

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

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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

## Introduction

“The future of the law in the twenty-first century lies in the mutant forms and experiments which prove to be fit-test and survive the demands of tomorrow” (Lobel, 2004).

Over the last decade the EU has witnessed an increased reliance on the use of experimental and collaborative forms of governance other than supranational legal regulation in different policy domains, with techniques and enforcement mechanisms ranging from relatively “hard” to “soft” (Szyzszak, 2006). Soft law techniques and mechanisms and policy coordination processes as a means to advance European integration is not a new phenomenon. Soft law encompasses a variety of processes the common feature of which is that although they may have normative content they are not formally binding. Independently of whether soft law provides the “right” answer to many intractable problems of regulation and implementation in the EU, in the current post-national setting the very reasons for which there has been a significant increase in its typology and use in many policy domains not only put to the fore the limitations of a traditional meaning and use of law (thus requiring re-evaluation) but also, and equally, explain the development of new conceptions of legality. While the Treaty of Amsterdam (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, compliance and legitimacy have arisen as a consequence of the greater reliance on experimental and collaborative forms of governance.

Since the launch of the Lisbon Agenda, New Governance practices and processes have reached a period of consolidation. Some have obtained full recognition with the insertion of new

provisions in the Treaty on the Functioning of the European Union (TFEU) further to the entry into force of the Treaty of Lisbon (ToL), namely Articles 2(3), 2(5), 5 and 6 TFEU regarding economic and employment policy coordination and supporting, coordinating and supplementing measures to the actions of the Member States. In addition, the so-called “Horizontal Social Clause”, Article 9 TFEU, provides that “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. It may also be argued that the provision in Article 3 TEU is stronger than its predecessor, Article 2 EC, as the formulation of the objectives to be achieved through EU action in the latter provision seems to indicate that these aims are considered to be automatically attained through the establishment of the Internal Market rather than representing a positive goal or target of the Internal Market (see Article 3(3) TEU). The combined reading of Articles 5 and 9 TFEU gives further recognition to coordination processes and to mainstreaming, *inter alia*, the objectives of high levels of employment, social protection and social inclusion into other EU policies. These provisions, therefore, have the potential of reducing the existing decoupling of the social and economic constitution of the EU.

At the same time, the increased recognition and visibility in both the TEU and TFEU of coordination processes may lead to what Craig terms as “boundary problems” between this category and that of shared competence (compare provisions of Article 4 TFEU and Article 5 TFEU) as the detailed Treaty provisions concerning economic policy accord the EU powers

to take dispositive and peremptory action in certain circumstances (Craig, 2008). Moreover, extant forms of New Governance remain far from both the standard democratic narrative of representative democracy and from the democratic ideal of directly deliberative polyarchy (Cohen & Sabel, 1997) as they do not provide the communicative presuppositions and procedural conditions of democratic opinion and will formation. In particular, New Governance has failed to be a process of self-determination of the actors involved and remains trapped in a conception of procedure according to which the law or the *command-and-control* type of vertical regulation is still deemed the best means for the pursuit of EU objectives. Part of the problem has been a tendency of “solving the question of the effectiveness of governance by reducing it to a question of justification, thereby confusing the degree of ‘practical’ acceptance with that of ‘rational’ acceptance” (Andronico & Lo Faro, 2005). Merely involving the addressees of a given measure—be it legislative or non-legislative—cannot be reduced to an instrumentalist function of input/output legitimacy purposes in the process of policy formation, nor equally can it be used to claim the latter’s effectiveness.

The Lisbon Agenda, which has been defined as constituting one of the two key governance architectures for the EU’s economic reform and competitiveness, (Borrás & Radaelli, 2011; Bulmer, 2012) is a case in point. Answers to the foregoing questions may help address the implementation deficit which has characterized Lisbon and ensure a more effective operation of its successor, the Europe 2020 Agenda, as well as addressing the problems of implementation affecting hard law instruments, namely Directives. As Koutalakis et al. explain “although soft regulation appears to be a panacea for regulatory ineffectiveness, its application is hindered by the very same institutional conditions that generate a growing demand for the departure from generally binding regulation. Non-hierarchical, private self-regulation or public-private co-regulation require a strong shadow of hierarchy to be effective” (Koutalakis, Buzogany, & Börzel, 2010). Over the last decade, various theoretical perspectives on the constitutional nature of European integration departing from the classical constitutional narrative—what Avbelj coined as “the revised EU constitutionalisms” (Avbelj, 2008) recognize these changes and advocate for a rethinking of the way we study and understand governance processes in the EU.

