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Integration through de-legalisation? An irritated heckler*

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Abstract

This paper is about the difficult relationship between law and governance in the European Union. The turn to governance which the Prodi Commission has forcefully propagated is a continuation of much older developments. By means of these developments the European Community (now Union) has sought to compensate for the inadequacies found within its institutional design (in particular, within the Community Method); a design which has had constantly to be adapted to the ever more intense and complex regulatory needs of the integration project. These constant institutional innovations were functional necessities and the turn to governance seems to be irresistible and irreversible. Such innovation, however, is not easily reconcilable with the Union's commitment to the rule of law, or with the very idea of law-mediated, politically accountable rule. These tensions are addressed in two steps. The first concerns the national level and is a mainly methodological reminder: many of the governing techniques that are today defined as governance can also be found within national systems and were, furthermore, the subject of intensive debate in the 80s within discussion on proceduralizing and reflexive methodologies which sought to capture the specifics of a – then so perceived – post-interventionist law. The second step concerns the European Union. Here, a methodological approach is insufficient. It must instead be accompanied by a re-conceptualisation of European law as a new type of supranational conflict of laws. This law seeks to realize what the Constitutional Treaty had called the "motto of the Union", namely a reconciliation of "unity and diversity". It is submitted that a re-conceptualisation of European law in terms of conflict-of-laws would not only help to rescue the rule of law but would also increase our capacity to cope with the unresolved substantive tensions within the European polity.

Keywords: comitology, Europeanization, governance, multilevel governance, open coordination, private international law, rule of law

Table of Contents

1 Introduction: The turn to governance as a challenge to the rule of law and the structuring of the argument[1]

This essays deals with the precarious tensions between the European Union's commitment to the rule of law, on the one hand, and its regulatory practices on the other, and suggests solutions to that tension. The tensions became readily apparent with the proclamation of the turn to governance in the European Commission's White Paper of 2001 (European Commission, 2001; also 2000) and the intensive research activities in its aftermath.[2] Governance is not a genuinely legal concept. It is therefore unsurprising that pertinent analyses within political science hardly ever include reflections on the compatibility of governance practices with the rule of law and the idea of law-mediated legitimating of the exercise of public power. Important strands within the legal literature have followed suit (Trubek and Trubek 2005; Sabel and Zeitlin 2006; De Búrca 2006) and are considering alternatives to the rule of law.

This, it is submitted, is a big step too far and not really required, let alone justified by functional needs. This critique evolves in three steps. The first short step undertaken in Section 2 is a reminder of the intense debates in the 1980s on the failures of interventionist conceptions of law and the search for methodologies, such as "proceduralisation" and "reflexive law", which could cope with (then) new post-interventionist practices. These practices already reflected, albeit under different headings, a turn to governance. "Proceduralisation", as advocated by critical theory, and "reflexive law", as promoted by systems theory, were responses to the failures of interventionism, steering fantasies and command and control regulation, which deserve to be revisited prior to a premature farewell to the rule of law. Both of these responses, however, did not yet reflect upon globalisation and Europeanisation processes. These processes require the development of denationalised governance arrangements and legal responses which are not dependent on a supranational statal entity. Section 3 provides an overview of old and not so old modes of European governance through which Europe has managed to adapt its regulatory machinery to transnational regulatory needs. It also documents the readiness for institutional innovations and the efforts keep them in the shadow of the law which have become ever more difficult with the advent of the truly new modes of governance, in particular, that of the Open Method of Coordination. The third step of the argument, undertaken in Section 4, suggests that the further erosion of the rule of law can be avoided. Rather than softening the law, transforming its substance or abandoning it, we should strive for a re-conceptualisation of Europe's constitutional charter. We should learn to understand European law as a supranational conflict of laws which

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[1] This essay is part of an ongoing project. It builds upon two recent co-authored pieces (Joerges and Everson 2005; Joerges, Braams and Everson 2007). A German version was presented at a conference on Governance organised by Gunnar Folke Schuppert and Michael Zürn on 8-9 February 2007 at the Wissenschaftszentrum Berlin. The present revision has profited from the discussion in Berlin, from subsequent discussions on conferences at the EUI and in Flensburg, in particular from comments by Armin von Bogdandy and also from intensive exchanges with Rory S. Brown, PhD researcher at the EUI. I also would like to thank the anonymous reviewer of EUROGOV for clarifying comments.

[2] The CONNEX bibliography collecting the relevant literature contained some 2900 entries at the time of writing (October 2006) and 3345 at the time of its translation (May 2007), see http://www.connex-network.org/govlit.

copes with Europe's diversity. The concluding Section 5 considers some practical implications of the conflict-of-laws approach.

2 Governance: Remarks on the recent career of the concept and a reminder of older methodological debates

Governance is not a legal concept. Its intellectual *Heimat* is international relations scholarship and practice (Rosenau 1992; Schmitter 2001). Reflections by lawyers on practices characterized as governance will hence have to be interdisciplinary. The quest for interdisciplinarity is *en vogue.* Compliance, however, remains difficult. As far as the interaction between legal and political science is concerned, we have to remain aware of the fact that each of our disciplines subscribes to a logic of its own; political science occupies itself mainly with explanations, legal science primarily with the interpretation of authorised texts and the elaboration of dogmatics. We also have to keep in mind, that the practices the term refers to differ from the forms of administrative and governmental action presumed in the inherited legal concepts of administrative and constitutional law. The re-conceptualisation in legal terms of "foreign" concepts can be sharpened through the lens of systems theory (Teubner 2004: 17 ff.). For its main interloctur, the discourse theory of law (Habermas 1992), a fundamental question arises: will the law, if it adapts and consecrates those practices, have to redesign the understanding of validity which is characteristic of constitutional democracies? If it cannot retain these validity standards, are criteria conceivable that shape national and transnational practices in such a way that, to use yet another formula from Habermas, they "*deserve* recognition" (Habermas 1998: 171 = 2002: 198; emphasis in the original)? Can we, using a term still to be analysed, "constitutionalise" modern praxis?

