Introduction

I. The rise – and relevance – of new governance in the European Union

In signalling the development of the Open Method of Coordination (OMC) through the Lisbon European Council in 2000, EU leaders were primarily interested in a particular goal – to make the EU, by 2000, the most dynamic economic area in the world.[1] Their actions, however, also triggered a deep and lasting debate regarding the development of 'new' or 'alternative' modes of governance in the EU: a debate that has found its most recent instalment in the scramble to build a new Lisbon strategy for the decade leading to 2020.[2] The very use of the term 'new governance' to describe methods like the OMC already creates the capacity to confuse. What is 'governance' anyway and what is 'new' about it? What methods of EU law and policy are included under the 'new governance' label and which are outside of it? What are the criteria against which new governance methods should be evaluated? These questions will be asked and answered in the first and second chapters of this book.[3]

A more foundational question, however, must also be addressed. Why is the new governance debate a debate fundamentally *worth* engaging in? What is it about the turn to governance in the EU that makes

[1] Presidency Conclusions, Lisbon European Council, March 2000 at 2.
[2] Commission Communication, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020; Presidency Conclusions, European Council, March 2010, EUCO 7/10.
[3] See also, on these conceptual questions, C. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 2; M. Jachtenfuchs, 'The Governance Approach to European Integration' (2002) 39 *Journal of Common Market Studies* 2.

analyses of these methods important, both for lawyers, and for the broader category of all those interested in EU integration? At one level we should approach this question with a healthy scepticism. As indicated by the Lisbon Council, one of the essential features of methods like the OMC is that they are non-binding. Given that new governance methods do not in most – but by no means all – cases lead to 'proper law', why should we then take their procedures and outcomes seriously? (Or, indeed, read a whole book about them!)[4]

There are three main reasons why this may be so. The first – and most central to the guiding thesis of this book – is that in examining new governance we are not just looking outside the law, but also exploring the manner in which EU law is evolving or transforming.[5] While the added value of new governance methods has often been seen in terms of their ability to provide coordination 'outside' the official constitutional structure of the EU Treaties, new governance, as we shall see, is in a relationship of continuity and interaction with traditional legal methods. The very need for a turn to governance in the EU illustrates how – as Chapter 3 of this book will argue – EU law has turned to procedural visions of law in order to cope with unique features of the EU system, such as the territorial diversity and functional complexity of regulating in a transnational context. In this sense, rather than seeing new governance as being something other than 'proper law', the development of new governance methods itself challenges what it means to make and apply law in an EU setting.

There is, however, also a second dimension to the added value of taking new governance in the EU seriously. While the overriding goal of the 2000 Lisbon Council, as already indicated, was to improve the EU's economic competitiveness, this was also to be embedded in other social goals – such as raising employment among key groups, and tackling poverty – to be delivered through new governance methods. In this sense, in examining the development of new governance in the

[4] To take an example of this, the social dialogue established under Art. 155 TFEU is often discussed under the new governance label but may lead to binding EU law where adopted by the Council. Dialogue between management and labour at EU level may also, however, remain in the form of non-binding agreements.

[5] The idea of transformation will be explained below in the context of the third wave' of governance research. It refers, however, to an idea of seeing new governance not as apart from law, but as indicative of its evolution to new 'participatory', 'experimentalist' or 'reflexive' forms. For more on this idea, see the papers of the 2009 'Transatlantic Conference on New Governance and the Transformation of European Law', Madison, Wisconsin, 20–21/11/09, (2010) *Wisconsin Law Review* 2. See also, G. de Búrca and J. Scott, 'Introduction' to *Law and New Governance in the EU and US* (Oxford: Hart, 2006).

EU context, we are also examining whether this attempt to provide a 'social dimension' to EU law, and to the EU's normal concerns, has been successful. As Chapter 1 of the book will explore, any simple reading of new governance's social potential should be understood in light of the deep ambiguity of new governance's social role – while methods such as the OMC have been used to develop social policies at the EU level, their close attachment to the Lisbon strategy have also led to accusations that the OMC may be a 'trojan horse' for the re-orientation of national welfare states along neo-liberal lines.[6] The substantive goals advanced through new governance will be explored and analysed not just at an abstract level, but through an in-depth case study of social inclusion and social protection in Chapter 4 of the book: to what extent has new governance led not just to a legal but to a social 'transformation' of EU law?

