

The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?

by

David M Trubek
(dmtrubek@wisc.edu)

and

Louise G Trubek
(lgrubek@wisc.edu)

Law School
University of Wisconsin-Madison

*Paper Presented at the Annual Meeting of the Research Committee on the Sociology of Law,
Paris, July 2005*

In recent years, a wide range of processes have developed that are designed to carry out public objectives using methods that differ in one way or another from classic forms of law. These processes, which we will collectively label “new governance”, range from informal consultation to highly formalized systems that seek to affect behavior but unlike traditional command and control regulation, use methods other than binding norms and sanctions.

As new forms of governance emerge in arenas traditionally regulated by conventional legal processes, a wide range of issues emerges. Fundamental among them is the relationship between new processes and traditional methods of regulation. In some cases, new governance is explicitly designed to replace legal regulation and once introduced occupies the field. This is a rare occurrence and we do not discuss it in this paper. But in many areas both systems co-exist in the same policy domain. Where both systems co-exist, there are numerous possible configurations and relationships among them. The purpose of this paper is to examine such relationships.

In this paper, we develop a stylized and provisional analysis of the relationship between “new governance” and legal regulation or “law”. The use of these terms is provisional and arbitrary: we recognize that substantial further work needs to be done to clarify terminology and develop a more sophisticated typology. We hope this paper points the way to such work.¹

¹ Note that “new governance” as defined in this paper includes what we and others have sometimes called “soft law”. (Trubek and Trubek, 2005).

I Varieties of Coexistence

Broadly speaking, there are two ways in which such systems may interact in a given policy domain. New governance and legal regulation may be *complementary*, with each operating at the same time and contributing to a common objective. Alternatively, there may be a *rivalry* between the co-existing processes, with the newer forms of governance seeking to perform the same tasks as legal regulation and, in the minds of some, doing it better.

In situations where new governance and traditional legal regulation co-exist, complex dynamics come into play. The introduction of new modes of governance may be part of a conscious design to get the best of the old and the new systems by yoking the two together in an integrated process. Such systems may or may not work: various forces can destabilize planned integration. On the other hand, new processes may emerge independently but gradually be seen as complementary, leading to *ex post* forms of integration. But in other situations, co-existence may lead to the displacement of one of the modes. Sometimes this happens by design, as when a new mode of governance is introduced with the intent of displacing older forms. But it can also occur unintentionally, as when the creation of a newer mode makes it so hard to deploy traditional modes that they wither away.

In this paper, we look at complementarity, rivalry and the dynamics of co-existence using examples drawn from the EU and the US. The goal of this very preliminary paper is to develop ideas that could help us create a more general theory of the relationship between new governance and legal regulation.

II The Emergence of New Governance

A great deal has been said about the reasons for the rise of new forms of governance. Scott and Trubek (2002) list the following reasons for new governance in the EU:

- To create more effective forms of participation
- To coordinate multiple levels of government
- To allow more diversity and decentralization
- To foster deliberative arenas
- To allow more flexibility and revisability
- To foster experimentation and knowledge creation

In the US, additional factors include devolution to the states, growing interest in economic incentives, and the emergence of new managerial technologies that employ data and indicators as regulatory techniques. (L.Trubek, 2005)

III Complementarity

We can speak of the complementarity of new governance and legal regulation when both systems co-exist in the same policy domain, operate in separate fashions, and promote the same goals. This may come about accidentally, or by design.

a) Complementarity by design

The clearest case of the complementary co-existence of new governance and legal regulation is when these different processes are consciously designed to work together. Consciously designed complementarity may occur when a new governance process is established as a prerequisite to the employment of legal regulation, or when new governance is allowed as an opt-out from legal regulation on certain conditions.

An example of the former type of design is the EU's Stability and Growth Pact (SGP). The SGP is designed to ensure that EU Member States maintain fiscally sustainable budgetary processes. It includes a "soft governance" system and hard law with specific obligations and sanctions for non-compliance. The soft governance part of the system employs non-binding guidelines, periodic reporting indicators, and multi-lateral surveillance to put pressure on countries to avoid excessive deficits and unsustainable levels of government debt. But the structure also includes the Excessive Deficit Procedure by which the European Council can impose sanctions if a country exceeds the Pact's deficit and debt limits.