Legal science in Germany has reacted with well understandable hesitancy towards the governance turn proclaimed so emphatically by the Prodi-Commission (Möllers 2001). Since then the debate at national level has intensified very considerably, at least in Germany. We are not reconstructing these efforts here because they still presuppose the existence and appropriateness of a comprehensive legal and political system. One theoretical and methodological feature of these efforts, however, deserves to be underlined. Pertinent contributions (see notably Trute *et al.* 2004;, Schuppert 2005; Franzius 2006) seek to situate governance practices in a normatively (constitutionally) accredited context and see them analytically as compensations for the failure of traditional command and control regulatory policies (Mayntz 2005); their methodologies seek to provide normative guidance for the adoption of new governance practices.[3] Core theoretical and methodological assumptions of these debates are by no means specifically national. They concern the rule of law as such and, in particular, the idea of law-bound and law-legitimated

[3] "Governance through regulatory structures" (*Regelungsstrukturen)*, the formula coined by Schuppert (2005: 382), that has now become influential (Franzius 2006, with references) postulates a connection between the law's problems of structure and methodology in a form that no doubt corresponds to the turn towards proceduralisation of law addressed in Section 2 below. In Section 3, however, we shall be concerned with specific features of the European polity that have led to the adoption of governance practices there; in order to cope with them legally, the patterns developed in our nation state context must be recast.

Herrschaft, the exercise of power over the governed through governance – and it is these leitmotivs which should be taken seriously also at European level.

I should like to recall a related commonality, namely the legal theory criticism made in the 1980s of political and legal interventionism and the ensuing search for concepts of a "post-interventionist" law. The disappointment at the ineffectiveness of legal "purposive programmes" (*Zweckprogramme*: for this category see Luhmann 1972: 227 ff.) and the concerns about "colonisation of the lifeworld" by social policy programmes and their conversion to administrative law (Habermas 1981: 522 ff.) were, at the time, developed simultaneously and in critical equidistance. A common feature was the perception that economic and social processes are embedded in a much more complex way in modern societies than is indicated by the dichotomies that pitted market and state, economy and intervention, law and economics in (quasi-) oppositional relations. What was sought was a new legal rationality to replace social state interventionism and its "material" ("substantive") rationality of law, without falling retreating into classical legal formalism and having to endure the associated weaknesses in relation to forms of economic and social power.[4] The new rationality of law was intended additionally to unmask the myth that law could cope with social reality by "applying" social theories. The "proceduralisation" of the category of law (Wiethölter 1982/1983; Habermas 1992: 516 ff.; 1996: 337 ff., 378 ff.) and the concept of "reflexive" law (Teubner 1982) were the new antagonistically disposed torchbearers.[5] Both tendencies dealt with very many dimensions of the practice of law; with shortcomings in implementation, alternatives to hierarchical "command and control" regulations, alternatives to strict judicial settlement of disputes, the pros and cons of "soft" alternatives to "hard" law – and with the core problem of the current governance debate: how can the law retain its legitimising functions once it is recognised that problem-solving will require the co-operation of politically accountable bodies with societal actors as well as a "cognitive opening" of legal discourses so as to ensure that scientific expertise and practical societal knowledge can come to bear in legal decision-making?

Déjà vu? Perhaps more exactly: *the 80s revisited*! After the turn to governance, all the questions just mentioned have to be asked again or, at least, be kept on the agenda. Is one irritation merely replacing another; is one fashion enormously rich in facets being replaced by a new trend? Historians of law with inclinations towards conceptual history may be able to clarify that. However, I wish to content myself with stressing three continuities which seem to me important for the transition to the "European level of governance".

1. One typical feature of governance arrangements is the usage of expert knowledge, not just, say, scientific knowledge, as is necessary for risk policy, but all sorts of expert know-how that may serve to solve and manage problems. This is a very old phenomenon, widespread even in the nation state. Wolfgang Schluchter (1985/1972) described it in terms of Weber's distinction between

[4] The common reference point of all debates in Germany were the pertinent passages in Weber 1967: 123-126; 329-343. These categories proved to be of long-term and trans-national significance (see D. Kennedy 2004).

[5] For a particularly helpful discussion of their specifics, differences and similarities see Cohen 2002: 151-179.

Amtsautorität and *Sachautorität,* respectively; institutionally derived authority as opposed to authority based on specific expertise.

2. If the administration cannot content itself in carrying out its tasks in the execution of norm-programmes, then society will have to be involved as the provider of expert knowledge, which the administration does not possess; it then seems also appropriate to incorporate social actors in the "carrying out of public tasks", not just because of their expert knowledge but in order to make use of their management capacities.
3. Of crucial importance for the arguments below is a phenomenon known in the tradition of American *Critical Legal Studies* as the law's "indeterminacy" (Kennedy 1986; Koskenniemi 1989) and "fragmentation" (Koskenniemi 2006). From a systems theory viewpoint, Helmut Willke (1983: 66; similarly 1992: 177 ff.) coined the term, "complex conflict situations" *(komplexe Konfliktlagen)*, to which the "supervisory state ought to respond with "relational programmes" (*Relationierungsprogramme)*.[6] His findings can also be described in more conventional terms. There are problems for which various competences have to be coordinated, and there may be conflicts among the objectives of political programmes in force, the solution to which is not pre-programmed anywhere.

This third aspect points to the unavoidability and the difficulty of the proceduralisation of law. Coordination efforts of the type just mentioned are *de facto* brought about in a "discovery procedure of practice". What normative qualities do such responses have? On what conditions do they "deserve recognition"? Given my focus on Europe I content myself with underlining affinities between the national and the postnational European constellation: even within nation state legal systems, there is a need to decide between or to coordinate incompatible legal principles or conflicting objectives. The outcome of such processes cannot be pre-programmed in any substantive way. The outcomes of such processes must derive their legitimacy from the normative quality of the processes themselves. All of this brings the discourse theory of law into some embarrassment. "When faced with political decisions relevant to the whole of society, the state must be able to perceive, and if necessary assert, public interests as it has in the past. Even when it appears in the role of an intelligent advisor or supervisor who makes procedural law available, this kind of lawmaking must remain linked back to legislative programs in a transparent, comprehensible and controllable way", as Habermas postulated (1992: 532; 1998: 441). Here he hits the necessity and the difficulty of "constitutionalising" decentralised production of law on the nose. The difficulty is two-fold: solutions to problems are dependent on *productive* performance by *social* actors, and therefore cannot be pre-programmed. The only procedural rules that can come into consideration have to extend to the consultation of governmental and non-governmental actors described brilliantly, if arcanely in Wiethölter (2003). We shall return to this in the European context (3.2 below).