The paper postulates that despite their intrinsic differences, 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 particular, 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 multi-dimensional 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). Moreover, the apparently irreconcilable difference between New Governance and constitutionalism is built on the premise that the former constitutes and embraces novelty whereas the latter the old and static. However, how do we know what is new and what is old? “And how can we legitimately call anything new (or old) while everything is in flux and therefore simultaneously old and new?” (Möllers, 2006).

The paper, therefore, puts forward an approach to the under-

standing 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 this way a space for national diversity and experimentation would be preserved and New Governance would be maintained intact without incorporating it into the *command and control* regulatory model of EU constitutionalism.

The challenge attendant upon such enterprise is acknowledged from the outset. Law and constitutionalism are touched upon by an idea of “stateness” (Shaw & 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 some 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 paper, therefore, intends to be speculative in nature rather than normative. Its contribution to the EU governance debate consists in exploring different ways of constructing the relationship between New Governance, law and constitutionalism using models of hybrid governance<sup>1</sup>.

### **New Governance in the Context of the Increasing Transnationalisation of Global Processes**

The emergence of new or experimentalist approaches to EU governance may be first explained as a manifestation of wider international processes and phenomena. As global trends dismantle barriers, they 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). 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, national fora (Nelken, (2008). What we are witnessing at international and European levels, therefore, is a case of divided sovereignty.

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 heteroge-

<sup>1</sup>On hybridity, see de Búrca & Scott (2006), de Búrca (2007), de Búrca & Scott (2007), Walker & de Búrca (2007), Trubek & Trubek (2007), Trubek & Hervey (2007), Maher (2007).

neous 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) 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) “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.” In the EU context, the rise of experimental modes of governance can be seen as a response to two broadly different kinds of background conditions: strategic uncertainty and in particular the need to address complex policy problems and, secondly, managing interdependence and the externalities deriving from the coexistence of different regulatory regimes (De Búrca, 2010).

A recent comparative study on governance models in competition law and financial regulation in the EU (Castellano, Jeunemaitre, & Lange, 2012) shows that such sectors necessitate a transnational and cross-sector governance approach supported by an adequate structural framework to adopt effective common policies. It also shows that in order to ensure regulatory coherence different governance models which depart from classic modes of regulation, whereby regulatory issues are dealt uniquely at national (and/or sector-based) level, have become a *conditio sine qua non*. Different governance structures (expressed in terms of degrees of “centralization”) may be combined with different regulatory approaches (expressed in terms of degrees of “invasiveness”) to ensure a fruitful relationship between transnational governance structures and regulatory approaches and, in particular, consistency and coherence. A variety of degrees of centralisation may be conceived and a governance structure may take the shape of: a decentralised network of authorities, a meta-organisation, or a single (centralised) independent authority. Similarly, a governance action might be conducted following different regulatory approaches, which may be expressed in terms of degree of invasiveness. Sunshine regulation (that is, regulation by information) for example presents a low degree of invasiveness consisting of less intense control of markets’ participants while self-discipline and command and control provide for more binding commitments for markets presenting, therefore, a higher degree of invasiveness.

As part of the globalisation phenomenon economic and social interdependency have been rapidly increasing requiring states to rethink and change their welfare-state systems. At the same time, there has been a growing demand for respecting and preserving the diversity of national social and welfare provision. Hence, flexible ways of conducting regulation in Europe and, in particular, New Governance, have arisen as a response to the

need to ensure both common action (“unity”) and, at the same time, respect for national traditions (“diversity”) (Dawson, 2011).

Social Services of General Interest (SSGIs) are a good example illustrating this complex phenomenon. SSGIs have been *Europeanized* through two methods (Szyszczak, 2012). Firstly, through a modernization process promoted by the EU Commission using soft law and New Governance techniques and providing legitimacy to such processes by creating a stakeholder constituency. This has allowed the EU to have some form of competence in an area traditionally, and jealously, protected by the Member States. Moreover, it also avoids an open conflict between the Member States, interest groups and, more generally, non-state actors in relation to the role of SSGIs in the EU. Secondly, through the Member States in the Council seeking justifications and exemptions for SSGIs in secondary legislation, defined as “safe havens” (Szyszczak, 2012). 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 as it addresses the changes in both the goals and capabilities of legal regulation. 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).

