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Summary

This paper introduces a set of working papers from the Law Taskforce, which explore the emergence of new approaches to governance (‘new governance’) in the European Union along three main lines of inquiry: firstly, the examination of the actual operation of new regulatory forms in a number of specific policy fields or issue areas; secondly, the interrogation of the relationship between law and new governance, both through these concrete case studies as well as through more abstract and conceptual reflections on how law and legal processes are implicated in the operation of new regulatory approaches; finally, the exploration of the relationship between new governance and constitutionalism. Collectively and separately, the papers presented try to address these issues by highlighting the nature and contours of the challenge new governance presents for law and for our thinking about constitutional values and structures.

Contents

I. INTRODUCTION	3
II. WHAT DO WE MEAN BY NEW GOVERNANCE?	3
III. HOW DO WE CONCEIVE OF THE RELATIONSHIP BETWEEN LAW AND NEW GOVERNANCE?	5
III.1 THE GAP THESIS	5
III.2 THE HYBRIDITY THESIS	6
<i>a. Fundamental/Baseline hybridity</i>	7
<i>b. Instrumental/developmental hybridity</i>	7
<i>c. Default hybridity (governance in the shadow of law):</i>	8
III.3 THE TRANSFORMATION THESIS	8
IV. WHAT IS THE RELATIONSHIP OF NEW GOVERNANCE TO CONSTITUTIONALISM?	9
V. CONCLUSION	10

I. Introduction

This collection of essays explores the emergence of new approaches to governance (‘new governance’) in the European Union. The papers represent the initial results of a research project which brings together a group of scholars to examine the emergence of the new governance phenomenon in different political, geographical and policy contexts.

Three distinct but related lines of inquiry inform the collection of essays. The first line of inquiry is a practical and empirical one, entailing an examination of the actual operation of new regulatory forms in a number of specific policy fields or issue areas. By bringing together scholars working on subjects ranging from employment to health to environment and anti-discrimination, we hope to shed some light on the actual nature and characteristics of various new governance forms and their effectiveness, as well as the possible reasons for their emergence. The second line of inquiry aims to interrogate the relationship between law and new governance, both through these concrete case studies as well as through more abstract and conceptual reflections on how law and legal processes are implicated in the operation of new regulatory approaches. The third line of inquiry addresses the relationship between new governance and constitutionalism. This inquiry can be seen in a number of the essays in the collection, whether attempting to situate new governance in relation to a traditional constitutional framework, or seeking a ‘theorization of the ideology’ which underlies the emergent practices of governance, or, more broadly, interrogating the various possible ways of conceiving the relationship between new governance and the notion of collective self-government which is inherent in the idea of constitutionalism.

The project has not been designed as a comparative one, but we see a value in examining similar or even parallel developments in more than one federal-type system, partly with a view to reflecting on whether and how the apparent trend towards ‘post-regulatory’ and non-traditional forms of governance transcends the particularities of a given political or geographic context. Further, while there are evident similarities between the emergence of alternatives to command-and-control regulation, and of more ‘experimental’ forms of governance in Europe and the US, it can fairly be said that this development has occurred in a more self-conscious and more closely scrutinised fashion in the EU. This is not least because of the role of the European Union institutions – and in particular the Commission – in funding and advancing research on the subject, as well as in actively testing and promoting the use of new governance forms at EU level. There seems to be no similar institutional investment in conceptualizing and analyzing such regulatory changes in the US. In that sense, it might be said that the trend towards new governance (or democratic experimentalism¹) has largely emerged bottom-up in the US, with non-traditional problem-solving approaches being practiced and tried out in different regulatory fields at the prompting of different sets of actors, while there have been significant top-down incentives in the EU, in the shape of the promotion of new governance approaches in specific fields by the European Council (the EU heads of state and government) and the Commission.

II. What do we mean by new governance?

The concept of new governance is by no means a settled one. It is a construct which has been developed to explain a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions. The language of governance rather than government in itself

¹ See M. Dorf and C. Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 Col. L. Rev. 267

signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically governmental actors, or indeed the absence of any traditional framework of government, as is the case in the EU and in any transnational context. In a practical sense, the concept of new governance results from a sharing of experience by practitioners and scholars across a wide variety of policy domains which are quite diverse and disparate in institutional and political terms, and in terms of the concrete problem to be addressed. Yet in each case, the common features which have been identified involve a shift in emphasis away from command-and-control in favour of ‘regulatory’ approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature. What can be seen already in this preliminary description is that new governance – as is suggested by the name – tends to be identified primarily by comparison with what it is not, and by contrast with some conception of traditional or ‘old’ regulatory approaches. Newness is not intended to signify being recent in time, but rather something which is distinctive from what has gone before. Of course this binary or oppositional approach to defining the object of analysis has its limitations, in that it overstates the disjuncture between supposedly traditional regulatory methods and more experimental approaches and conceals the continuities between them. More importantly, it has implications for the idea of ‘hybrid governance’ which we will develop further below, and which forms an important theme in the various analyses and studies of new governance forms presented in this collection.

