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## Special Issue of Columbia Journal of European Law

The collection of essays in the special issue of the Columbia Journal of European Law (issue 31.3, 2007) represents the results of a conference held in London in 2006. The aim of the conference was to develop a better understanding of how the increasing use of ‘new governance’ in the European Union has affected our understanding of law and the role of law.<sup>1</sup> In so doing, we hoped also to bring more clarity to the discussion of these categories. In particular, we aimed to re-examine what we assume to be distinctive and important about law, and about legal values and functions, and to think about how these values and functions are affected by or pursued within new governance mechanisms. We set out to address these questions both abstractly and concretely: through reflection on the concepts themselves, and through their operation in a range of policy contexts. The papers develop and build on a number of existing, overlapping research projects on new and experimental modes of governance which have been undertaken by various of the authors separately, together and in collaboration with others.<sup>2</sup>

There is an increasingly widely held view that new governance strategies are becoming more important both nationally and trans-nationally in recent times. Three different kinds of explanatory account of this development deserve to be highlighted. The first is the increasingly transnational dimension of policymaking. This feature, which is particularly salient in the case of the EU, means that there is no conventional governmental framework to follow, and no pre-existing blueprint from which to draw in devising appropriate regulatory strategies. The absence of a traditional ‘government’ necessitates a degree of experimentation with different kinds of public policy-making strategies. The second is the phenomenon of the ‘hollowing out of the state’ from within, which is a significant part of the story of the changing patterns and modes of governing at the domestic rather than transnational level. This phenomenon, in part the product of a shift in political ideology, is generally identified as having begun in the 1980s and having resulted amongst other things in a growth in the role of private actors and networks in governing.<sup>3</sup> The third is an apparently growing dissatisfaction with command-and-control-type regulation for public policies, with the environment being a particularly salient example in this respect.<sup>4</sup>

In preparing papers for the conference, we decided not to seek or stipulate a particular definition of ‘new governance’, despite its centrality to the project. Part of the reason for this is that there is a growing academic industry on new governance in the European Union, in which a great many attempts have already been made to identify, describe, define and map the phenomenon.<sup>5</sup> Much of the scholarship is funded by the Commission, which is heavily involved

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<sup>1</sup> The conference on “Law in New Governance” took place at University College London in May 2007, under the auspices of the NEWGOV project, (see [www.eu-newgov.org](http://www.eu-newgov.org)) which is funded by the European Union Sixth Framework Action Program and coordinated by the European University Institute in Florence.

<sup>2</sup> For some of the previous results of collaborative research in this field, see the special issue of the European Law Journal, vol of 2002, and also *Law and New Governance in the EU and the US* (G. de Búrca and J. Scott, eds, Hart Publishing, 2006).

<sup>3</sup> See e.g. R. Rhodes, *Understanding Governance* (Open University Press, 1997)

<sup>4</sup> See e.g. M. Aalders and T Wilthaagen “Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment” (1997) 19 *Law and Policy* 415, K. Holzinger, C. Knill and A. Schäfer “Rhetoric or Reality? New Governance in EU Environmental Policy” (2006) 12 *ELJ* 403

<sup>5</sup> See e.g. some of the research results available at [www.eu-newgov.org](http://www.eu-newgov.org), and [www.connex-network.org](http://www.connex-network.org). And see the discussion of the many different definitional types in the article by Kenneth Armstrong and Claire Kilpatrick in this journal issue.

in attempts to find novel and workable ways of making policy for the EU's complex transnational system, and which has sought to harness academic energies to the task. Rather than having another shot at the definitional task, we have continued, as in previous research,<sup>6</sup> to use the term 'new governance' in a very broad sense, referring to a wide range of processes and practices that have a norm-setting or regulatory dimension but do not operate primarily or at all through the conventional mechanisms of command-and-control-type legal institutions. The term 'new' does not necessarily entail a claim of originality or temporality,<sup>7</sup> but is used to refer to the increasingly widespread, deliberate and explicit use of such forms of governance in the place of more traditional legal and regulatory techniques.<sup>8</sup> The consequences of not stipulating a specific definition, but of using the term in a broad way to include different approaches, is discussed – and indeed criticized- in several of the essays in this journal.

