New Modes of Governance and their relevance for EU law

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1. Introduction
The project which the Law Taskforce 1a set for itself was a conceptual rather than an empirical one. The aim was to provide an analysis of the possible implications for law, and for legal and constitutional values, of the development of new modes of governance in the EU. While a good deal of scholarly attention has been paid to the emergence and spread of new governance, less has been devoted to the implications for law and legal values of these developments.

Rather than adopting a precise definition of new governance modes, the law taskforce used the term ‘new governance’ in a 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’ therefore does not necessarily entail a claim of originality or temporality, 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.

2. The Challenge of New Governance for Lawyers
The spread of new forms of governance presents significant issues for EU law and for theories of the role of law in European integration. Traditional conceptions tend to present EU “law” as a body of rules enacted though the classic Community Method, binding on Member States and in some cases on individuals and corporate bodies, which are more or less uniform in application, justiciable before the European Court of Justice (ECJ), and enforceable.

The existence and acceptance of such a corpus of law, and the presence of the ECJ to interpret and enforce it, has traditionally been understood and presented as an important factor in the integration process. Because this kind of European “law” was uniform, the law itself was seen as constituting “integration”. Because it was created through processes that involved the Commission, Parliament and Council, it was accepted as legitimate. Because the interpretation of the ECJ was accepted as final and binding, it was seen as ensuring the existence of common standards throughout the Union. Within this broad schema, EC/EU law has operated as part of a framework that includes processes and principles designed to allocate competencies, to guarantee that decisions are made by authorized actors, to ensure accountability, assign responsibility, prove clear sanctions for infractions, guarantee access to impartial bodies to settle disputes, and finally to protect individual rights.

The move to new forms of governance appears to create a very different situation altogether. New governance involves greater tolerance of diversity, less use of binding norms, and greater participation of actors other than those that are responsible for the traditional Community method and whose role is stipulated in the treaties. New governance mechanisms may by-pass the Parliament and the ECJ, assign a more limited role to the Commission, involve actors from the private sector and sub-national entities, and rely heavily on technocratic networks.

For these reasons new governance presents a challenge to EU law. EU lawyers must understand the rationale for, and operation of, a whole new set of mechanisms, instruments, and processes that may affect
or even supersede the mechanisms they are used to. They must learn how to assess these new developments in light of the basic principles that govern EU law. They must look for ways to ensure that the law supports new governance when that is necessary and desirable. They must determine how best to integrate these new developments into overall processes to ensure that the EU can benefit from the functional capacities of “old” and new governance. And they must learn how to make the transition from old to new or from old to hybrid configurations of new governance and traditional legal methods.

3. Legal Values

A major problem which new governance presents for lawyers is the difficulty of applying “legal values” to many of the new governance approaches. For most lawyers, legal values are embedded in specific institutions and processes and any deviation from these institutions and processes can be seen as violating a fundamental principle. But new governance requires us to detach principles (such as separation-of-powers, participation, accountability, and justiciability, and even core political concepts such as the rule-of-law, democracy and citizenship) from the old procedures in order to assess new approaches that could turn out to be better for the EU than traditional methods. To that end, the Law Taskforce sought to identify some of the core values, institutions and functions of law, which could be used to assess various new governance mechanisms. The aim was to see whether it would be possible to identify in the principles that have emerged in the building of EU law a set of “meta-legal” concepts that could be used to assess and understand the new governance processes.

Our intuition was that we should not conflate the core values and functions which we associated with ‘law’ 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 universalisability and generalisability 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 analysed 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.

Members of the taskforce explored the range of new governance mechanisms in selected policy domains, including aspects of employment policy, occupational health and safety, anti-discrimination, health, environment and EMU.

4. Summary of the papers
In a general framing paper, two members of the taskforce (Neil Walker and Gráinne de Búrca) examined some basic conceptual questions about the categories of ‘law’ and of ‘new governance’ as well as the possible relationships between them. They argued that law and new governance can be understood as different species of normative ordering, each striving for some kind of balance between the values of reflexivity (adaptability to changing circumstances) and universalizability (treating like cases alike, the idea of equality-before-the-law etc), but with law being primarily oriented towards the over-arching value of ‘social regularity’ and new governance oriented towards an over-arching value of ‘social responsiveness’.

Kenneth Armstrong and Claire Kilpatrick continued the conceptual task by using two case studies of the European Employment Strategy and the Open Method of Coordination in Social Inclusion to explore the deficiencies of some of the definitions of “new” versus old governance. Their paper criticizes the use of a binary hard/soft distinction in relation to law, rather than a more graduated spectrum approach. They argue for more careful and thorough empirical research which examines the impact and effectiveness of a range of different institutional designs for problem-solving in different areas, without necessarily seeking to categorize these as ‘old’ or ‘new’.

David Trubek and Louise Trubek then explored a variety of possible causal relationships between new governance and more traditional law-based forms, looking in particular at clean air and clean water regulatory systems in the EU and the US. They concluded by arguing that new approaches can co-exist with conventional legal regulation in a variety of ways, sometimes complementing one another, sometimes rivalling one another, and sometimes in a transformative way which seems to lead to the creation of ‘new’ forms of law.

Imelda Maher and Waltraud Schelkle in two separate papers examined aspects of economic governance in the EU. Each author presents aspects of EMU as a combination of traditional law-based approaches with other alternative approaches. Maher examines the different mechanisms for achieving accountability within different systems of governing, including parliamentary and non-parliamentary forms, and participation and market-based constraints, and reflects on the challenges posed for accountability mechanisms by new governance. Schelkle rejects any easy characterization of reforms to the Security and Growth Pact 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.

Further reading
This policy brief is based on research carried out within the NEWGOV Legal Task Force Ia on “New Modes of Governance and the relevance for EU law”. The general aim of this team was to provide an analysis for the NEWGOV project as a whole of the implications for law and legal and constitutional values of the development of new modes of governance in the EU and to explain the relevance of law and legal institutions for the operation of these new modes.

Further information can be found on the NEWGOV Website in the special section of the Legal Task Force Ia.
Tamara Hervey and Louise Trubek in a joint paper also explored 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 pointed to the failure of the classic European Community method in this field. They argued for the adoption of a “transformative” directive, which would combine the articulation of framework objectives with experimentalist institutions and processes for implementation.

Two further papers then addressed 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 focused on citizenship, and considered the extent to which new governance might provide an opportunity to rethink citizenship in the European Union. He argued that citizenship and new governance have typically been treated separately, whereas his suggestion is that 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, he cautions 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.

This fundamental question of the role of the judiciary and of courts in new governance is the subject of a final, forward-looking paper by Scott and Sturm. Combining theory and practice, they propose a framework for thinking about the role of courts in new governance. They argue that courts can act as catalysts to create an incentive structure for securing full and fair participation in governance, for enhancing the informational basis for decision making, and for promoting principled decision-making based upon transparency and reason giving.

5. Future Research Agendas
At the end of its project, the Law Taskforce 1a concluded that there is an extensive and challenging research agenda ahead, including research on questions such as the effectiveness and impact of ‘hybrid governance’, and on the role of courts in advancing the values associated with principled legal governance.

Bibliography