[6] The closeness of this to the method of the Open Method of Coordination (3.5 below) and to its terminology are both striking. Relational programmes ought not to programme contents, and their supervision must be correspondingly reticent.

3 New and not so new forms of European governance: A chronology

Officially, unmistakeably and with far-reaching practical political ambitions the turn to governance in Europe came about under the aegis of the Prodi-Commission (Kohler-Koch/Rittberger 2006). Now, law and legal science cannot simply let themselves be impressed by a fine-sounding political agenda authorised from on high. In the White Paper on governance itself (European Commission 2001) there are very clear traces of legal-technical opposition to the "modernisation" of the traditional community method inspired by political and administrative science out of commitment to that method (Joerges 2001; 2002). These communication difficulties very clearly reflect the differences between the disciplines involved, addressed above. The structure of the following sections will follow these. It does not start from one of the definitions of governance that have by now been developed,[7] but follows the development of European practice (3.1-3.5), and only then will go on to ask whether this "deserves recognition" (Section 4).

The law has taken a markedly pragmatic attitude towards the turn to governance. Those who took the turn early were not economics or sociology think-tanks, but practitioners, officials and judges who saw themselves forced to operate in the shadow of and behind the back of the treaties. They soon did what has always typified the practice of law: it normally goes about things unspectacularly, but always remains concerned to clothe even far-reaching innovations in the conceptual garb of the established community method or at least present them as prosaic application of rules of adjudication. It was only in the course of implementing the 1985 internal market White Paper (European Commission 1985) that this reticence was gradually dropped. Options that had "turned up" became approaches and regulatory models.

The gamut of forms of European governance that has become established over and above the traditional community method has become extraordinarily rich. Lawyers are accustomed in seeking an overview to orient themselves by institutionalised forms of action and are thus ignoring refined and subtle differentiations – able to distinguish five modes of governance.

3.1 Comitology

The European committee system is the oldest form of "new" governance. It arose where complex European governance incorporating national actors first became indispensable, namely in agricultural policy (cf. Falke 2000: 176 ff.). In the course of the widening and deepening of the Europeanisation process, the rise of the committee system became unstoppable. "Comitology" is the technical legal term for the

[7] This form of descriptive approximation does admittedly not provide some analytically satisfying concept of governance. However, the way legal practice introduces innovations and legal science reflects them is a stumbling block to interdisciplinary communication that ought not be got of the way so easily. The turn away from the "community method" and the development of alternative forms of governance displays an exemplary course: (1) Practice "discovers" an undeniable need and "acts". (2) The interested parties and the academic experts become aware of these irregularities and endeavour to link them back to established positions of law. (3) The more hopeless such efforts appear, the more prospects there are for theoretical and methodological innovations and even interdisciplinary approaches.

committees entrusted with the implementation of Community law framework provisions. Through these committees, made up of representatives of the member states and experts appointed by them, the Commission organises a Community (i.e. overarching and cooperative) administration of the internal market in such policy areas as food safety, safety of technical products and safety at work. The committee system has to compensate for the Community's lack of genuine administrative powers, and guarantees. It ensures the accountability of the Commission-driven European administrative machinery to the member states – not to the European Parliament, which for decades has striven for a strengthening of its institutional powers. By incorporating national bodies, however, it also promotes acceptance of European rules in member states. The committees do the detailed work on reducing the functional and structural tensions of the internal market project. Even though, for the most part, the issues at stake seem purely technical, they may have important economic implications and politically sensitive dimensions. Thus comitology can be characterized as a mediator of functional requirements and normative concerns. The changing composition of the committees follows from the task of balancing differing sorts of technical knowledge and regulatory concerns and bringing them into a sort of synthesis. It also, however, reflects the multiplicity of interests and political differences that have to be coped with in the implementation process. The committees often act like "mini-Councils"; they act as venues for mediation between market integration and member states' concerns and reliable indications suggest that their discussions take place objectively and deliberatively (Joerges/Neyer 1997).[8]

3.2 The principle of mutual recognition as a governance practice

Following the legendary *Cassis* decision of the ECJ (1979), the Commission, in an 1980 Communication seeking to explain this judgment, presented the view that it should follow from the principle of mutual recognition developed by the ECJ that Europe could henceforth find the "better law" through a competition of legal systems so that law-making had to take a correspondingly reticent stance. This position was attacked by many.

However, this Communication was wishful thinking that the practice of internal market policy neither could nor would follow. It could not, because the assumption that processes arising from mutual observation by legal systems and the upholding of freedoms of European market citizens could be understood as a competitive discovery procedure was based on far too heroic premises. The pertinent ECJ jurisprudence was more sensitive and cautious notwithstanding its constitutionalising ambitions. The ECJ assigned to itself the functions of a constitutional court. But this it did with prudent self-restraint and in a manner consonant with and inherent in the

[8] Strikingly enough, the intense debate on comitology, and in particular the many critical voices, hardly ever touch upon the socio-economic implications of the system, even though their importance is obvious – and will become even more important with Eastern enlargement. This silence can be explained by the understanding of the internal market as a sphere without economic asymmetries of normative significance. It became apparent especially in the BSE crisis that this premise can be all too fictitious. Europe had to tolerate and to support compensatory measures which British farmers were unable to bear: More positively speaking: Comitology operates on the premise that safety concerns should in principle be insulated from socio-economic concerns (see Joerges/Neyer 1997: 287 f., 293 f.). It seems safe to predict that this premise will be ever more difficult to defend in the enlarged Union.

integration project. Member states were not confronted with "positive" prescription but instead asked to present the justification for their regulatory concerns and urged to ensure their compatibility with Community objectives as far as possible (see Poiares Maduro 1998: 150 ff.). Since this became clear, the debate on mutual recognition has become more intensive and more interesting (Schönberger/Somek 2006; Nikolaïdes/Schmidt 2007). The ECJ's caution need not to be interpreted as some arrangement with the political power of the member states. Its jurisprudence was – most of the time – normatively convincing because, specifically in the area of internal market policy, questions of political sensitivity that political systems ought not simply to leave themselves continue to arise.

