

Sovereignty and New Governance in European Integration

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Introduction

The nature of law and integration within the internal sphere of the EU's system of governance has come under increased scrutiny in recent years. Successive waves of enlargement have more than doubled the membership of the EU in less than 15 years since the entry into force of the Treaty of Maastricht, resulting in a larger and more diverse Union. Despite significant achievements in European integration, most notably the moves towards completion of the single market, the launch of the single currency and increased cooperation and competences in the field of Justice and Home Affairs, the EU faces fundamental questions relating to its law and policy-making, and their connection with national legislative and policy-making processes.

One of the key issues facing the EU is how to make the necessary changes to law and policy-making in order to keep up with, on the one hand, an enlarged and more diverse Union, whilst bearing in mind the challenges of globalisation and the economic rise of, in particular,

China and India. Making institutional changes which are acceptable to the citizens of the EU has also become a core issue, and one which is even more pressing in the light of referenda defeats in France and the Netherlands over the Constitutional Treaty and in Ireland over the Treaty of Lisbon. In the latter in particular, popular concerns over national sovereignty figured strongly in the 'no' campaigns.

The key to integration through harmonisation has been the use of regulations and directives, as defined by Article 249 EC, and the principles of direct effect and supremacy of EC law as developed by the ECJ. Enforcement of the EC Treaty provisions has been key in ensuring compliance by the Member States. This is often termed the 'Classic Community Method' (CCM) and forms the basis of the traditional model of EU constitutionalism.¹ The CCM is the main factor in contributing to the emergence of a system of (supranational) governance at the EU level. In relation to how this concerns sovereignty, Neil MacCormick has argued that, 'we have a 'post-sovereign' Europe. It is a Europe of no longer absolutely sovereign states interacting with and through a Community with an independent legal order of its own'.²

In recent years, 'new governance' has been increasingly discussed in relation to the EU. 'New governance' does not have a settled meaning and its use is not restricted to the EU. For the purposes of this paper, 'new governance' is a term which is understood to have two main uses when discussed in the context of the EU. The first is indicative of a broad move towards something 'new' in EU governance which, in general terms, can be seen as differing from ways and means of 'old' governance. The point of reference for 'old governance' in the EU is represented by the CCM. 'New governance' suggests a move with the process of EU integration away from the characteristics of the CCM towards incorporation of more participatory, inclusive and 'soft' measures. The language of new governance points towards these qualities in terms which are generally seen as positive in that they emphasise a closer relationship between citizens and institutions of governance.

¹ G de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *European Law Review* 814, 817.

² N MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999), 142.

The second use is similar to the first but denotes more specific modes of governance which have emerged within the European integration process. Though some contest the 'newness' of these modes by tracing their (albeit less explicit) existence far back in the history of the EU, it is only since the 1990s that their use has dramatically increased. The Open Method of Coordination (OMC) is generally regarded as the most readily visible expression of the new modes of governance. It must also be borne in mind that whilst 'new modes of governance' is the preferred term here, not all the modes are as easily recognisable as the OMC or are endowed with quantifiable standards which can be analysed. New modes of governance do not require the same level of express Treaty competence as for the CCM.

In either of the uses identified here, new governance is rightly characterised as a 'phenomenon'³ due to its seemingly central place in the debate on how the future integration or Europe will develop. The centrality of new governance in our contemporary understanding of the EU suggests that it is important to consider the relationship between sovereignty and new governance. For the purposes of this paper, 'sovereignty' is discussed around two connected dimensions: sovereignty in terms of national sovereignty of the Member States, and sovereignty in terms of the role of citizens and non-governmental actors in the integration process and governance of the EU. Both feature strongly in the two uses of 'new governance' identified above.

The Classic Community Method and 'new modes of governance': bringing the state back in?

The CCM is built upon the Commission's exclusive right to initiate legislation and policy, with the Council and European Parliament exercising legislative functions. Qualified Majority Voting in the Council is an essential component in overcoming the difficulties of securing unanimity amongst the Member States. The presence of the European Court of Justice with the power to

³ J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 European Law Journal 1, 1.

rule on the validity of legislative measures and infringements by the Member States of Community law is of paramount importance. According to the Commission,

The Community Method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union's legislature.⁴

There is little doubt that the CCM has contributed to successful harmonisation of law and legal systems across the EU. It has formed the backbone of the integration through law process in the Union and without it, it is likely that the EU would not have been able to attain the level of integration that it has. One need only compare the extent to which integration has succeeded in the EU as compared to regional integration processes (for example, Mercosur) which lack binding and enforcing legal norms to see this.