In approaching the question of the relationship between law and new governance in our discussions, we sought to identify some of the core values that we tend to associate with law, to think about the various functions which we assume are performed by law. Our intuition was that we should not conflate these values and functions with their particular institutional embodiment in conventional legal institutions and forms, but should think instead about the ways in which those values and functions might be furthered in the context of different governance methods and techniques. In focusing on what is thought to be distinctive about law, both conceptually and normatively, we identified three broad properties which underpin the authority and legitimacy of law: First, the presence of a general and reflexive discourse; second, the universalizability and generalizability of a practice and its underlying principle; and third, a degree of publicness to the practice. We then identified two core standards by which law is generally evaluated: its democratic quality, and its effectiveness or contribution to problem-solving. These broad standards, in turn, could be analyzed in terms of a range of more specific features and attributes: (a) the rules governing process, including requirements for participation, deliberation, reason-giving, transparency and reflexivity (b) the relationship of the process to larger publics (c) the relationship between the process and the objectives or goals and (d) the autonomy or responsiveness of the process and output, including mechanisms for checking accountability such as judicial scrutiny. Following from these preliminary thoughts on the role, values and functions of law and legal process, we hoped to consider the way in which these or their analogues may (or may not) be at work in some of the examples of new governance evident in the EU.

The seven papers which follow represent individual and collective attempts to begin the process of addressing some of these questions. Some papers focus primarily on conceptual questions about what is meant by law, governance, new versus old, hard versus soft, in an endeavour to sharpen the analytical tools we are using to understand the nature of the changes being examined, and the variety of relationships between the different categories. Others address specific normative questions such as the role of accountability, courts, rights, identity and participation in new governance. Many of the papers draw on particular empirical studies and examples in constructing the conceptual and normative analysis.

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<sup>6</sup> See our earlier outline in the Introduction to G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Hart Publishing, 2006) p. 3-4

<sup>7</sup> The novelty is sometimes said to be as much in the discourse of analysis as in the practice of governance: see G. Peters "Governance: A Garbage Can Perspective" Institute for Advanced Studies, Vienna, Working Paper 2002, [www.ihs.ac.at/publications/pol/wp\\_84.pdf](http://www.ihs.ac.at/publications/pol/wp_84.pdf)

<sup>8</sup> For a critique of the language of 'newness', see J. Wilson "'New' and 'old' modes of environmental governance: the evolution of the North American waterfowl bird policy regime", <http://web.uvic.ca/polisci/wilson/articles/westernpolisciassociation>.

In the first paper, Walker and de Búrca examine some basic conceptual questions about the categories of ‘law’ and of ‘new governance’ as well as the possible relationships between them. They focus primarily on excavating and questioning some of the existing assumptions about what law is and how it is presumed to relate to new governance. They argue that these are inevitably normative assumptions, and they go on to sketch out their own particular framework for understanding the two categories and their interrelationship. They argue that law and new governance are different species of normative ordering, each of which is striving for some kind of balance between universalizability and reflexivity; but with law being primarily oriented towards a meta-value of ‘social regularity’ and new governance oriented towards a meta-value of ‘social responsiveness’.

David and Louise Trubek in their essay concentrate on the variety of possible causal relationships between new governance and more traditional law-based forms. They map out a set of possible relationships, drawing in particular on clean air and clean water regulatory systems in the EU and the US, between traditional forms of legal regulation (loosely defined as using fixed statutory enactments, detailed administrative rules, and judicial enforcement) and some of the newer governance forms (loosely defined as regulatory mechanisms which do not rely on command and control but which seek to encourage experimentation by a range of alternative methods including: employing stakeholder participation to devise solutions; relying on broad framework agreements, flexible norms and revisable standards; and using benchmarks, indicators and peer review to ensure accountability). The new approaches, they argue, can co-exist with conventional legal regulation in a variety of ways – sometimes complementing one another, sometimes rivaling one another, and sometimes in a transformative way which leads to the creation of ‘new’ forms of law. Their mapping of different ‘co-existent’ or hybrid approaches is reflected in the findings of several of the other essays in this collection, including the two papers on economic governance and that on health-care.