Finally, the importance of new governance also lies in the possibilities it offers for democratic transformation in the EU. Certainly, the democratic potential of OMC-like methods was a strong part of their original allure.[7] As an alternative to the type of 'direct' representation provided by the European Parliament, or through the intermediaries of national governments in the Council, the turn to governance – as heralded in the Commission's 2001 *White Paper on Governance* – was to be legitimated through principles of openness, accountability and participation, in which the direct involvement of civil society actors in forming EU rules 'from the bottom up' would substitute for traditional forms of democratic accountability. In evaluating new governance, we are also evaluating one of the original attempts by the EU to anchor the legitimacy of post-national law in a different, and more participatory, form of rule-making. The very struggle of methods like the OMC to live up to this original hope has much to tell us providing, as Chapter 5 will argue, important lessons for how new governance mechanisms could be reformed.

One should not over-state new governance's 'transformative' potential. As this book will argue, the transformations methods like the OMC have brought about in legal, social and democratic terms have often

[6] C. Joerges and F. Rödl, 'Social Market Economy as Europe's Social Model?' (2004) *EUI Working Papers (Law)* 8; M. Dawson, 'The Ambiguity of Social Europe in the Open Method of Coordination' (2009) 34 *European Law Review* 1.

[7] See J. Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press, 2005) at 224; S. Borras and K. Jacobsson, 'The Open Method of Coordination and New Governance Patterns in the EU' (2004) 11 *Journal of European Public Policy* 2 at 189.

under-whelmed, leaving a number of serious legitimacy concerns in their wake. The advent of new governance has not only altered the contours of EU law, but also threatened some of its most important values, such as the level of general political input and democratic oversight into its procedures. Nonetheless, the changes methods like the OMC have unleashed in their first ten years deserve attention not just for those engaged in new governance mechanisms themselves, but for all those interested in the legal and institutional evolution of the EU. New governance's evolving relationship to EU law provides important insights for sceptics and supporters of its development alike.

II. What does this book have to add? Two waves of 'new governance in the European Union'

In some senses, new governance was very much the EU's movement of choice at the beginning of the twenty-first century. Following the corruption and political failures of the Santer Commission in the late 1990s, the governance agenda seemed to offer a way forward for the Union which rejected both intergovernmental self-interest and bureaucratic centralisation. The academic debate followed this optimism, devoting countless articles to the study of political phenomena whose contours and outcomes were highly unclear. A significant academic and institutional literature on new governance thus arose.[8] What does this book have to add to that literature?

Answering that question requires a basic understanding of the existing contours of the academic debate over the relationship between new governance and law.[9] As stylised as it may be (indeed a less stylised account will be developed in the second chapter), it may be useful to consider this literature in three 'waves' of activity; waves which both embody different conceptions of the new governance project – and indeed of law itself – and carry distinct strengths and weaknesses.[10]

[8] See, for example, the hundreds of entries contained in the OMC Bibliography hosted by the EU Centre of Excellence of the University of Wisconsin (available at: http://eucenter.wisc.edu/OMC/open12.html).

[9] It should be noted that only essential references will be provided in this introduction. A more thorough review of existing literature on governance is developed at the beginning of Chapter 2, section 2.

[10] On the concept of different 'waves' of activity in the relationship between new governance and law, see M. Dawson, '3 Waves of New Governance in the European Union' (2011) 36 *European Law Review* 2.