However, the CCM as a means by which integration goals have been pursued during the history of the EU has been under pressure for three main reasons. First, the CCM has undergone changes, such as the greater role now played by the (directly elected) European Parliament in the passage of legislation and the extension of qualified majority voting in the Council, but it remains in essence a method conceived for a polity of six states. Enlargement to 27 states has posed challenges for the effectiveness of legislative measures and the ability of the EU institutions to ensure that harmonisation occurs in practice as well as on paper. Directives, which require transposition in the Member States, are particularly at risk from uneven and insufficient application.

Second, and in the context of enlargement, the nature of 'one size fits all' legislative measures applicable to a much more diverse EU has been raised. The issue of ensuring that the

⁴ Commission (EC), 'European Governance: A White Paper' COM (2001) 428 final) 8.

differences, for example in economic and social terms, are respected in the integration process is an apt one. Within the context of the current global economic crisis, the question of whether EU Member States old and new can or should respond to economic challenges in the same way is inherently linked to the legislative framework of the EU polity.

Third, the competences of the EU have expanded into new areas where binding legislative measures of the type used during the completion of the Single Market might not appear the most appropriate. This can be because the goals to be achieved could not easily be obtained through regulation, for example in some aspects of social and economic policies. This point is explored further since one of the origins of new governance is found in the monetary coordination process.

The other reason why the CCM may not be appropriate for some areas where integration is pursued is because of their sensitivity for Member States in terms of their closeness to the heart of state sovereignty. Whilst traditional CCM measures may be theoretically possible, their use faces resistances from (some of) the Member States. Employment policy is one such example. Considerations of sovereignty in terms of Member States would suggest that they have much to benefit from the new modes of governance if their main characteristic is the lack of legal enforceability. Since the new modes of governance would not appear to involve formal competences on the part of the EU institutions, they do not need to be grounded in a Treaty article – which may involve complex, lengthy intergovernmental conference negotiations if the Treaty is to be reformed. Further, the lack of enforcement provisions suggests that the new modes of governance do not involve the pooling of sovereignty and resist ‘competence creep’. In addition, a public which may be sceptical of European integration generally or in certain areas can be assured that cooperation remains strictly at the intergovernmental cooperation level.

The Open Method of Coordination

The clearest example of a new mode of governance in operation in the EU is the Open Method of Coordination (OMC). The OMC was explicitly recognised as a mode of governance at Lisbon

European Council Summit in 2000, though its roots in EC/EU policy stretch as far back as 1958.⁵ The OMC is composed of four elements; fixing short, medium and long-term goals and guidelines for the Union; benchmarking and using quantitative and qualitative indicators as a means of comparing best practice; translating the guidelines and goals into national and regional policies through specific targets; and using monitoring, evaluation and peer-review as mutual learning processes.⁶ These characteristics therefore move the EU away from the top-down/command-and-control regulatory approach of the CCM, and do not seek to establish a single common framework, but instead place the Member States on a path towards achieving common objectives while respecting different underlying values and arrangements.⁷ The OMC has been utilised in a number of policy areas, which according to de la Porte, are characterised as those in which there has been limited regulation (and therefore use of the Community Method), these include the information society, research and development, education, employment and social exclusion.⁸

It is interesting to note, however, that amongst the diverse origins of the inspiration for the OMC, Hodson and Maher identify the monetary coordination procedure used in the Economic and Monetary Union (EMU) process as the model.⁹ In this situation, Member States wishing to enter EMU agreed to adhere to certain benchmarks and policy guidelines: in the event of non-compliance, a non-binding recommendation could be made by the Council against a Member State. However, although this served as a model for the OMC, the situations in which the OMC have been applied, as listed above, have not operated within a comparable situation since the benchmarks in EMU revolved around a hegemonic force (i.e. the German economy),

⁵ D Hodson and I Maher, 'The Open Method as a New Mode of Governance: the Case of Soft Economic Policy Coordination' (2001) 39 *Journal of Common Market Studies* 719, 720.

⁶ European Council, 'Presidency Conclusion of the Lisbon European Council' (Lisbon Strategy), 23-24 March 2000, 37.

⁷ C de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8 *European Law Journal* 38, 39.

⁸ *Ibid.*, 40.

⁹ Hodson and Maher (n 5) 727.

which is not the case for social and employment policy.¹⁰ To take one example, social exclusion has been the focus of both Armstrong and de la Porte's research into the application of the OMC.¹¹ Tackling social exclusion is an example of a policy area generally seen as 'sensitive' for Member States, and harmonisation measures have been minimal. Non-binding mechanisms have long-since been used in this area in order to encourage Member States to act in a particular way, although the use of the OMC is a marked change since it is in effect a 'generalizable technique of governance', the characteristics of which are examined in the following section.