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 contract. In this context, the EU has become in de Witte’s (2012) words “an international legal experiment”, acquiring a unique role and acting, on the one hand, as a liberalizing force for international capitalism, while on the other acting as a regulator of capitalist economic forces. It has followed, therefore, the tendency for transnational systems of governance to experiment with new, less prescriptive and less hierarchical ways of regulating. In this context, New Governance should be seen as a product of the contingencies of history and transnationalism with multiple overlapping and conflicting juridisces (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 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).

These systemic changes have significant implications for regulation in the EU and the way we study it. They bring to the fore how 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. Acknowledging this is challenging *per se* given how accustomed we have been so far with the idea that, in the Union, law has been both the object and the agent of integration and thus central not only to regulation but also its existence. Dawson rightly points out that “the creation of a self-sustaining and authoritative legal order has been the very standard by which

we have *measured* the EU's development, or seen its 'success'" (Dawson, 2009).

EU law has 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 (Bermann, 2001). 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 move towards experimentalism illustrates how complex the process of European integration is and, in particular, establishing the goals of integration and identifying the most appropriate means to achieve them. 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. This in turn requires a new way of thinking from the perspective of EU constitutional and administrative law because of the broader spectrum of actors involved and mix of measures and action employed.

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 & Scott, 2000). 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). Uniform approaches to EU integration have gradually been substituted or complemented by differentiated integration, broadly defined as encompassing "variations in the application of European policies or variations in the level and intensity of participation in European policy regimes" (Wallace, 1998), which has been increasingly constitutionalized by subsequent Treaty reforms. Arguably differentiated integration has strengthened rather than weakened the ability of the EU to constantly evolve in response to changing pressures and new priorities.

Borrowing a phrase by Walker in relation to flexibility (Walker, 2000), New Governance may be 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 a new form of legal realism (Erlanger et al. 2005) or legal pragmatism (Simon, 2004) and the off-spring of all the contradictory urges and pains of the Europeanization process and of the EU's constitutional self-understanding. In particular, New Governance well-illustrates 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.

Initially, New Governance has been said to be essentially a

mere procedural governance process *within which* political choices are made. However, there is more to New Governance as the set of procedures *themselves* have a bearing on the political choices that can be articulated through them.<sup>2</sup> Hence, in order to address the democratic deficit and accountability gap which new modes of governance seem to suffer from it is necessary to increase "opportunities for political scrutiny and contestation of debate too often treated as mere 'technical' or 'regulatory' discussions" (Dawson, 2010).

The reasons for its emergence offer sustenance to the view that the term "New Governance" is a misnomer<sup>2</sup> and rather than constituting an alternative process to the Common Market "core" it operates within the "constitutional embrace" of the Treaties<sup>3</sup>. Dougan (2006) 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".

New Governance, therefore, forces European scholars to re-think 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.

## New Governance as a Threat to EU Constitutionalism

### Contextualising the Debate

Many lawyers object to placing greater reliance on the processes and practices of New Governance the main reason being a more or less explicit concern that "new" or experimentalist approaches to regulation based on horizontal forms of cooperative or collaborative governance undermine the foundations of the Community Method and their increased use in recent years has been "emasculating" it. The reason for this—it is argued—is that these new forms of governance operate in the shadow of the law and its hierarchy evading the democratic controls of parliamentary and judicial scrutiny<sup>4</sup>. Klabbbers talks about the undesirability of soft law maintaining 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" (Klabbbers, 1998).

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 & Scott, 2000). 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

<sup>2</sup>Scott and Trubek look at different modes of regulation pre-dating New Governance such as Comitology and the institutionalization of the European Social Dialogue, see Scott & Trubek (2002) and Kilpatrick (2006).

<sup>3</sup>Both expressions are borrowed from de Búrca (2000).

<sup>4</sup>For a critical account of the "gap thesis" and liberal legalism, see Wilkinson, (2010).

relationship between law, constitutionalism and European integration. This “orthodoxy of hostility”<sup>5</sup> 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 considered 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”) (Papadopoulos, 2007). However, as stressed by Weiler, democracy and legitimacy are not “co-terminus” (Weiler, 1995). Legitimacy may be preserved by other values other than representative democracy and by substantive policy outcomes rather than process (Scott, 1998). On this point, Esty (2006) 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.