Alongside the process of definition-by-contrast, new governance forms can be depicted descriptively in terms some of the key characteristics which they can be said to exhibit. For example, the idea of new or experimental governance approaches places considerable emphasis upon the accommodation and promotion of diversity, on the importance of provisionality and revisability - both in terms of problem definition and anticipated solutions, and on the goal of policy learning. New governance processes generally encourage or involve the participation of affected actors (stakeholders) rather than merely representative actors, and emphasize transparency (openness as a means to information-sharing and learning), as well as ongoing evaluation and review. Rather than operating through a hierarchical structure of governmental authority, the ‘centre’ (of a network, a regime, or other governance arrangement) may be charged with facilitating the emergence of the governance infrastructure, and with ensuring co-ordination or exchange as between constituent parts. A further characteristic often present in new governance processes is the voluntary or non-binding nature of the norms. While this feature is sometimes described in terms of ‘soft law’, the ambiguity of the notion of soft law is highlighted in several of the papers.² In the EU, the much-discussed ‘open method of coordination’ (OMC) is often presented as the archetypal, though by no means the original, example of new governance.³ Aspects of the ‘new approach to standardization’ promoted by the EC Commission in the 1980s also provide an earlier example.⁴

Apart from the basic exercise of depicting the operation of new governance forms in various policy fields, the primary focus of the papers is on the relationship between new governance, law and constitutionalism. It is notable that, although the new governance phenomenon has attracted significant scholarly attention in recent years in the EU in particular,⁵ the legal di-

² See in particular the paper by Dave Trubek, Patrick Cottrell and Mark Nance.

³ See the ‘OMC Research Forum’ for a collection of the copious literature on this subject: <http://eucenter.wisc.edu/OMC/>

⁴ See <http://europa.eu.int/comm/enterprise/newapproach/index.htm> .

⁵ See now the major EU-funded research consortium which builds on existing European projects dealing with new governance: <http://www.eu-newgov.org/>

mension remains under-explored.⁶ Yet as the papers which follow demonstrate, new governance presents significant practical and conceptual challenges for law and for lawyers, as well as for notions of democracy, self-government and constitutionalism. In terms of the specific relationship between new governance and law, below we sketch out three tentative theses. Elements of each of the three – a ‘gap thesis’, a ‘hybridity thesis’, and a ‘transformation thesis’ – and in some cases elements of more than one, can be seen reflected in various of the essays in this collection. These theses have a descriptive as well as a normative dimension. They offer a framework for thinking not only about the actual nature and role of law in new governance, but also about its potential nature and role.

III. How do we conceive of the relationship between law and new governance?

III.1 The Gap Thesis

In its descriptive form, the gap thesis attests to the imperviousness of law in the face of new governance, and to the existence of a gap between formal law and the practice of governance. According to this thesis, formal law, including constitutional law, is largely blind to new governance. A reading of legal texts, including constitutional texts, conceals rather than reveals or illuminates the presence and prevalence of new governance forms. Moving from descriptive to explanatory mode, law either has not ‘caught up with’ developments in governance, or it ignores developments which do not conform to its presuppositions, structures and requirements.

Moving from the explanatory to the more explicitly normative dimension of the gap thesis, at least two distinct if related strands can be identified. The first argues that law resists the new governance phenomenon, and the second argues that law is confronted with a reduction in its capacity. The resistance argument presents law as an actual impediment or obstacle to new governance. The premises of law are not aligned with the premises of new governance. Not only does law, traditionally conceived, ignore the existence of experimental forms of governance, but through its blindness and non-recognition it may even operate to curtail and inhibit such experimentation. The reduced capacity argument, by comparison, is preoccupied not with what law does in the face of new governance, but with what it can no longer do. According to this argument, the capacity of law to steer, to inform the normative direction of policy, and to secure accountability in governance is put in peril, by virtue of the mis-match between the fundamental premises of law and the premises of new governance.