Characteristics of the new modes of governance and the White Paper on Governance: citizen sovereignty?

One of the distinctive features of the OMC which allows Member States to fulfil these common objectives is the importance and role of a variety range of actors, and in particular 'social partners' and 'civil society'. This is also a common feature of other new modes of governance, such as mainstreaming and benchmarking, and suits the discourse emerging from the institutions about the need to connect with citizens to a much greater extent. Eberlein and Kerwer group the characteristics of the new modes of governance as follows:

new modes of governance depart from the Community methods of legislating through the use of regulations and directives. They build on the participation of private actors in policy formation, relying on broad consultation and substantive input. Policy-making follows a procedural logic in which there is joint target-setting and peer assessment of national

¹⁰ Ibid., 729.

¹¹ K Armstrong, 'Tackling Social Exclusion through OMC: Reshaping the Boundaries of European Governance' in T Börzel and R Cichowski (eds) *The State of the European Union volume 6: Law, Politics, and Society* (OUP, Oxford 2003).

*performances under broad and unsanctioned European guidance.*¹²

The engagement of non-governmental actors in policy processes is one of the strongest characterisations of new governance, in both the broad and narrow senses. The inclusion of 'social partners' and 'civil society' also point to why talking about *new* governance can have ideological and normative connotations, since they are invariably associated with the connotations of what a modern system of governance *should* be.

Faced with the increasing discussion about new governance in the EU, a Commission White Paper on Governance appeared in 2000. It did not discuss the use of new modes of governance in specific aspects of European integration, but took a wider view as to the place of new governance within European integration. The Commission noted that despite the achievements of European integration, which has 'delivered fifty years of stability, peace and economic prosperity',¹³ there is without a doubt the problem that many Europeans do not feel involved in, or close to, decision-making at the European level. Questions about the relationship between the EU and national policy-making processes become highly apt.

The White Paper identified areas for action on the part of the institutions and Member States with the general aim of rendering decision-making clearer to the citizen, who should also be more involved (individually or as part of a group) in the formation of law and policy. This is especially true since the areas in which the EU institutions, particularly the Commission, had a clear mandate to pursue integration (especially the Single Market) have largely been achieved.¹⁴ These action points are underpinned by five principles of good governance, namely openness, participation, accountability, effectiveness and coherence, therefore making the link with the normative connotations of 'new' governance.¹⁵ New governance approaches may offer

¹² B Eberlein and D Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 *Journal of Common Market Studies* 121, 123.

¹³ White Paper on Governance (n 4) 7.

¹⁴ Caporaso, J A and Wittenbrinck, J, 'The New Modes of Governance and Political Authority in Europe' (2006) 13 *Journal of European Public Policy* 471, 473.

¹⁵ White Paper on Governance (n **Error! Bookmark not defined.**) 10.

enough flexibility so that the EU institutions are not faced with gridlock or an impossible task of ensuring implementation of directives and so on. There has also been the view amongst several Member States that the volume of binding legislation has become overly burdensome, and that there is a need for a reduction in the overall amount of regulations and directives in force. 'Better regulation' and the readiness to roll-back 'unnecessary red-tape' were stated objectives of the Barroso Commission upon taking office.¹⁶

As such, decision-making at all levels is the best way of ensuring that European citizens feel informed about how the EU and its policies affect their lives. Debates about global civil society have reflected similar arguments.¹⁷ The White Paper speaks in terms of 'a reinforced culture of consultation and dialogue'¹⁸ and 'network led initiatives'¹⁹. This would assist in adding democratic legitimacy to the Union's system governance, especially if it eventually results in the development of a European civil society, beyond the traditional boundaries of the Member States.²⁰

By stressing the inclusiveness aspects of the new modes of governance, the White Paper demonstrates that 'new' governance as a term can come close to the meaning of 'good' governance, which in this scenario may help to legitimize the European integration process in the eyes of the citizens of the EU. It is also grounded in the language of reforming the European integration process and better engaging with citizens. It must also be borne in mind, however, that the Commission has an inherent self-interest in presenting the new modes of governance as a variation on the CCM (where it enjoys a monopoly on the initiation of legislative measures),

¹⁶ JM Barroso, 'Strategic Objectives' (Address to the European Parliament, Strasbourg, Speech 04/539, 14 December 2004).