### Reframing Accountability

From a management point of view the EU has grown too fast. As Harlow 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-making system of the EU (Harlow, 2002). By the same token Everson argues that (Everson, 1998), 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? Governance encompasses institutions and structures that observe, reflect and evaluate the performance of Member States, which promote regulatory experimentalism and do not have necessarily formal legal powers. For this reason they may not be democratically accountable.

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 from 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.

A quick glance to the present EU will suffice to see that within the EU 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. It follows that if it is difficult to accomplish an efficient system of accountability within more traditional modes 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) notes, “the word crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic ‘governance’”. 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 this context, 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 (“agencyfication”) 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. SSGIs are a case in point. As Szyszczak (2012) observes a new constellation of stakeholders has been created, largely at the instigation of the Commission, to provide legitimacy to the Europeanization of SSGIs by channeling new avenues for what are portrayed as democratic, participatory processes. Thus, it is argued that the participation and responses of the stakeholders to Commission initiatives are part of the emerging new governance processes. Hence, it may be more apt to describe New Governance as being closer to what De Búrca refers to as “new public management style of engineered bureaucracy” (De Búrca, 2010) rather than the participatory, collaborative and reflexive forms of governance which are all part of the experimentalist paradigm.

The foregoing problems do not constitute an insuperable challenge, particularly if the aim is not that of achieving fully-fledged democratic legitimacy but, more modestly, a better functioning of supranational global governance bodies with improved legitimacy (Esty, 2006). Indeed, notwithstanding these limitations to experimentalist and collaborative governance, 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. Answering this question is necessarily linked to

<sup>5</sup>I have borrowed this term from Shaw (2000).

visions and imageries of what constitutes a democratic and legitimate system of governance in the EU and conceptions of the EU itself, which remains an unsettled and vexed issue.

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). 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). 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” (Scott, 2000) 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 governance 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 & Rawlings, 2007) because mutual accountability networks tend to be more concerned with policy input and long-term relationships than retrospective evaluation, rendering accountability difficult. Alternatives to the classic Community Method while not being legally binding still entail a process of choice, selection and interpretation of specific norms and values thus requiring some form of democratic legitimacy (Borrás & Radaelli, 2010).

The above forces us to rethink both classical notions of accountability and mutual accountability. Drawing on the work by Benz & Papadopoulous (2006) and Benz (2007) and in line with what Kingsbury et al. (2005) and Krisch and Kingsbury (2006) define as “global administrative space” and “global administrative law”, it may be possible to develop a new notion of accountability by combining mutual accountability with classical democratic and political accountability which may improve the democratic accountability of the EU’s multilevel system. 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. 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. At national and regional levels, the constituent and veto functions could be performed by national parliaments or elected governments. In this context, non-state actors participating in New Governance processes would submit policy proposals to veto players, while the latter would be forced to supervise participation and policy making in governance effectively.

Within this meta-governance frame we could include what Everson defines as a “rule of reasons provision”, (Everson, 1998) which could serve as a basis for judicial review. In particular, European administrative law *lato sensu* could be built upon Article 296 TFEU (ex Article 253 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 as well as the strict approach of the CJEU in relation to non-private applicants’ fulfillment of the criteria for individual concern under Article 263(4) TFEU).

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. 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. Law would retain an important and renewed role. In this context Walker’s analysis of law’s renewed role is particularly fitting and deserves to be quoted in full: “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).

## **Bridging the Gaps between New Governance, Law and Constitutionalism**

### **The Premise**

In the preceding sections the paper showed that New Governance presents significant practical and conceptual challenges for the EU's 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. These problems may be explained to a certain extent 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. 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 Poiare Maduro (2003) 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. New Governance reflects 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) 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".

Hence, despite the paper's purported "normative inertness" (Gardner, 2001) it is acknowledged that there is a need to develop a notion of regulation which takes into account the peculiarities and realities of the EU system. In this context, meta-constitutionalism enables us to assign law with a renewed role. 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. While the Open Method of Coordination (OMC) has expanded to new areas, at the same time, the adoption of EU legislation in the social sphere in the decade follow-

ing the launch of the OMC has gone up rather than down (Dawson, 2011). In addition, the CJEU's judicial activism has been focusing on ensuring the effective implementation of market freedoms potentially undermining the "soft" compromises reached by new governance or even by legislation (Jørges & Rödl, 2009).