In theory, the two parts of the system complement each other. Soft processes allow flexibility in the ways that the goals of the Pact are to be reached, something harder to do through formal regulation. At the same time, the threat of sanctions should provide an incentive for countries to follow the non-binding guidelines. While the system has proven less effective in practice than it seems in theory, it remains a paramount example of complementarity by conscious design. (Trubek et al, 2005)

A second example of designed complementarity can be seen in Wisconsin's new "Green Tier" environmental regulation. Green Tier is a system that allows regulated industries and other entities to opt out of a variety of environmental regulations if they agree to construct a self-regulatory regime and use it to achieve higher standards of environmental performance that is required under existing regulations. (Christianson and Smith, 2004) Entities that enter the "Green Tier" are given much more flexibility in finding ways to meet and exceed existing standards than could be provided under standard command and control regulatory norms. The systems are complementary because without the standard regulatory framework entities might lack incentives to self-regulate, while without the more flexible new governance processes they would not be able to carry out some innovative strategies.

A third example of complementarity by design can be found in the context of environmental governance in Europe. Scott and Holder identify cases in which legally binding framework directives (laws that are binding, but leave discretion as to Member

States as to how they are carried out) are combined with new governance mechanisms for their implementation. For example, the EU Water Framework Directive (WFD)² establishes a legally binding legislative framework for the protection and improvement of water quality in the EU, but the implementation of this directive by Member States relies extensively on new governance, as reflected by the multi-level, multi-actor, and collaborative, Common Implementation Strategy (CIS).³

b) Unplanned complementarity

In addition to areas of conscious design, where new governance and legal regulation form part of a single design, there are situations where such systems work in complementarity fashion without, at least initially, having been designed together.

A leading example of unplanned complementarity can be seen in the EU's efforts to combat discrimination against women in the workplace. Here, we can see the operation of three distinct systems that initially emerged independently of one another. These systems include a series of directives dealing with equality in the workplace and facilitating female participation, the European Employment Strategy, and the European Structural Funds. The directives establish legal rights to be free from discrimination in the workplace and mandate that Member States create such rights as a matter of national law binding on employers and enforceable in national courts. The EES, on the other hand, is a new governance process that, like the SGP, employs non-binding guidelines, periodic reporting, multilateral surveillance, and exchange of best practices to increase employment and the quality of work. One of the goals of the EES is to foster national policies that will discourage gender discrimination and increase female labor market participation. While the Directive operates at the level of individual cases, the EES operates to change national policy and employer attitudes. Finally, the EU Structural Funds can be used in such a way that complements both the directive and the EES by providing funding for projects that further the general goal of equal access for women such as improved day care facilities.

In a study of the operation of these three processes, Claire Kilpatrick has argued that not only are they operating in a complementary fashion, but as their potential interaction becomes clearer to policy makers at the EU and Member State levels, conscious efforts are being made to integrate them into a complementary system. (Kilpatrick, 2005).

A somewhat similar example of accidental complementarity can be seen in efforts to reduce racial disparities in health in the US. It has long been clear that some racial minorities have poorer health than the population as a whole. For some time, lawyers have sought to attack these results using litigation aimed at various racially

² Directive 2000/60/EC

³ See Scott and Holder (2005.) See also the discussion of instrumental/developmental hybridity in the volume's introduction. Another example is the mixture of traditional litigation and experimental governance mechanisms used in "new public law litigation" as described by Sabel and Simon (2004)

discriminatory practices. But in the past these efforts have not proven to be very effective. In the meantime, efforts by the medical profession to use new governance techniques have begun to show results in one area of racial inequality. It has long been known that certain racial minorities suffer disproportionately from various chronic diseases such as asthma and diabetes. In recent years quality processes using such new governance techniques as benchmarking, nationally accepted protocols for best practice, and patient self-management have been introduced in some health care systems. Preliminary results show that these processes may be effective in reducing racial disparities. At the same time, the civil rights community has become increasingly active in health care and the potential for employment of legal remedies remains. Once it has been shown that the use of new governance techniques can have positive results, it may be possible to use litigation to create pressure on health providers to adopt the new processes. In that way, the simultaneous presence of anti-discrimination law and new quality improvement processes may make possible progress not previously achievable. (L. Trubek and Das, 2003)