What the ECJ's case law instead brought about in the area of fundamental freedoms is an opening of national legal systems to internal criticism that is, however, able to use viewpoints from other jurisdictions to support its arguments. National legislatures have to justify the reasonableness of their own laws in front of their own courts and the ECJ. European law supplies criteria for this – such as appropriateness and proportionality – and obliges member states to take account of their neighbours' concerns. This proceduralisation of law does not mean that Europe's citizens are allowed to choose whatever law is most favourable to them thus replacing legal policy debates about the proper law by a competition of legal systems (for the exemplary case of company law see Joerges 2006: 161 ff.)

3.3 The "New Approach" to technical harmonisation and standards: "Private Transnationalism"

The (success) story of the "New Approach" has been reconstructed often enough (brilliantly recently by Schepel 2005: 37 ff.). Suffice it here to recall only the following; efforts to remove non-tariff barriers to trade had involved the EEC in dilemmas because, being caught up in the paradigm of "integration through law", it wanted to create the internal market by harmonising the relevant norms of member states. This called for "positive" legislative acts to an extent that would have outdone Sisyphus. Not much changed much with the replacement of the old unanimity rule of article 100 EEC by qualified majority decisions in 1987 (Art. 100a TEU). Again, transposing the mutual recognition obligation brought in by the *Cassis* decision (ECJ 1979) proved tricky in practice in individual cases and was basically inadequate for making broader changes. Typically, the formally private sets of standards which, particularly in Germany, fleshed out product safety requirements were no less integration-averse. Given the definition of these sublegal product standards as non-mandatory, merely private obstacles to trade, the Community was impotent to act through harmonisation measures. The cunning in the New Approach was concealed in a package of interrelated measures: European law-making had a large burden taken away from it, essentially by henceforth contenting itself with laying down "essential safety requirements". Fleshing these out was delegated to experts from European and national standardisation organisations well-used to dealing with each other. In practice, the inclusion of non-state actors meant "a delegation" of legislative powers that obviously could not be admitted openly. The protagonists of the new approach had to paper it over with the fiction that the "essential safety requirements" adequately programmed the work of the standardisation organisations.

3.4 Agencies: the politicisation of administrative action

Independent agencies were the institutional core of Giandomenico Majone's ideas (1994) for developing the EU in the direction of a "regulatory state". Majone's suggestions were never transposed one-to-one. While Europe took over the conceptions he had brought from the US and also created an impressive number of institutions that were termed agencies, what these new bodies are, or will become is not evident. However, the new European agencies share only nomenclature with their American namesakes, the independent regulatory agencies. They are not self-sufficient administrative units, and have no law-making powers. They are concerned with licensing procedures, for instance for medicaments, or with general, informal tasks of gathering and disseminating information, which merely guide or accompany "real" politics. The new European agencies, thus, as it were, meet the need for market-correcting, sector specific regulations indirectly or – in line with the European Commission's conceptual notions – merely as executive organs working under the Commissions. Correspondingly, it is assumed in many unofficial announcements that the agencies can do their jobs "technocratically". In fact, this conception fits their semi-autonomous status. It is also entirely compatible with their function of assisting the stakeholders of internal market policy in articulating their interests. It is equally compatible with the position that the administration of the internal market has more to do with "neutral" support for business activities than with laying down and implementing political and social programmes. But the legal treatment of the agencies as mere auxiliary organs is nonetheless insufficient, if not indeed misleading. Despite their formal subordination and despite membership of representatives of national authorities on their management bodies, the agencies seem, thanks to their founding charters (Council Regulations and Directives), their organisational stability, the relative autonomy of their budgets (taking different shapes in individual cases), and their networking with national administrations, to be very well protected against direct, explicit political influences (Everson 2005). Admittedly, all these ties also mean that the agencies cannot develop their programmes, but constitute a reorganised comitology, the powers of which are *de jure* confined to the form of the advisory committee.

3.5 The Open Method of Coordination (OMC): "Farewell to law?"[9]

The so-called OMC cannot, as far as its record of success is concerned, compare with the forms of governance sketched so far. Nonetheless, since the introduction of the new title VIII on employment in the Amsterdam Treaty and after the Lisbon European Council's recommendation to apply the OMC in areas of social policy, it attracted great attention and became seen as the new mode of governance *par excellence* (among many, Gerstenberg/Sabel 2002; recently De Búrca/Scott 2006; Sabel/Zeitlin 2007). The OMC gets its popularity by appearing helpful in areas where political actors feel considerable pressure to act but the treaty offers them no legislative powers, and anyway, little could be done using traditional Community methods. The thing that causes lawyers conceptual and methodological headaches is, particularly, the mode of action: legal bindingness and the sanctionability of legislative and administrative action is replaced in the coordination process by a

[9] The quotation marks are meant as a reminder: Voigt 1983.

procedure of multilateral supervision in which, on the basis of guidelines or benchmarks laid down by the European Council, the Council and the Commission, mutual systematic monitoring (multilateral surveillance) and assessment of the performance of the individual governments in the Council (peer review) takes place. Public support for this policy coordination and comparison of best practices are supposed to supply the necessary pressure to succeed and perform leading to adaptation and change of national policies at member state level.[10] No judicial protection is provided against this sort of political dominance, still less constitutional review thereof. Like measures would, after all, appear downright dysfunctional if political action is to be exercised outside powers provided for in constitutional and European law, whether in social, or educational policy, or harmonisation of civil law in Europe.