The first 'diagnostic' wave, for example, was largely 'negative' in character. The very labelling of the term 'new governance' demanded that early literature could say both what the phenomenon of 'governance' implied in the EU context, and what was new about it. In legal literature, the simplest way of contemplating this task has been to define 'new governance' in relation to its other – the 'classical community method' of EU law (a contrast conducted by the Commission itself through its own *White Paper on Governance*).[11] Whereas the classical method – or at least the Commission's partial view of it – implied a strict division of powers between the different EU institutions, and between the EU and its member states, 'new governance' encompassed methods – like the OMC, regulatory agencies, the social dialogue, and even 'old' comitology committees – that eroded these distinctions, interweaving between different levels of governance.[12]

The threats this posed to implicit and explicit constitutional guarantees in the EU – like the 'institutional balance' and 'enumerated competences' protected under the Treaties – was justified through a unique step – the idea that, as these methods are conducted via 'soft law', they pose no direct threat to the Union's existing legal structure. This move – to simultaneously advance new governance as a significant normative project, and to downplay the significance of its pathologies through the label of 'soft law' – has been a vital focus for the academic commentary. It has led to a strong guiding idea – that in examining and developing new governance, we are somehow distancing or rejecting EU law, or the template of 'integration through law' offered by the very founders of the integration project.[13]

The significance of the label 'soft law', however, lay in its ability to encourage both proponents of the turn to governance in the EU and critics to see new governance in similar terms. For some, particularly political scientists, this softness spoke to inherent limits in the method's functional steering capacities. If the OMC was really 'soft', what incentives would states have to follow its instructions, especially when

[11] See J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1. See also, later, J. Zeitlin, 'Is the Open Method of Coordination an Alternative to the Community Method?' in R. Dehousse (ed.), *The Community Method: Obstinate or Obsolete?* (Basingstoke: Palgrave Macmillan, 2009).

[12] *European Governance: A White Paper*, COM (2001) 428 final, 8–9.

[13] see M. Cappelletti, M. Seccombe and J. Weiler, *Integration Through Law* (Berlin: De Gruyter, 1986).

coupled with the 'hard' and binding sanctions of monetary union or the law of the internal market?[14] For others, this softness was precisely why methods like the OMC were attractive. Rejecting the model of 'one size fits all' regulation, soft modes of governance could allow distinct national welfare regimes to move towards shared goals without disturbing the autonomous organisational structures upon which they were based.[15] The 'rise of soft law', and its contra-distinction to the 'hard' forms of integration that had characterised the previous twenty years, was read both as the source of, and the principle barrier to, the lasting effectiveness of 'new governance' methods.

What this first wave largely ignored, however, was the paradox within. The source of the perceived 'effectiveness' of new governance methods under both readings lay in their ability to bind their participants into a common cognitive framework; one that did not require coercion. This way, a common re-orientation of national social regimes (i.e. towards ideas of 'active' and 'open' labour markets or 'sustainable' pensions) could occur without the need for the traditional legal apparatus (and the idea of 'enumerated competences' that it implied).

The more, however, the method was 'effective' in these terms (the more it was able, for example, cognitively to bind its participants, or alter their preferences), the less 'soft' it appeared. The very success of new governance in achieving concrete policy outcomes (which could then act as a trigger for domestic policy-making), would precisely undermine the argument that it could happily evade traditional guarantees of due process and parliamentary scrutiny, i.e. on the basis that it was a 'mere soft coordination procedure', parallel or complementary to 'hard law'. The need to demonstrate that the method was more than a 'paper tiger' thus could lead directly to the accusation that it was a 'Trojan horse', subverting democratic governance in the very name of a more efficient and responsive form of rule. The mere labelling of the OMC as 'soft' – as Chapter 2 will argue – does not, and should not, allow it to escape extensive legitimacy challenges.

[14] For two exponents of this 'paper tiger' thesis, see F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* 4 at 654–656; A. Héritier, 'New Modes of Governance in Europe: Policy-Making without Legislating?', in Héritier (ed.), *Common Goods: Reinventing European and International Governance* (Lanham: Rowman and Littlefield, 2002) at 185–206.

[15] J. Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press, 2005).