IV Complimentary Functionality

Fundamental to any robust theory of complementary co-existence of law and new governance is the analysis of the various ways that each mode might function in various configurations. In this section, we suggest a number of possible ways in which co-existence may involve complementary functions.⁴

a) Law creates new governance procedures and mandates basic parameters

The move to new governance is linked to a shift to “proceduralism” in legal regulation, in which the law simply structures procedures for conflict resolution or problem-solving. For example, in the US a restorative justice process may be used to deal with conflict between patients and health care providers; although the process itself does not use binding norms or sanctions, they may be employed to require participation by reluctant providers.⁵

b) New governance solves problems; law provides a safety net

Many of the new governance processes are designed to foster collective problem-solving by stakeholders in a policy domain. These processes may exist in areas that in the past were exclusively covered by traditional legal processes and rights-based systems. The rights-based structures may be retained as a safety net; available to rights-holders should the new governance processes prove ineffective.

⁴ This analysis draws heavily on the Introduction to de Burca and Scott (2005) in which the authors analyze various forms of “hybridity” between law and new governance. Their typology employs a similar functional analysis and identifies many of the forms of complementarity noted here.

⁵ A similar situation exists under Medicare in the US, where statutes and contracts mandate new processes.

- c) Law provides general norms; new governance is used to make them concrete

In some cases, the law may establish a very general norm but does not spell out how it applies in concrete instances. In cases where concretization requires consideration of substantial diversity, demands revisability, and benefits from widespread participation, new governance methods can be used to give specific meaning to the norms. This process occurs under EU Framework Directives, and could be used to develop fundamental rights.

- d) Law creates minimal standards; new governance is available for those who exceed the standards

In this configuration, legal regulations set minimal standards but allow actors to “opt out” of the legal regime on condition that they use new governance processes such as self regulation and self-monitoring to exceed the minimal standards. This use of law as the default position creates incentives for regulated entities that seek more flexible approaches to meeting and exceeding the standards. De Burca and Scott call this configuration “default hybridity”. Examples can be found in Green Tier and OSHA.

- e) Law and new governance are yoked in a multi-pronged strategy that deals with complex problems

This is a situation in which a complex social problem requires a variety of different forms of intervention. Take for example, this issue of female employment in Europe as analyzed by Claire Kilpatrick (2005). The issue of low levels of female labor market participation is a problem for many EU Member States. Over time, it has been clear that an effective strategy benefits from very different approaches. To some degree, the problem stems from real discrimination in the workplace. This is a problem that can be handled by traditional legal means. But the participation issue is much more complex; women may face barriers to work insituations where employers are eager to have them and treat them fairly. Such barriers include policies that hinder part time work, lack of adequate day care facilities, cultural stereotypes, etc. To deal with those aspects fo the problem, new governance systems like the EES aimed at policy transformation, and structural funds that complement the EES by underwriting policy change and structural reform, may be employed simultaneously.

- f) New governance leads to new law

This is the classic use of “soft law” in international and EU Law (Synder, 1994). In this configuration, various “soft” or non-binding mechanisms may be used to develop normative commitments that eventually lead to the creation of “hard law” either though judicial interpretation or statutory innovation.

V Rivalry

In some cases, new governance and legal regulation coexist as alternatives and potentially as rivals. These may be cases where a conscious decision has been made to offer a new governance alternative to legal regulation while considering each route as equally valid, or they may be situations in which new governance processes are being developed as a preferred solution but where the older forms are still in place. In both cases, the different systems may be seen as actual or potential rivals, rather than complementary.

a) Alternative routes of equal value: the EU's Social Dialogue

The EU's Social Dialogue is a good example of the creation of an alternative route to conventional legal regulation that is not designed to work with, or displace, the legal route. The Social Dialogue is a process by which the social partners can negotiate rules governing employment relations and similar matters: negotiated agreements can become binding law by being subsequently adopted as Directives by the European Council. The social dialogue can be seen as a new governance approach as it relies on bargaining by private actors to set norms, not the traditional EU route of Commission initiative, Parliament co-decision, and Council approval. It does not foreclose the conventional route that remains available for the same forms of regulation that can be developed through the dialogue.

b) New governance as a substitute for legal regulation: dealing with medical error in the US