Law's function, however, is not only prescriptive but has also become 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 context, law would 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 solely based on the narrow and standard 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. As Dawson posits "the integrative function of a procedural approach to law builds on this insight through 'bringing together' not in order to reduce, but to establish and deliberate differences. The law is a mechanism that, in so much as it cannot 'reflect' common preferences, must bring divergent positions into a common discourse" (Dawson, 2011). 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 Poiare 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, 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. Hence, while hybridity enables the EU to exist within a complex multi-tiered system of governance and to live with paradox it also leaves us with the difficulty of reconciling 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.

### **The Quomodo: A Hybridized System of EU Governance**

Hybridity-as put forward here- aims at bridging the gap between New Governance and EU constitutionalism and enables them to build on one another's strengths in order to enable the

EU, as a highly complex, multi-tiered and postnational site, to provide new answers to the new collective action problems posed by further EU enlargements and by ever-increasing transnationalized and globalized markets. The aim here is to identify ways to establish new bonds of association and political configuration in which New Governance and EU constitutionalism can happily coexist thereby identifying the conditions necessary to assure and optimize effective voice and participation as well as ensuring the preservation and application of the rule of law and due process (as defined in the previous section). In this context, Hervey suggestively puts forward the idea of conceptualizing both processes of adjudication and New Governance not only as being categories of “normative ordering” but also as places and processes of social learning (Hervey, 2010). Specifically, rather than being closed and self-referential systems she advocates the creation of a process of interaction whereby “law, and the exercise of legal rationality to solve problems that takes place within adjudication, is not a stand-alone process, which exerts a one-way coercive influence on the ‘non-legal’ world. Rather, the flow of ideas, solutions and rationalisations for those solutions, between legal and non-legal fields reveals law as at least in part ‘endogenous’ to those non-legal fields” (Hervey, 2010). Using a constructivist approach Hervey develops the idea of “adjudicating in the shadow of the informal settlement” according to which in litigation judges may take account of private ordering “bargains” in their decision-making processes and embed them into their decisions concerning similar cases.

In this context, constitutionalism rather than representing a fixed legal framework, provides the ground for a process of continuous renewal and dialogue in relation to a polity, the EU, that is always in the course of negotiation and renegotiation. As Avbelj (2008) posits, constitutionalism should free itself from “the overly narrow statist bonds and the ensuing drawbacks, so that its spatial, temporal and normative criteria are redefined in pluralist terms”. In this way it could—as a constitutive discourse of imagination and conceptualization—fit the epistemically pluralist European construction (Walker, 2002) and law would thus acquire an important renewed and transformative role along its more traditional instrumental and prescriptive function.

Insights about state and market failure confirm the need to move beyond existing conceptions of law and legality and patterns of law-making (acknowledging the inherent indeterminacy of law as posited by American Legal Realists). Dawson talks about the need to reframe the role of law in New Governance processes and ensuring that New Governance is “both conditioned by, and contributing to, the larger structure of EU law, in ways that can support the democratic character of both” (Dawson, 2010).

The democratic inclusiveness and legitimacy of the EU will depend on the level of access to participation and public contestation and on continuous “democratic communicative action” (Tully, 2002). The recent changes introduced by the Lisbon Treaty promote greater involvement by national parliaments in EU decision-making and direct democracy (Articles 10 - 12 TEU; Protocols 1 and 2). However, with the exception of the citizens’ initiative<sup>6</sup>, these changes represent a response to con-

cerns over the EU’s alleged democratic deficit and, therefore, remain premised on a state-centric understanding of democracy which does not take into account the complex and pluralist policy and legal system of the EU.

Another key feature of this conceptual frame, therefore, is that it embraces a broad notion of democracy transcending any conceptual dichotomy and combining direct, representative, participatory and deliberative forms of democracy. Central to this broad notion of democracy is partnership, as it “does not involve the parceling out of limited pockets of sovereignty to different tiers of government, but a genuine pooling of sovereignty that demands intense interaction between the different tiers within a single, undivided, policy sphere” (Scott, 1998). In addition, this model is based on an *empowerment* paradigm in which there is an active participation in the political sphere rather than mere *enablement*, in which there is only technical participation to reach the objectives of a given policy. At the same time, it promises to reconcile the objectives of efficiency of New Governance with those of democratic legitimacy and accountability of EU constitutionalism.