4 A new type of supranational conflict of laws as a form of Constitution for Europe

The reasons adduced for the development of the paralegal practice of European governance are fairly well known from criticisms of interventionist law, which deserve to be taken seriously: we need to address complex conflict situations that cannot be coped centralistically or hierarchically; at best, the law can provide a framework within which solutions to problems may be sought. Two features of the European system cause additional difficulties: Even where the nation state is not capable of programming solutions to problems and implementing its legislation through an administrative vertically stratified administration, nonetheless its integrative power, a requisite for consistent problem-solving is stronger than that of the European multilevel system. In Europe, law has to learn to mediate between various levels of competence with legal ties that are weaker than in a federal system. European law needs to accept the (relative) autonomy of its sub-units. The proper response to this difficulty is not to dissolve the law but, as we shall seek to show below, to re-conceptualise European law as a new type of supranational conflict of laws (4.1 below). Conflict of law responses may require a cognitively open and more reflexive approach. The mere description of the practices of European governance here brings out a trend that political scientists evidently find less irritating than do lawyers: the forms of governance that Europe uses were not provided for, or not “that way” in the treaties. This retreat to extralegal forms of action, which in the case of the OMC goes as far as governance with*out* the range of competences in the Treaty and, then, also tries to get by without law at all. Again, we will argue that this is to throw the baby out with the bath-water. It is conceivable within a conflict-of-laws model to provide for the integration of scientific and practical expertise not with a view to replace the rule of law by some technocratic regime but with a view to the elaboration of solutions on which politically accountable actors are able to agree at least provisionally (see on this “second order conflict of laws” 4.2 below).

[10] For a sceptical view, see e.g. Schäfer 2005: 190 ff.

4.1 *Unitas in Pluralitate*: First order European law of conflict (Deliberative Supranationalism I)

The answer to the first difficulty stems from a proposal developed by Jürgen Neyer and myself (Joerges/Neyer 1997) ten years ago when we called for the introduction of "Deliberative Supranationalism" in European law instead of the traditional or orthodox version; an approach we continue to defend and develop (Joerges 2006/Neyer 2006). Deliberative Supranationalism was developed on the example of a then theoretically neglected but a (relatively) venerable practice, namely comitology. Comitology, we found, in fact functioned far better than its opaque appearance might suggest. We asserted neither that the deliberative processes we had observed in transnational bodies could, in themselves, be democratic or ensure the type of legitimacy constitutional democracies can provide; still less, did we suggest a transnational functional bureaucracy as a mode of good European governance. We wanted instead to evade the usual debate about Europe's democratic deficit by inverting the usual perception of Europe's legitimacy dilemma. Rather than complaining that Europe does not meet the standards of democratic constitutional states we suggested that European law can be legitimated because of its potential to cure structural democracy failures of the nation states.

The kernel of the argument may date back to Rousseau (thus Grant/Keohane 2005) and is not as idiosyncratic as my terminology.

> "The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies presuppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes." (Joerges/Neyer 1997: 293)

If the legitimacy of supranational institutions can be designed so as to cure these deficiencies – as a correction of nation-state failures, as it were – they may then derive their legitimacy from this compensatory function. As I have recently put it:

> "We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires." (Joerges 2006: 790)

That is of course not the way the supranational validity of European law was originally understood and justified (see Weiler 1981). Fortunately enough, however, the methodologically and theoretically bold and practically successful ECJ decision in favour of a European legal constitution (ECJ 1963) can be rationalised in this way. The European "federation" thus found a legal constitution that did not have to aim at Europe's becoming a state but is able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of Deliberative Supranationalism. Existing European law had, we argued,

brought into validity principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project. All we have to do is look: Community members cannot implement their interests or laws unconstrainedly, they are obliged to respect the European freedoms, are not allowed to discriminate, they can pursue only legitimate regulatory policies blessed by the Community; they must, in relation to the objectives they wish to pursue through regulation, harmonise with each other and they must shape their national systems in the most community-friendly way possible. This kind of law, we said, was not undemocratic but was compensating for the nation state's democratic deficits. The legal form that can be achieved in this appeal to European law is available in the methodology of conflict of laws. Conflict of laws is an old discipline. Its "modern" era (which begins in Germany in 1848) is itself full of nationalist prejudices to the extent that in international situations it seeks to pronounce one of the legal systems with which the case has a relation applicable. That tradition of conflict of laws (private international law; international administrative law) denies application of all foreign public law *a priori* and determines the scope of its own public law unilaterally. It is the paradigm example of a "methodological nationalism" (Zürn 2001). But conflict of laws thinking has one further instructive potential: it can be applied everywhere that legal principles differing in content and objectives come up against each other and have to be coordinated within a legal system or in its external relations (Wiethölter 1977; Teubner 2003; Fischer-Lescano/Teubner 2006). I cannot claim the authors mentioned in favour of my interpretation of European law, but I can for the perception that legal responses to conflicting claims of democratically legitimised legal systems need to be conceptualised in conflict of laws terms and be based on a proceduralisation of the category of law. European law of conflict of laws has to be understood as a "law of law-making" (Michelman 1999: 34, a *Rechtfertigungs-Recht*, see Wiethölter 2003). This conflict of laws viewpoint retains the supranationality of European law, but gives it a different meaning. It takes away from European law the practical and legitimatory expectations it cannot reasonably hope to fulfil. At the same time, it opens a window on the manifold vertical, horizontal, and diagonal[11] conflict situations in the European multilevel system. It promotes the insight that the Europeanisation process should seek on flexible, varied solutions to conflicts rather than strive for the perfecting of an ever more comprehensive body of law.[12]

All of this is not just wishful thinking. Europe has long had available a legal system that holds the Community to a legal policy that respects the political autonomy of member states, and the member states to one compatible with the Community (Scharpf 1993). Member states may not discriminate and must take their neighbours' concerns into account. The citizens of Europe can bring actions through which their home country is compelled to justify its legislation. In the more familiar language of the *acquis communautaire*; the states of the Union may conceive and apply their interests and laws as they see fit: they are obliged to comply with the European

[11] These conflicts arise out of the allocation of powers needed for problem-solving and therefore objectively connected to different levels of government (see Schmid 2000). It follows from the principle of limited individual empowerment that the primacy rule can find no application here.