To take a high-profile example of the apparent blindness of law to the emergence of new governance in Europe, an analysis of the (unratified) EU Constitution suggests that it failed to capture and accurately depict the prevalence of new governance forms. Instead, the constitutional document downplayed the extent of the co-operative efforts between Member States

⁶ See however the special issue of the *European Law Journal* (Volume 8, 2002) on ‘law and new approaches to EU governance’, upon which this current project builds. See also G. de Búrca, ‘The Constitutional Challenge of New Governance’ (2003) 28 *European Law Review* 814. In the US setting, apart from the influential essay by M. Dorf and C. Sabel ‘A Constitution of Democratic Experimentalism’ 98 *Columbia Law Review* 267 (1998), see also S. P. Sturm, ‘Second Generation Employment Discrimination: A Structural Approach’ 101 *Columbia Law Review* (2001), J. Liebman and C. Sabel ‘A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform’ (2003) 28 *NYU Review of Law and Social Change* 183 and C. Sabel and W. Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ 117 *Harvard Law Review* 1015 (2004).

which these approaches entail.⁷ Tamara Hervey's paper on health care indeed argues that there is a significant gap between formal constitutional articulation and emerging practice in this field. According to the former, health care is a matter for the Member States, but according to the latter, this policy domain is increasingly characterised by European Union influence through a whole variety of governance modes. In a different setting and context, Joanne Scott and Jane Holder also point to the existence of such a gap, whereby elaborate and settled governance arrangements are nowhere visible through the prism of a traditional understanding of law, or through conventional legal documents.

In terms of resistance, whether deliberate or inadvertent, many examples of law which appear to impede the emergence and functioning of new governance can be cited. Claire Kilpatrick in her paper on EU employment policy, for example, points to the possibility that the new (un-ratified) EU Constitution could have served to impede rather than to foster the emergence of transnational civil society actors in that field, whereas such broadened stakeholder participation is one of the normative presuppositions of new governance approaches.

From the "reduced capacity" perspective, several contributions point to the concern that new governance may evade traditional legal mechanisms for securing accountability, or that it may circumvent important political and constitutional constraints and commitments. New governance practices may well not be subject to binding administrative procedures, and even where they are, effective review may be hard to secure.

III.2 The Hybridity Thesis

The 'hybridity thesis' approaches the relationship between law and new governance in a more optimistic and constructive manner. It acknowledges the co-existence and engagement of law and new governance, and explores different ways of securing their fruitful interaction. Law and new governance are posited as mutually inter-dependent and mutually sustaining. They potentially play off one another's strengths and mitigate one other's weaknesses. The hybridity thesis once again has a descriptive and a normative dimension, and can be presented both as fact and as desideratum.

On one account of this thesis, the hybridity of law and new governance is an interim phenomenon, a transition from a regime of formal legal ordering to a whole-hearted embrace of new governance. On another, it is both factually inevitable and normatively desirable that hybridity is a long-term phenomenon and not simply a passing stage.

The concept of hybridity is articulated in several of the papers, most notably in the contributions by Claire Kilpatrick, by Dave Trubek, Patrick Cottrell and Mark Nance, and by Gráinne de Búrca. In Kilpatrick's, and in Trubek, Cottrell and Nance's contributions, hybridity is conceived primarily in terms of the interaction of hard and soft law, both substantively and procedurally. In the fields of employment and fiscal policy coordination, these authors argue that hybridity – in the sense of simultaneous and mutually inter-dependent recourse to hard and soft law – is a prominent feature of EU governance. While some clearly view soft law as a second-best and less effective alternative to hard law, Trubek and his colleagues argue that soft law may receive a more favourable evaluation in circumstances where there is a shift in

⁷ Indeed, but for the eleventh-hour lobbying of members of the Convention which produced the first draft of the constitutional treaty, even the minimal references to 'coordination' which did ultimately appear would apparently not have been in the text: See articles III-213, III-250(2), III-278(2) and 279(2), and the brief explanation for the adoption of these last-minute amendments (which at that time were numbered Articles III-107, III-148, III-179 and III-180) in Convention working documents CONV 849/03 and CONV 848/03.

the underlying theoretical framework from a rationalist/realist, to a constructivist account. On a constructivist analysis, soft law is presented and understood less as a tool for directly constraining behaviour than as a transformative tool capable of changing behaviour. In de Búrca's paper, hybridity is depicted in the context of an opposition between two other models of normative ordering: a traditional human rights model on the one hand, and a new governance model on the other. However, we can see even from these different depictions in several papers that the concept of hybridity potentially refers to the interaction of many different kinds and characteristics of governance: at its most general, it refers to the combination of elements of a stylized 'new governance model' and those of a stylized 'traditional regulatory model'.