In this context, metaconstitutionalism (Walker, 1999) is particularly apt for addressing the challenges that the EU is faced with because rather than transcending state constitutionalism and seeing state and postnational constitutionalism as entirely separate, it seeks to unfold their genealogical link: while the premises on which they are based may vary in many different and important ways at the same time one—the postnational—derives from the other—the state (Lindahl, 2010). It also acknowledges the challenges to the constitutional state as the primary unit of political authority and accepts the existence of a more heterarchical order. Within these currencies it recognizes “the continuities and discontinuities between the public law discourses of the state sphere and the non-state sphere” (Walker, 2000) which it seeks to address. It is necessary, therefore, 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. This approach would also bring representation and participation closer to one another giving a renewed and strengthened value to Union citizenship.

At present there are many instances where we can see New Governance practices and processes and law operating in the same policy domain. In certain configurations they are not only complementary but also integrated into a single system in which the functioning of each element is necessary for the successful operation of the other. In these scenarios law is in effect transformed by its relationship with New Governance. Trubek and Trubek (2007) have identified four types of such transformation. First, it may be associated with a shift to legal proceduralism in which law mainly provides procedural rules for conflict resolution and problem-solving; second, to configurations in which New Governance practices and processes have been added to areas which were initially covered by traditional forms of legal regulation and rights-based structures are retained to provide a kind of “safety net”; third, to situations whereby law sets minimum standards and New Governance may be used for exceeding those standards through self-regulation and self-monitoring; fourth, to instances in which legal regulation provides general norms and New Governance is used to help them become more specific. Various areas of EU policy have relied-albeit to a different extent- on “hybrid” forms of governance:

<sup>6</sup>Article 11 TEU and 24 TFEU; Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens Initiative OJ L65, 11.03.2011, p. 1; for academic commentary, see Dougan, (2011) and Mendes (2011).



- fiscal policy coordination, where the Stability and Growth Pact (SGP) provides for a combination of soft coordination processes with hard sanctions (Maher, 2007);
- gender equality, where measures include a combination of hard law instruments such as Directives (for example, the Recast Directive<sup>7</sup> which itself does not exclude the use of soft measures), the case-law of the CJEU and the adoption of softer tools or coordination processes such as gender mainstreaming as in the European Employment Strategy (EES) (Beveridge & Velluti 2008);
- integration of regular third-country nationals (TCNs), where OMC-like mechanisms are used in combination with hard law instruments such as Directives (for example, Directive on Long-term Residents TCNs)<sup>8</sup> in order to develop an inclusive immigration policy pursuant to the 1999 EU Tampere multiannual programme's objectives (Velluti 2007);
- healthcare, where the work of *ad hoc* High Level groups and agencies is coupled with the CJEU case law and the EU Commission Communications; the Patients' Rights Directive<sup>9</sup> itself contains two types of provisions, legally binding rules reflecting CJEU judgments and non-legally binding rules focusing on participatory mechanisms (Trubek & Hervey, 2007), (De Ruijter & Hervey, 2012);
- environmental policy, the Water Framework Directive<sup>10</sup> provides for a number of informal and horizontal processes and, at the same time, it provides for more detailed legislation (Holder & Scott, 2006);
- competition law, within which different governance structures are at work under a common framework: the Directorate General for Competition (DG COM) and a network of national authorities and courts (Castellano, Jeunemaître, & Lange, 2012). Hence, EU competition law and policy relies on a decentralised structure of parallel enforcement of the law. At the same time, a European Competition Network (ECN) has been set up in order to foster coordination among national competition authorities;
- services regulation, with the Services Directive<sup>11</sup> being the main legislative tool to regulate services in a horizontal manner, focusing on administrative simplification and co-operation. The Directive provides for regulatory reform at national level and contains rules for setting up the institutional framework for the exchange of information, mutual learning and for self and mutual evaluation;
- SSGIs, where the use, and range, of soft law and soft governance processes has grown in recent years, with the Commission involving a wider group of actors to contribute to the development of a European discourse on SSGIs (Szyszczak, 2012). This has allowed for the creation of a set of Europeanized themes: a European concept of SSGI; a European discourse on SSGI; a European understanding of

<sup>7</sup>Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204/23.

<sup>8</sup>Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44.