In this way, the first diagnostic wave – while important in saying what governance was, or what was innovative about it – failed to think about what 'governance' could mean in positive terms. Its rush to define new governance in opposition to law carried the capacity to stylise both 'governance' *and* 'law', while ignoring the exchanges and interplays between them.[16] Furthermore, by viewing governance as something merely 'parallel' to 'EU law proper', first wave understandings conveniently ignored the question of whether existing EU institutions – such as committee structures, courts and even Parliaments – might need to be reconsidered in light of the regulatory environment which the dawn of OMC-like methods heralded.[17]

It was precisely to face these challenges that a 'second wave' of literature was needed. Rather than view new governance and law as compliments, second wave literature argued that methods like the OMC were indicative of law's evolution in a post-national context. While first wave literature had gone to great lengths to establish the differences between new governance mechanisms and 'traditional' forms of European law, there was nothing 'traditional' about EU law to begin with. It had to be understood – like national law – as an inherently unstable medium, capable of responding to changes in its surrounding regulatory environment.

This was both a positive and a negative thesis. Negatively, this evolution meant the evacuation of law as a universal register, in favour of more functional, or directly political, logics.[18] The dubious ideal of Majone's 'regulatory state' was central to this negative narrative – his image of a depoliticised European polity a symbol of the attempt to divorce European law from distorting forms of majoritarian politics.[19] For critics, this technocratic ideal privileged market rationality above all else – using the misnomer of 'soft law' to allow the gradual filtration

[16] See D. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 3; C. Kilpatrick, 'New EU Employment Governance and Constitutionalism' in de Búrca and Scott, n. 5 above.

[17] A task taken up in Chapter 5 of this book.

[18] See C. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 2; M. Greven, 'The Informalization of Trans-national Governance: A Threat to Democratic Governance' in E. Grande and L. Pauly (eds.), *Complex Sovereignty: Re-constituting Political Authority in the 21st Century* (University of Toronto Press, 2005).

[19] G. Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 3.

into national welfare states of economic imperatives that could never be agreed upon through an explicit political decision.[20]

For proponents, however, the 'transformations' being brought by new governance meant not just the removal, but the *re-invention* of concepts such as democracy and the rule of law in the EU, outwith the comfortable environs of the nation state.[21] Descriptively, a softening of legal rules, and a preference for procedural 'frameworks' over substantive prescriptions, was an increasing tendency in 'hard' forms of EU law, as well as soft. One could observe 'proceduralisation' in European law – an acceptance that, in a system made up of overlapping welfare regimes, a relatively uniform hierarchy of European norms would have to make way for the ongoing negotiation of EU rules in delicate policy fields (with law largely relegated to the role of a 'structuring device').[22]

The second wave was more, however, than a descriptive project but an attempt to defend, and indeed promote, a 'governance vision' of the very future of the EU polity. Dense theoretical models – from American 'democratic experimentalism', to Gunther Teubner's category of 'reflexive law' – were at the forefront of a claim that an EU governed by OMC-like methods provided a broader model for regional integration the world over ('EU as front-runner not outlier').[23] While new governance methods lacked the validation of a democratic sovereign, their multiplication of the number of actors involved in the formation of European rules could allow differences between national contexts to be seen as a 'democratic advantage', allowing otherwise distanced regulation to be both re-framed in a *local* context, and used to create innovative public policies potentially applicable to *all* member states. The normative vision of the second wave thus saw, in new governance, not a subversion of democratic rule, but an attempt to render it operational in

[20] C. Offe, 'The European Model of "Social" Capitalism: Can it Survive European Integration?' (2003) 11 *Journal of Political Philosophy* 4 at 464; C. Joerges and F. Rödl, 'Social Market Economy as Europe's Social Model?' (2004) *EUI Working Papers (Law)* 8.

[21] See e.g. W. Simon and C. Sabel, 'Epilogue: Accountability without Sovereignty' in de Búrca and Scott, n. 5 above.

[22] See A. Adronico and A. Lo Faro, 'Defining Problems: The OMC, Fundamental Rights and the Theory of Governance', in O. de Schutter and S. Deakin (eds.), *Social Rights and Market Force: Is the Open Coordination of Employment and Social Policies the Future of Social Europe* (Brussels: Bruylant, 2005).