For analytical purposes, below we identify and distinguish three versions of the hybridity argument which emerge from several of the papers which follow: 'baseline or fundamental normative hybridity', 'functional/developmental hybridity', and 'default hybridity (or 'governance in the shadow of law'). These different varieties of hybridity may be viewed as closely related or even overlapping, but we consider that there is nonetheless a heuristic value in distinguishing them. This is not least because the different versions of hybridity reflected in several of the papers in this collection seemed to us to point towards the existence of a range of different understandings arguably held by different authors of both the character and the value of new governance.

a. Fundamental/Baseline hybridity

Of the three variants of hybridity, baseline hybridity is arguably the most restrained or even cautious in its insistence on a robust role for a traditional legally grounded framework. This form of hybridity eschews, both descriptively and normatively, the idea of pure, unadulterated new governance, or 'new governance all the way down'. On this analysis, new governance is conceived as complementary to rather than a replacement for more traditional forms of law and regulation. Fundamental or baseline hybridity insists on a continuing role for constitutional commitments and established rights, which remain binding and justiciable. This notion of a baseline of rights represents a regulatory bottom-line below which experiments in new governance may not be permitted to take us.

In instrumental terms, fundamental or baseline hybridity may provide a partial response to those who are concerned that new governance amounts in fact to unconstrained governance, to politics without principle, or to governance by the powerful at the expense of the weak. The rise of experimental governance and new problem-solving approaches has generated profound scepticism and unbridled enthusiasm alike, and an insistence on the co-existence of the familiar (traditional, legally and constitutionally grounded regulation) with the new (experimental governance) sets a limit to the risks posed by an excessive faith in new governance.

A more positive version of fundamental or baseline hybridity claims not merely a continuing parallel role for traditional law and regulation, but also that new governance mechanisms may even serve to enhance the effectiveness of law's traditional role. Kilpatrick's and de Búrca's papers offer possible examples of this in relation to the enforcement of race and gender equality rights.

b. Instrumental/developmental hybridity

Shifting somewhat from the dualism of fundamental/baseline hybridity, but in keeping with the more constructive aspect of the latter, the concept of development hybridity posits recourse to new governance techniques as an instrumental means of developing or applying existing and traditional legal norms. The clearest and perhaps the most prominent example of

instrumental/developmental hybridity in the EU context combines legally binding, framework directives (laws which are binding as to their aim but leave discretion as to the manner of implementation) with new governance regimes for their implementation. Scott and Holder point to the example of the water framework directive, and to its associated multi-level, multi-actor, collaborative, common implementation strategy. The concept of ‘good water quality’ is elaborated within a governance frame which closely resembles the open method of coordination. De Búrca and Hervey’s respective papers also offer examples of developmental hybridity, in that they present new governance mechanisms as a means of applying, elaborating and ensuring respect for established legal or constitutional rights. Their argument applies not only in respect of ‘new’ rights, such as social welfare rights, the justiciability of which is contested, and which lend themselves more obviously to new governance techniques, as has long been evident in the international context in relation to the kinds of monitoring and supervisory mechanisms which operate under the International Labour Organization and the International Covenant on Economic, Social and Cultural Rights. It is also applicable also in respect of what some would label ‘core’ constitutional rights, such as equality and anti-discrimination rights.

c. Default hybridity (governance in the shadow of law):

The concept of default hybridity rests upon the idea that legal rules – often rigid and hyper-demanding - may represent a default regime, to be complied with in the absence of participation in new governance. According to this account, law represents a ‘default penalty’, applicable only in the case of failure to conform to new governance demands. The default position is set precisely for the purpose of inducing people to contract out of it – and presumably into a governance regime which is considered to represent their interests better. As such it is likely to be a more specifically tailored and severe default regime than the general legal-constitutional framework presupposed by fundamental/baseline hybridity. Penalty defaults are presented as ‘action-forcing’, which in practice often means ‘information forcing’, within a new governance regime. This concept of penalty defaults emerges most clearly in the US in the sphere of environmental governance. The clean air example in the US encompasses a federalism-localism dimension, whereby the threat of federal intervention serves to mobilise states in their elaboration of clean air implementation plans. Another example is in the field of occupational health and safety regulation: contemporary penalty defaults in US occupational health and safety regulation are voluntary rather than mandatory in nature. An earlier attempt to use penalty defaults to induce compliance in under-regulated areas encountered legal difficulties (reflecting the obstructive dimension of the gap thesis outline above), and was struck down by the federal courts.