<sup>9</sup>Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare OJ L 88/45.

<sup>10</sup>Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327/1, 22 December 2000.

<sup>11</sup>Directive 2006/123/EC of the European Parliament and of the Council of

<sup>12</sup>December 2006 on services in the internal market OJ L 376/36.

the problems of SSGIs.

The above examples seem to suggest that hybrid forms of governance are increasingly being used in various areas of EU action. In particular, in each of the afore-mentioned areas of EU regulation, we can see an increased participation of non-state actors and their networking, the creation of national contact points, EU agencies, the general requirement of dissemination at national level as well as the exchange of information at European level, the systematic inclusion of cyclical reporting in hard law measures such as Directives, the adoption of Communications, scoreboards and action plans by the EU Commission and other soft instruments as well as a predilection for framework directives strongly suggest a transformation of "old" into "new" governance or into "old-new governance" (Hatzopoulos, 2012).

### Courts, Parliaments and New Governance

In this context, the role of the judiciary is a complex one given that New Governance processes often operate beyond formal structures (Scott and Sturm, 2007). *In primis*, courts have an important monitoring function as deliberative problem-solving units and, in particular, they have a process-perfecting function by ensuring that the decision-makers themselves make policy with explicit reference to constitutional and policy reasons. The increase in decentralized, heterarchical and dispersed sites of policy and decision-making raises the issue of how and which substantive and procedural safeguards need to be imposed to limit the risk of abuse in power relationships. My argument is that while the definition of these safeguards needs to be elaborated through enabling mechanisms of deliberative democracy and structures of participation for policy formation (so that all those affected have a voice or have given their consensus in shaping it following a process of reflexivity), the respect of these safeguards could be assured by the courts acting both in their more traditional role as norm enforcers and in their renewed role as catalysts. In particular, courts could facilitate the creation of "process values and legitimacy principles by the institutional actors responsible for norm elaboration within New Governance [...] providing an incentive structure for participation, transparency, principled decision-making, and accountability which in turn shapes, directly and indirectly, the political and deliberative process" (Scott & Sturm, 2007). Similarly, Hervey puts forward the proposition that the relationships between adjudication and "new governance", bargains or informal settlements should be developed along hybrid and transformative lines. New Governance could contribute to affect or interact with the framing of a problem; second, it could contribute to, affect or interact with the reasoning that is adopted in reaching a solution; third, it could contribute to, affect, or even determine, the preferred solution itself (Hervey, 2010). As pointed out by Hervey, in the context of "the problem of social Europe", it is the very constitutional structure of the EU that creates the problem which combined with the EU's *real politik* will not change (Hervey, 2010). Both litigation and New Governance remain *a fortiori* the main means to address it at European level and "a mutually transformative relationship between the two processes, that brings together the best features from each process in a symbiotic interaction, must be desirable" (Hervey, 2010).

In this way, we reconcile what at first sight appear to be opposing rationales and aims of apparently divergent forms of

regulation, namely, EU constitutionalism and New Governance. In particular, a way of democratizing New Governance, providing the necessary safeguards for preventing abuse or concentration of power while, at the same time, ensuring efficiency of regulation, could be ensured through the design of guidelines or rules which promote decentralization and participation of different actors. This democratizing process could be established with the involvement of both the European Parliament and national parliaments in New Governance processes and practices. The latter could have a key role in setting a meta-governance frame (as outlined above) defining objectives and procedures, monitoring progress towards agreed goals and revising the processes in light of the results achieved. As posited by Becker, *ex ante* involvement would improve representation and deliberation during the drafting process of national reports submitted by Member States in the context of coordination processes as well as *ex post* scrutiny of countries' promised reforms and overall performance (Becker, 2009). Their involvement in New Governance, however, would require a partial transformation of their traditional role as legislators: pass framework legislation containing commitments to a broad set of goals such as OMC objectives, establish administrative infrastructures to stimulate decentralized experimentation, monitor the efforts of local units to improve their performance against them, pool resulting information, set provisional standards in light of what they have learned, review the results and revise framework objectives and administrative procedures accordingly (Zeitlin, 2005). This renewed role may give national legislators access to insights and tools for producing better legislation and provide them with grounds for criticizing governmental legislative and administrative measures (Duina & Raunio, 2007; Zeitlin, 2005). Moreover, this could generate what Sabell and Zeitlin (2008) have termed a "democratizing destabilization effect" and could also help to remove the primacy given to executive federalism which has empowered the governments and marginalized the European and national parliaments<sup>12</sup>. The level and type of involvement of national parliaments would vary depending on the institutional structure of the country's democratic system.

