.), *Social services of general interest in the EU* (pp. 317-345). The Hague: TMC Asser

Press.

- [74] Teubner, G. (1988). Introduction to autopoietic law. In G. Teubner (Ed.) *Autopoietic law: A new approach to law and society* (p. 1), Berlin, New York: De Gruyter.
- [75] Tully, J. (2002). The unfreedom of the moderns in comparison to their ideals of constitutionalism and democracy. *Modern Law Review*, 65, 204-228. doi:10.1111/1468-2230.00375
- [76] Trubek, L., & Hervey, T. (2007). freedom to provide health care services within the EU: An