III.3 The Transformation Thesis

The transformation thesis argues that new governance has demanded, and will increasingly demand, a re-conceptualisation of our understanding of law and of the role of lawyers. According to this thesis, the entire preceding discussion including the ‘gap’ and the ‘hybridity’ theses alike, are predicated upon an unduly formalistic and positivistic account of law. Instead, the discussion ought to focus less upon the relationship between two ostensibly independent, but interacting (or mutually blind or antagonistic) social phenomena, than on the mutually constitutive nature of these phenomena. Law, as a social phenomenon, is necessarily shaped and informed by the practices and characteristics of new governance, and new governance both generates and operates within the context of a normative order of law.

A central theme of many depictions of new or experimental practices of governance is the procedural role of law. On these accounts, law may play a crucial role in shaping the institu-

tional environment in which decisions are reached, but it does not specify the need to achieve specific, pre-conceived goals. And even the procedures established by law may themselves be seen as self-consciously provisional and imbued with the logic of reflexive adaptation. Even if proceduralization is understood to operate against a backdrop of existing principles and standards, these are not necessarily conceived of as fixed or rigid standards, but rather are themselves open to interpretative evolution. Thus the transformative nature of law is built into its design.

IV. What is the relationship of new governance to constitutionalism?

No less than the concept of new governance, the idea of constitutionalism is highly elusive and much contested. Nevertheless, systems of law and governance alike derive crucial legitimacy from the constitutional framework within which they operate. In the context of public policy making, constitutionalism can at a minimum be said to imply the notion of collective self-government. The third major theme of this collection seeks to inquire how novel and experimental governance forms relate, if at all, to constitutional values, norms, processes and structures. Do new governance practices elude and remain outside any constitutional framework? Do they require the articulation of a new constitutional theory tailored to their particular characteristics? Or are they in fact self-constitutionalising – new governance as constitutionalism?

In relation to the first of these three questions, it would certainly be difficult – as we argued above – even to detect the existence of the many European new governance initiatives from a reading of the EU constitutional texts, whether the unratified constitutional treaty or the existing EU treaties. The formal constitutional framework of the EU (such as it is) unlike the policy documents of the Commission and European Council, seems largely blind to the spreading practices of new governance. Far from providing a legitimating framework for the development of experimental governance forms, the EU's current constitutional framework appears to exclude the latter, which seem instead to operate free of its constraints and normative underpinnings. In relation to the second question, Paul Margette and Justine Lacroix, in their comparative analysis of EU and American constitutionalism, have noted in passing that John Dewey's idea of epistemic democracy – which has much in common with the premises of new governance – was advanced as a deliberate departure from what were then perceived as ideological and grandiose European conceptions of democracy and constitutionalism. However, they conclude their analysis by arguing that the EU today should eschew any thick version of constitutionalism based on common values and should instead adhere to a cold and abstract constitutional discipline which is more suited to its diversity of norms, identities and values. It might be said that neither the EU nor the US at present has come up with a constitutional theory appropriate to the realities of experimental governance.

Neil Walker in his paper on constitutionalism and new governance has adopted a more comprehensive analytical approach by exploring the notion of constitutionalism, and the potential relationship between new governance and constitutionalism, from a range of different thematic perspectives. New governance might simply be subsumed into an expansive definition of constitutionalism; the defenders of new governance forms might seek to make instrumental use of constitutional norms and processes; new governance might remain entirely untouched by the 'higher practice' of constitutionalism; or the two might be structurally antagonistic to one another. Ultimately, and in forward-looking mode, he proposes a constructive notion of constitutionalism as epistemic transformation. He has called for constitutionalism to be reconceived as a "responsible discourse of transformation" which both recalls the general aspiration of collective self-government and political responsibility, but which also provides a set of

ideas and norms which can be applied to the new and more differentiated world of reflexive and experimental regulation.

V. Conclusion

The contributors to this collection of papers began their research with a common inquiry and a clear set of questions before them. Few clear answers have emerged, but many new questions and many tentative theses have been advanced. We make no pretence at articulating or asserting a shared understanding of the nature, role and significance of new governance practices, nor of the implications of the emergence and spread of experimental governance forms for our conceptions of law and constitutionalism. To do so would belie the diversity of approaches and assumptions which clearly underpin the various contributions. What they have in common, despite the differences in subject matter, analytical approach and normative outlook, is a deep interest in the phenomenon of new governance, and a related interest in the way in which this phenomenon seems to call for a rethinking of legal and constitutional categories. Collectively and separately, the papers highlight the nature and contours of the challenge new governance presents for law and for our thinking about constitutional values and structures. This work represents the early stages of an intellectual inquiry and a research project which we hope will continue in different forms and different *fora* over the coming years.