However, the involvement of national parliaments in New Governance processes such as the OMC is not easy to ensure in practice. The Bruegel Policy Brief (Pisani-Ferry & Sapir, 2006) containing comparative data on the involvement of national parliaments in the design and adoption of National Reform Programmes (NRPs) shows that there is still little involvement and suggests the setting up of minimum standards for national parliament involvement in the NRPs. In addition, as noted by Benz national parliaments have to rely on information provided by the governments which could be manipulated (Benz, 2007). Hence, current involvement of national parliaments does not sufficiently help to improve the legitimacy and effectiveness of coordination processes not only because parliaments are not involved in the drafting process but also because they seldom make NRPs topic of discussions in plenary sessions. The end result is that the current state of parliamentary involvement does not trigger any further political contestation and thus fails to empower Member States legislative bodies (Becker, 2009). Further research, therefore, needs to be carried to identify ways for ensuring effective participation of national parliaments and how courts may act not only in their traditional role of ensuring

<sup>12</sup>For a proposal on the parliamentarization of the OMC, see Dawson, (Dawson, 2010).

law enforcement but also their renewed role within New Governance processes.

## Conclusion

EU law must constantly put forward claims about itself centred around the idea of self-betterment or European *eudaimonia*<sup>13</sup> which underpins the justification for any EU legal norm (Chalmers, 2009). This concept "requires EU law to grant individuals the structures, entitlements, responsibilities and protection to make better and more successful lives for themselves" (Chalmers, 2009). This idea of self-betterment has normative and deontological implications for EU action especially when it claims to offer something that cannot be offered by national law. As Chalmers convincingly puts it a central mission for EU law is not simply to better citizens' lives but to develop and realize accounts of their lives that they perceive as their own rather than set out for them (Chalmers, 2009).

Against this backdrop, it is necessary to provide the basis for developing a system of EU governance which not only facilitates but also, and more importantly, actuates in an equal manner the self-determination of all actors involved. In particular, it must provide the communicative and cognitive conditions and procedural safeguards for ensuring democratic representation and participation in the EU at all levels of decision and policy-making thus recalling ideas of proximity and subsidiarity as well as giving renewed value to the concept of active Union citizenship. So far attempts have been rather piecemeal and trapped within a logic of regulation whereby processes and techniques based on a *top-down* and *command and control* type of governance are considered preferable to those based on differentiation and experimentation, if not in the short-term certainly in the long-term. This binary approach to New Governance and the classic Community Method stifles processes of self-transformation of the EU, which have been made necessary by various significant internal and external structural changes. A more careful analysis, as noted by Dawson (2009) reveals that the debate over soft law methods within the EU has not only produced anxieties about law's role in the EU, but also a number of conceptual accounts which posit the development of instruments such as the OMC not as indicative of a move away from law, but as part of a distinct and novel stage of legal integration. In the context of this new phase of legal integration, the strengths of New Governance, law and constitutionalism should be combined together for the pursuit of the EU's self-betterment.

From the outset, the explicit aim has been to revisit and problematize traditional meanings and languages of law and constitutionalism in the EU—and in this context classical legal methodology—as well as rescuing New Governance both from its supporters and its enemies. To this end the paper questioned narrow understandings of democracy, legitimacy and accountability and, in this context, the role of institutions and non-state actors, including national parliaments in the EU. In so doing, it also explained how governance does not substitute for government, but complements it. There is no governance without government, as there is no soft law without hard law (Möllers, 2006). On the basis of this approach, the paper explored possible encounters between law, constitutionalism and New Governance processes and mechanisms in order to put forward a

<sup>13</sup>The term is taken from Aristotle, *Nicomachean Ethics* (translated by W Ross) (Clarendon: Oxford, 1995) book I, paras 4 - 7.

loose conceptual frame which may help in developing a hybridized system of EU governance.

The explorative investigation carried out in the present paper is important not only for addressing and rethinking problems of effectiveness and implementation gaps of both New Governance and classical modes of regulation but also for the future direction and evolution of EU law and, more broadly, the existence of the EU which is navigating in uncharted waters. An academic debate which must continue.

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