[12] This is readily compatible with the existence of European secondary law and does not in any way in principle call its legitimacy into question. There are important problem areas in which "second order" law of conflict is insufficient and the "federation" has to develop supranational substantive law. This question cannot be dealt systematically here .

freedoms; they may not discriminate; they may pursue only regulatory objectives recognised in Community law; in pursuing such objectives they must comply with the proportionality principle.[13]

4.2 The juridification of European governance practices through second order conflict of laws (Deliberative Supranationalism II)

The plausibility of a law of conflict of laws interpretation of European governance practices seems obvious in case of mutual recognition, and the proceduralised version of this principle can be reconstructed in socio-legal terms (as "managed mutual recognition", see Nikolaïdes 2005). The conflict of laws interpretation of European law needs not be restricted to this example. It is equally illuminating in the case of other forms of governance, specifically, comitology. The comitology procedures were developed in the course of the "completion" of the internal market in order to keep the internal market project compatible with concerns of "social regulation" (safety at work, consumer and environmental protection). The framework regulations to be implemented here typically employ general clause type formulas that do not seek to program this coordination in detail but leave the elaboration of individual solutions to the implementation process. Typically, the problem situations concerned are ones in which expert knowledge has to be taken into account. It is the involvement of member states through their representatives on the regulatory committees combined with discussion by a plural expert community that should guarantee both political legitimacy and the objective viability of the regulations developed. Safeguard clause procedures employed when new knowledge is acquired or a regulation proves insufficient strengthen their normative and procedural qualities. A conflict of laws interpretation of this form of governance is appropriate because the coordination effort aim at a solution which is acceptable to a Union of relatively autonomous states that have to get by without any hierarchically ordered or at least uniformly structured administrative apparatus. Admittedly, a "constitutionalisation" of this machinery ensuring that it "deserves recognition" has to find answers to a series of further questions: the appointment and function of the expert circles to be included in the decision-making process; ties with parliamentary bodies on the one hand and with civil society on the other; reversibility of decisions taken in the light of new knowledge or changes in social preferences. Last but not least, one has to remain aware that these coordination media are hardly the proper modality for ethical concerns nor capable of facilitating decisions with major distributional implications.[14] Because of the complexity of these requirements, the oft-heard quests for a European administrative procedures act on the US model are hardly convincing (Corkin 2007: Ch. V G). They risk catalyzing the strengthening of the executive in the European polity. *„The EU can currently be understood as a decentralized, territorially differentiated, transnational negotiation system dominated by elites"*– this generalising description of the Union by Ulrich Beck and Edgar Grande (2007: 53, italics in the original) captures *cum grano salis* the comitology system well. The adequate prescriptive

[13] I have to refrain here from any systematic discussion of the kind of political order Europe's *suprantionational* conflict of laws must require. Suffice it here to point to the recent *renaissance* of the notion of "Bund" (Schönberger 2004; Preuß 2005: 511 ff.) and to J.H.H. Weiler's (2001) "Principle of Tolerance" as the Union's *proprium.* To accept and to live with diversity is exactly what a suprantonal conflict of laws seeks to further.

[14] See note 7 above.

response to that finding is a conflict of laws approach rather than juridification strategies based on administrative law models.

4.3 Interim Summary

We conclude that the European multilevel system is dependent on a law that guarantees its functioning, without, however, transforming the EU into a state or a state-like federation, or even only a comprehensive and unified legal order. Neither can this state of the Union be substantially changed nor would such a change seem desirable. To use the fortunate formulation of the otherwise unfortunate Constitutional Treaty, "unity in diversity" should be "the motto of the Union".[15] We feel encouraged to read: it is not removal of diversity but instead respect for it that should characterise Europe. As far as the multiplicity of its legal traditions is concerned, it should be the ethos of "unity in diversity" that constitutes the *proprium* of post-national EU law. The conflict of laws understanding of EU law is an interpretive precept intended to take account of just these specific features. This new conflict of laws 'proceeds through proceduralisation', but is supranational hard law. It is intended truly to constitute Europe and thus stands in the tradition of "integration through law".

The complexity of this law is conditioned by the complexity of European governance arrangements in which decisions are neither delegated to supranational expert bodies nor entrusted to the European Commission, but cannot be referred back to national parliamentary bodies either, or brought under the ultimate responsibility of the European Parliament. There is no inbuilt guarantee that this system will arrive at a transnational shared position on contested issues. This, however, should not be interpreted as a disadvantage. The difficulty to deliver common positions has its *fundamentum in re.* It really does seem reasonable to take no irreversible steps but to continue to organise national and transnational discourses in which political actors and expert bodies are involved and both civil society and the general public can be heard. To put it slightly differently: the conflict of laws interpretation of Europe takes its diversity seriously. It does not provide for some invisible hand ensuring that "autonomy-sparing, community compatible" solutions to conflicts are not merely thought up but also implemented. It can only confirm the existence in the EU of preconditions favouring a deliberative form of political communication bound by rules and principles, in which arguments are accepted only when those concerned can follow them because they do not merely strategically reformulate particular interests and which is realistic because it admits this fragility of the system.[16]

This is also true of Europe's old and new governance practices. Whether a constitutionalisation of these processes can succeed is an open question. The only conceivable forms of response whereby law can push for it to be accepted as worthy of recognition are of a procedural nature; such as transparency, pluralism, opening of consultancy and decision processes, incremental juridification strategies and

[15] Art. I-8 of the Treaty on a Constitution for Europe, OJ C310/1, 16/12/2004.