¹⁷ R Wilkinson, 'Global Governance: A Preliminary Interrogation' in R Wilkinson and S Hughes (eds) *Global Governance: Critical Perspectives* (Routledge, London 2002) 11; J Bartleson, 'Making Sense of Global Civil Society' (2006) 12 *European Journal of International Relations* 371.

¹⁸ White Paper on Governance (n **Error! Bookmark not defined.**) 16.

¹⁹ *Ibid.*, 18.

²⁰ K Armstrong, 'Rediscovering Civil Society: the European Union and the White Paper on Governance' (2002) 8 *European Law Journal* 102, 105. Armstrong, in the same article, discusses the possible meanings of 'civil society' and 'European civil society' since these can be interpreted in vastly different ways.

rather than a more radical departure.²¹ It is certainly not in the Commission's interest to portray the new modes of governance as a reinforcement of the role and sovereignty of the Member States at the expense of its own role. The White Paper was there notable for the importance placed on the continued need for the CCM. The Commission's own interpretation of the place for the new modes of governance has provoked a great deal of debate.²² Nevertheless, Eberlein and Kerwer warn against being overly sceptical;

*one should not rush to dismiss new modes of governance as nothing but a smokescreen for the Commission as it attempts to pursue revitalised but old-style regulation. Most importantly, documents such as the White Paper cannot be viewed as authoritative guides to the 'real' policy approach of key actors such as the Commission. They are notoriously political, ambiguous, and thus difficult to decipher. And they are not reliable guides to a complex 'policy reality'.*²³

It may be the case that fewer regulations and directives are made than in the past, especially when compared to the period prior to the completion of the Single Market, but it should not be taken to mean that methods of new governance such as the OMC will always be appropriate as alternatives. Similarly, it should not be argued that one form of governance is necessarily superior to the other: the binding nature of rules and voluntarism of new modes of governance both have their place within the European integration process depending on the aims and context. In this respect, discussion of 'old' governance (meaning the CCM) and 'new' governance (including the OMC) can be misleading. The important point to draw from this

²¹ D Wincott, 'The White Paper, the Commission and the Future of Europe' (2001) 14 European Union Studies Association Review 2

²² For example; L Metcalfe, 'More Green than Blue: Positioning the Governance White Paper' (2001) 14 European Union Studies Association Review 4; DM Curtin and IF Dekker, 'Good Governance: the Concept and its Application by the European Union' in D M Curtin and R A Wessel (eds) *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Antwerp, Intersentia 2005)

²³ Eberlein and Kerwer (n 12) 124.

discussion for the purposes of this paper is that the system of governance in the Union is more complex than the provisions laid down by the Treaty would suggest. Neither is it suggested that the 'new' will replace the 'old'. Even a narrow view of the new modes of governance as limited to very specific instruments, such as the OMC, shows that understanding the 'law' in the internal sphere must take account of a greater variety of actors involved in the processes and the effects of measures which may not have explicitly stated binding characteristics. The level of citizenship participation thus varies as to what measures are pursued, whether within the new modes of governance or the CCM. However, the extent of citizen participation in the new modes of governance is unclear, given their lack of definition.

Conclusions

This short paper has attempted to link the emergence new governance within the broader questions of how sovereignty works in an enlarged EU in the 'post-constitutional' era. Two conceptualisations of sovereignty were drawn upon – state sovereignty and popular/citizen sovereignty – and both can be seen to feature strongly in analysing how and why new governance has emerged. For the Member States, new modes of governance offer an alternative to the CCM with two distinct advantages: the lack of (formal) enforcement procedures and (from a more integrationist perspective) the opportunity to pursue cooperation in the absence of explicit Treaty competences if the Member States so desire.

This suggests, however, that the new modes of governance could threaten the position of the CCM as the core legislation-making process in the EU. It also suggests that European integration could take a step backwards by moving back towards a more intergovernmental structure with the Commission acting merely as something akin to a secretariat. Neither of these points appear to have strong foundations: in many cases where OMC (for example) has been used, CCM legislation would have been inappropriate and therefore counter-productive: the new modes offer a way to pursue cooperation which should not be seen as a rejection of the 'old' modes. For popular/citizen sovereignty, new governance promises much in terms of bringing a wider range of actors within decision-making processes. This can only be achieved,

however, if a clear notion of what 'civil society' actually means in the EU context. Otherwise, the advantages of 'new governance' for the citizens of the EU will be unfilled. Since it appears that new governance is here to stay, these are pertinent issues for the EU in its 'post-constitutional' era.

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