[23] C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 3 at 323.

circumstances where the legitimacy of a central 'popular will' could no longer be taken for granted.[24]

Therein, however, lay the primary problem of the 'second wave'. Theories like experimentalism and reflexive law certainly had considerable success in framing the academic and institutional debate. One would find it difficult to find a major institutional document about the OMC that did not contain some reference to its 'multi-level' or 'participatory' character. The irony, however, is that these references were often made without serious or comprehensive attempts to test their guiding assumptions.[25] Owing to a number of methodological difficulties, the first two waves of literature – with some important exceptions – did not engage in significant empirical research, on the basis of the (admittedly often valid) assumption that it was 'too early to tell'.[26] Often the closest such frameworks came to empirical testing was to gauge the level of 'best fit' between the theoretical models they offered and the descriptions of the OMC given by the EU institutions.

This deductive approach carried significant limits. The first was that so much could clearly be missed out. Entering the new governance debate from particular fixed theoretical perspectives, one is tempted to claim that many theoretical accounts were quick to seize on any evidence of concurrence between their models and the 'practice' of the OMC without stopping equally to consider what failed to fit the picture. The urge on the part of the philosopher to prove that he or she is 'living in the real world' (rather than an ivory tower) is understandable, but can also potentially lead the practice to 'fit the theory' rather than the other way around. Such approaches faced the problem

[24] M. Dorf and C. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 2; C. Sabel and O. Gerstenberg, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford Univeristy Press, 2002).

[25] This obvious deficiency is addressed by Sabel and Zeitlin in the article cited in n. 23 above. The 'patchwork' nature of the article, however, is notable, as is the shift from seeing particular methods as 'experimental' to pointing towards a general 'experimental architecture' in the EU (where the authors can pick and choose between processes in various disparate fields in order to evidence each of their core 'experimentalist' claims).

[26] An obvious exception – albeit with limited theoretical analysis – is Jonathan Zeitlin and Phillipe Pochet's *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Bern: Peter Lang, 2005). See also, on the impact of the OMC on national reforms, J. Zeitlin and M. Heidenreich (eds.), *Changing European Employment and Welfare Regimes: the Influence of the Open Method of Coordination on National Reforms* (London: Routledge, 2009).

that – while they emphasised 'learning' and 'pragmatic experimentation' in their substantive content – they displayed little of this impulse in the framework of their own theories (with the framework deemed to be solid and complete, rather than something open to re-adjustment in light of observations emerging from experience).

The 'second wave' also, however, carried another problem. Its attempt to develop a robust account of how governance was changing law, or what 'legality' really meant in the twenty-first century, led it into a myriad of paradoxes and inconsistencies. These tensions were not only manifest in abstract theoretical models, but could also be observed in the practices of new governance and the OMC itself.

The model of 'democratic experimentalism' propounded by Sabel and Dorf is emblematic of these problems.[27] As the third chapter will argue, it faced a complex web of inner tensions. The first concerned participation. Experimentalism – as well as the other 'second wave' approaches discussed in Chapter 3 – relies on forms of direct participation to fill gaps of representation and political accountability vacated by the absence of a single or unitary popular sovereign. The normative claim that new governance could create a more responsive legal order depends on the capacity of its norms to be articulated by more than technocratic experts, but precisely those actors at the local level to whom social inclusion and employment policies are addressed.

Who though is to do the participating? It is almost impossible to conceive of an adequate threshold. Either the number of 'ideal' participants is likely to be too small – a sectional slice of the population, representing only its direct interests – or too large – so all-encompassing that any individuated, local or 'deliberative' articulation of public policy problems is impossible. While such theories relied on a participative ethic, they give few criteria over who is to take up the participatory burden, or if participants are to be selected, over who is to do the choosing. As we will see, this is no abstract difficulty, but one that is evidenced by the OMC itself, where 'the choosing' is most often conducted by the very executive actors that non-governmental participants are meant to be holding to account.

The second problem concerned the relationship of 'second wave' theories to stability. Experimentalism in particular recognises that the

[27] M. Dorf and C. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 2; J. Cohen and C. Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 4.