[16] Here again the conflict of laws approach remains obliged to the tradition of "integration through law", at any rate in the version that Weiler (1981) developed with his dualism of legal supranationality and political intergovernmentalism. Nothing in this construction guaranteed the stability of the balance of the two modes of integration that Weiler diagnosed in the formative phase of the integration process.

reversibility guarantees, respect for ethical reserves, evaluations by national and supranational parliamentary bodies: all the law can do is to promote the deliberative quality of the essential interchanges entailed by European governance; it cannot guarantee the success of these processes.

5 Prospects

M. Rainer Lepsius (2000) has reconstructed the *Wandelverfassung* (convertible constitution, see Ipsen 1987: 201) of the integration project as a history of institutionalisation of various rationality criteria. The term can be used to describe the various functions allotted to law in the chequered history of integration, in which the following three periods can be distinguished.

1) Integration through law, in which the ECJ, in contemplative Luxembourg, unobtrusively and successfully managed to write a "constitutional charter" that was to endure through political crises. This charter owed its integrative power too a substantial degree to the fact that it contented itself with rules and principles that did not seek to impose any detailed programmes on the integration project, whether an economic neoliberal pattern or a technocratic managerialism such as Ipsen conceived of in his *Zweckverbands*-thesis which characterised the Community as a functional purpose association (1972: 197 ff.; on this see also Kaufmann 1997: 174 ff.).
2) A decisively economic approach came about later, in connection with the Delors-Commission's internal market project when Europe's competitiveness and economic efficiency squeezed out the law, seen as too cumbersome – but only nonetheless to initiate an unexpectedly intensive re-regulation of the internal market.
3) The turn to governance turn proclaimed by the Prodi-Commission can be seen as an attempt to respond to the practices developed in the shadow of the internal market policy, compensate for their pragmatic and legitimatory weaknesses, and develop new prospects for a democratically-reformed "good European governance".

As in the previous periods, we have to draw a distinction between proclaiming a programme and implementing it. The question what is "really" happening is the object of the 3345 publications to be found at the website in footnote 1. One cannot get an overall picture of all this, far less engage in some sort of sophisticated assessment. Cassandra warnings are out of place. However, anyone who takes the idea of law-mediated legitimacy seriously cannot refrain from articulating a number of concerns about the European turn to governance.

1.

Jürgen Neyer and I surprisingly found a decade ago (1997) in our studies on the foodstuffs sector (not the agricultural sector, especially not its veterinary compartments) that the comitology system is operating sensibly. We had observed debates between competing schools of thought, serious discussions of public interests and strategies of risk management. We concluded that it was advisable to develop a legal framework that would stabilise these practices and correct the Kafkaesque features

of comitology. Since then, much has happened. The Commission proposed new provisions in 2002[17], which were taken into account in the Constitutional Treaty[18] (see Bradley 2006). Quite recently, in July 2006, a Council Decision was adopted[19] which ushered in a reform. It strengthens Parliament's rights in areas which are subject to the co-decision procedure (Art. 251 TEU):[20] To that extent – but only to that extent – it removes one stumbling block in the regulatory Committee procedure, namely the Commission's powers the so-called *contre-filet* procedure. A comprehensive reform which could be called a proper constitutionalisation of comitology has not been accomplished. That would have required the Commission, Council and Parliament to reconsider what they perceive as their institutional interests.

Is the new world of the agencies better? The (until very recently) most interesting example is the Food Safety Authority set up in 2002.[21] The fact that this agency is not empowered to take legal decisions (which would then be directly reviewable judicially) has already been noted (3.1 above). Its remit and its power are of a different nature. As the 22nd Recital in the Commission's bureaucratese says, it is supposed to strengthen "the trust of consumers and trading partners". How is this to come about? An instructive example is the design of the licensing procedure for genetically modified foodstuffs (Dabrowska 2006: Ch. 4). The agency here has to organise the best possible scientific assessment of permit applications. It organises bodies of knowledge that no decision-maker can overlook. Will it be able thusly to diminish the irritations of European consumers? The text of the Regulation itself does not back this up. Art. 37(2) guarantees the independence of the scientific advice from any external influence. By Art. 37(1), the members of the administrative board, the advisory board and the managing director are also independent. Their independence is not, however, to shield them the way it does science; it is supposed to oblige them to act "in the public interest". This is a concept that opens up the political dimensions of the foodstuffs market. It is no coincidence that the composition of the administrative board (Art. 25), advisory board (Art. 27) and the regulations on scientific consultancy (Art. 28) again show the triad we are familiar with from comitology procedures.

In the institutionalisation of independence, of the public mandate and of the framework conditions of agency action, Everson (2005) observes fascinating prospects for a "political administration" of the internal market in which the law can assert itself. To cite her at some length:

> "Within a context of 'arguing' rather than 'bargaining', a political administration might identify the appropriate basis for regulatory self-restraint; the context specific primacy of competing public interests. In short, 'effective problem-solving' is a criterion that matches the Commission's desire to ensure the factual legitimacy of European regulatory bodies … whilst deliberation augments the normative le-

[17] COM(2002) 719 final, 11. December 2002.

[18] See Arts. 36-37 and the recommendations of the WG IX of the Convetion (together with the Amato Report – CONV 424/02; http://european-convention.eu.int/).

[19] Council Resolution 2006/512/EC 17.7.2006, OJ L 200/2006, 11; consolidated version in OJ C 255/2006, 4.

[20] Article 5a ("Regulatory Committee Procedure with scrutiny").

[21] Regulation 187/2002, OJ L 31/2002,1.