Kenneth Armstrong and Claire Kilpatrick continue the conceptual task – and sharpen the conceptual critique - by using two case studies to explore the deficiencies of current conceptualisations and definitions of “new” versus old/traditional governance, whether expressed in terms of new actors, instruments, modes, attributes or architecture. They caution against the risk of conflating ideal-types with the actual conduct of governance in particular policy fields in a way which obscures what is occurring in practice. They are equally critical of the use of a binary hard/soft distinction in relation to law, rather than a more graduated spectrum approach. They examine the evolution of the European Employment Strategy and the Open Method of Coordination in Social Inclusion, and suggest that the nature of change in these spheres cannot adequately be captured either by definitions of new governance which focus on particular attributes or by definitions which are expressed in terms of architecture. One of the conclusions flowing from their paper is that, in particular if we are to understand change, there is no substitute for careful and thorough empirical research which examines the impact and effectiveness of a range of different institutional designs for problem-solving in different areas.

Focused explorations of the concepts of ‘hard’ and ‘soft’ law, and the relationship between them within a particular policy context, are to be found in the next two papers. Both Imelda Maher and Waltraud Schelkle examine economic governance in the EU, including in particular the recent reform of the Stability and Growth Pact. Each author presents this as an instance of hybrid governance, combining traditional law-based and alternative approaches. Maher applies the concept of hybridity not only to governance forms but also to their regimes of accountability. She examines the different mechanisms for achieving accountability within systems of governing, including parliamentary and non-parliamentary forms, and participation

and market-based constraints, with a view to reflecting on the challenges posed for accountability mechanisms by new governance. Schelkle then uses Abbott's legalization frame<sup>9</sup> to chart changes in the nature of the Stability and Growth Pact. She rejects an easy characterization of recent reforms as implying a move from 'hard' to 'soft', favouring a more nuanced account based upon a variety of different indices. She argues that flexibility is not to be confused with 'softness' in a context of deep uncertainty, where credibility of norms is to be combined with the very real possibility of a need for change. She considers how hard law can operate 'in the shadow' of soft law, with soft law obligations serving to reinforce acceptance and enforcement of hard law. In this sense, hybridity does not imply parallel tracks, but the possibility of mutual reinforcement as between different governance approaches.

Tamara Hervey and Louise Trubek also build on the theme of hybridity, or the 'yoking' of traditional law-based regulation to more experimental forms of governance. Using the example of health care regulation, they point to the failure of the classic European Community method in this field. They draw an analogy with the EU Water Framework Directive and its associated 'Common Implementation Strategy', and argue for the adoption of a "transformative" directive, which would combine the articulation of framework objectives with experimentalist institutions and processes for implementation. They outline the modalities of this, including the means for ensuring respect for procedural and substantive constitutional principles, as well as anticipating objections to and difficulties with their favoured approach.

The final two papers address a number of the important values which are generally assumed to be protected and promoted by conventional forms of legal regulation, and consider how these might fare within new governance. Stijn Smismans focuses on citizenship, and considers the extent to which new governance might provide an opportunity to rethink citizenship in the European Union. He argues that citizenship and new governance have typically been treated separately, whereas he suggests the focus of new governance on decentralized participation might be a means of reinvigorating citizenship practice. By broadening the participation of the citizen beyond the one-shot four- or five-yearly electoral participation, new governance might signify a move towards a participatory, or active model of citizenship. At the same time, however, Smismans argues that while new forms of governance may support the participatory dimension of citizenship, they sit less easily with the two other constitutive elements of the concept, namely identity (stakeholders versus citizens) and rights – particularly judicially enforceable rights.

The (limited) role of the judiciary and of courts in new governance is discussed in several of the essays, including those of Maher, and of Hervey and Trubek. This topic is also at the heart of the final, forward-looking paper by Scott and Sturm. Using a methodology which combines theory and practice, they propose a framework for conceptualising the role of courts in new governance. They conceive of courts as catalysts which could create an incentive structure for securing full and fair participation in governance, for enhancing the informational basis for decision making, and in favour of principled decision-making based upon transparency and reason giving. Like Hervey and Trubek, they argue that the seeds of this are already apparent in the case law of the European courts, and they provide a range of examples to illustrate and substantiate their claim.

As was emphasized at the outset, this collection of essays in some ways provides merely a snapshot. It represents one collaborative step in an ongoing set of individual and collective

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<sup>9</sup> Abbott, K.W., Keohane, R.O., Moravcsik, A., Slaughter, A.-M. and Snidal, D. (2000): 'The concept of legalization', *International Organization* vol.45, No.3, pp.401-419

research projects on the changing nature of governance in Europe and elsewhere, and the relevance of these changes for our conceptions of law and legal values. There is an extensive and challenging research agenda ahead, but we hope that some of the questions and critiques raised by these essays help to clarify and further that agenda.

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