> gitimacy functions of 'accountability', especially as regards the adequate representation of all civil society interests." (at 196)
>
> "[T]he current genius of European law lies in the fact that, in view of the lack of conventional Constitution settlement, it has never be able simply to refer to outdated and inappropriate legal doctrines within its judgments, but has instead always been required to respond to the political complexities of the Union with its own evolving and functionally appropriate mechanisms and doctrines of control. Most importantly, European law has already begun to evolve a series of procedural doctrines that seem to support the on-going process of adjustment between equally valid public interests in policy facilitation and restraint through political deliberation." (at 197)

Not the committee system but the new agencies would then be representatives of a transnational form of democracy: Everson concludes:

> "[W]here, and to the degree that, the law of review is tailored to ensure that all relevant interests might participate in decision-making, either through a widened basis for *locus standi* or through the 'deliberative' stipulation that all relevant interests are reviewed during decision-making, lack of representation within the plural polity presents a lesser problem." (at 198)

Are such perspectives compatible with the notion of the "second order conflict of laws"? Their *problématique* can at least be restated in that framework: On the one hand, both socio-economic discrepancies within the Union and the likelihood of normative divergence militate against the uniform decision-making which the food authority seeks to promote. It is, on the other hand, simply reasonable that risk-evaluation is co-ordinated so as to facilitate intra-Community trade. This is acceptable as long as the comitology-like internal structure of the food authority prevents a take-over of decision-making powers by autonomous executive and politically accountable actors can bring the views of their constituencies to bear. The more difficult issue concerns the socio-economic dimensions of safety standards. One can be sure that they have an impact on the evaluation of products. But it is difficult to see how such concerns can be adequately discussed in a procedure insulating the safety aspects from such potentially conflicting concerns.[22]

[22] In that respect the most recent of all agencies, entrusted with the regulation of chemicals, takes an exceptional step [Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396/2006, 1 -851!)]. This regulation establishes a Committee for Socio-Economic Analysis side by side with a Risk Assessment Committee and a Member State Committee. The design of socio-economic analyses is regulated in detail in Annex XVI. Article 60 (4) provision shows how to deal with conflicts between socio-economic benefits pros and the findings of the Committee for Risk Assessment. In such cases an authorization may only be granted "if it is shown that socio-economic benefits outweigh the risk of human health or the environment arising from the

2.

The OMC is a more radical alternative to comitology than the new agencies. Here the deformalisation of transnational governance has been perfected – even though one has to differentiate between the many OMCs now in place. Proponents of the method oscillate between two types of legitimation. One strand underlines the apparent need to take supranational action and legitimizes open coordination by its potentially favourable output. Theoretically more ambitious are efforts to legitimize the OMC by its inherent normative qualities which are spelled out in the concept of democratic experimentalism (Gerstenberg/Sabel 2002; Sabel/Zeitlin 2007).[23] Iterative benchmarking of national practices, the management of nation states to agree upon guidelines and the mutual learning thereby stimulated are seen as genuinely democratic processes through which a problem-related *demos* articulates itself. These are fascinating and highly conditioned perspectives which provoke sceptical questions: how can transnational criteria that enable and legitimate a benchmarking of national experience, national history and national expectations be found? Why can we reliably expect that confrontation with the experience of others will change national perceptions and practices so as to lead to coordinated policies? And if indeed learning occurs in some quarters, how is its successful implementation conceivable if we are confronted not only with extremely complex fields of social policy but also with vested interests? There are no good reasons which could be brought forward against transnational exchanges of ideas among bureaucracies and expert communities. What seems risky however, is to entrust such networks with quasi-regulatory tasks? This sort of governance would be “soft” to the extent that it is no longer dependent on binding law. But it might be “strong” because its informality lets it evade the risks of being tied down and controlled by the regular political process including the constraints of the rule of law.

3.

The most successful mode of reconciling market-building objectives and regulatory concerns is still the New Approach to technical harmonisation and standards. Interestingly enough, this mode of governance not only has strong and quite ancient national roots but has also from its inception been predominantly privately constituted even before it was adopted the European level. This may seem downright paradoxical, a plausible explanation is that the juridification of this “private transnationalism” (Schepel 2005) has taken much more intensive form than that of the traditionally public law areas now dominated by the new forms of governance. This is, as Schepel (2005: 241) has shown, true not only for European but also for international standardisation. Generally recognised and stable procedures have matured that combine legal principles, professional standards and opportunities to participate and keep on leading to consensual solutions to problems. Significantly, European standardisation has taken on many of the features of the comitology. Its non-unitary network structure ensures that national delegations each bring in their own views, *de facto* enabling learning processes. Administrations and the courts are sometimes actually and always latently present in standardisation questions. Committee members acts

use of the substance and if there are no suitable alternative substances or technologies” (see Kjaer 2007: 17 f.).

[23] The theoretical secondary literature is still scarce: an exception is Scheuerman 2004.

not in accordance with instructions from governments though they are shadowed by them. This "private transnationalism" has broken from national law, but is not delegalised. It feeds on expert knowledge but does not surrender to it. How could this happen?

> „The paradox is, of course, that the mechanism through which to achieve this is, well, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific 'truth' or for allowing room for the invisible hand." (Schepel 2005: 223)

Law and politics both remain present. Admittedly, the political processes ordered by the law of private transnationalism are not directly reached by public policy or public law. In other words, their juridification seemingly emanates "from below". This sort of "law-making" takes account of the fact that the modern economy and its markets simply are not executing some economic *Gesetz* but need to address politically sensitive issues. How likely is it that the political processes within economy and society will be socially responsible and that they will constitute themselves in such a way that they "deserve recognition"? A parallel with comitology but also with the emerging law of the new agencies suggests: comitology operates reasonably well thanks to the principles and rules it follows, and in the shadow of democratically legitimated institutions and their law. Similarly, the legitimacy that Schepel attributes to standardisation is based on the compatibility of its institutionalisation with the legal institutions that surround it, which are able to see that they cannot themselves achieve what the standardisation process can. Is all this still accessible to conflict of laws patterns of thought? The step to be taken is not too difficult. Conflict of laws deals with the acceptability of laws of "foreign" jurisdictions. Once we are to recognize that our statal law cannot operate autonomously but is dependent upon the norm generation in non-statal spheres, we need to define criteria for their recognition (Schanze 2005: 90 f.). These criteria will primarily concern norm-generation processes and their implementation will have to engage various legal areas such as antitrust and tort law (Schepel 2005: 285 ff., 335 ff.). There are avenues towards a legitimate juridification of transnational governance arrangements even though the distances we have to cover seem intimidating (McCormick 2006: 415 ff.).

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