A second example of coexistence and rivalry can be seen in the effort to reduce medical errors and compensate the victims of such errors. Traditionally, in the US, this has been handled through two forms of legal regulation: the tort system and physician licensing. Medical malpractice litigation uses tort law to secure compensation for victims and the licensing process is supposed to weed out doctors with significant records of medial error. However, many see malpractice litigation as an excessively costly way to compensate victims with little overall impact on the quality of health care. And the licensing process has not been very effective in reducing error. As a result, efforts have been made to create a rival system to deter error, compensate victims, and improve quality. This system uses such new governance techniques as "regulation by information" through the publication of data on physicians' results, fiscal incentives for good performance by hospitals and clinics, alternative forms of victim compensation through administrative processes similar to workers compensation, and conflict avoidance through informal methods to explain and apologize for error.

These two systems currently operate as rivals. Some tout the new governance approach as an improvement on the traditional legal regulatory and litigation rout and urge that it be expanded and consolidated while others see it as a way to displace the traditional remedies and weaken patient protection. At the moment, however, the systems offer rival routes to error reduction and compensation.

VI Dynamics

In developing a general theory of new governance and legal regulation, it is important to identify the possible range of outcomes when these two systems co-exist and understand the dynamics that may lead to each of these outcomes. A provisional list of outcomes includes:

- conscious integration succeeds
- conscious integration fails
- *ex post* integration of co-existing systems is effective
- *ex post* integration of co-existing systems fails
- rival new governance forms displace traditional regulation
- traditional regulation blocks emergence of rival forms of new governance
- rivalry leads to transformation of traditional regulation or new governance, creating a new “hybrid form”

To develop a robust theory of the relationship between new governance and legal regulation, one would need to refine these categories, explore cases in which each of these outcomes has occurred, and chart the factors that have led to one or the other of these results.

This process will require careful delineation of variables and substantial empirical work. “Success” and “failure”, “displacement” and “transformation” are themselves complex notions. And there is very little hard data available on most of the cases we have identified. In this paper, we merely indicate a few examples, make a preliminary assessment of actual or likely outcome, and suggest some of the factors that may explain the various outcomes.

a) The success or failure of conscious designs

The mixture of old and new forms of governance seems to have been quite successful in environmental regulation. There are examples, like Wisconsin’s Green Tier, in which the coexistence of command and control regulation, and more flexible forms of public-private governance have led to better environmental outcomes. The apparent success of these systems can be explained by a variety of factors, including agency support for innovation, stakeholder buy in, and collaborative planning.

On the other hand, a conspicuous example of failed integration is the EU’s Stability and Growth Pact that tried to combine soft methods and hard sanctions in the effort to maintain sustainable budgetary policies in the Member States. It appears that the soft methods have not worked to deter excessive deficits while it has proven impossible to deploy the Pact’s sanctions against powerful countries like Germany and France. This failure may have come about because the hard law sanctions were never credible: the offending states have ways to block the process and the sanctions chosen may be counterproductive.

b) The success or failure of *ex post* integration

The clearest case of probable success in the *ex post* integration of old and new governance is the combination of hard law and soft governance to combat discrimination against women in the workplace. There appears to be convergence towards this goal under the classic Community Method through the (Discrimination Directive), the EES, and the Structural Funds. While evidence is needed to show that actual impact of this three-pronged approach in one or more Member States, some observers believe this is working. (Kilpatrick, 2005)

On the other hand, there is evidence that an effort to bring together old and new governance in the field of occupational health and safety in the US is not faring very well. For two decades, OSHA has experimented with a variety of new governance strategies in response to internal and external critiques of its traditional regulation. It is now planning to move beyond the experimental phase and regularize the new governance techniques into the mainstream system of regulation. The shift would be from a primarily command and control model of risk regulation to a model that fosters public/private partnerships, encourages industry cooperation and allows flexibility in policy implementation. Critics, however, suggest that the *ex post* integration of the old and new may fail as they will lead to a decline in public oversight and monitoring of the new techniques and participation of workers in the new processes will be limited and weak. (Lobel, 2005)

c) Rivalry leads to displacement of one or the other mode

We have not found any case in which complete displacement has occurred but we are aware of several situations in which this appears possible or even probable. Take the emergence of the OMC as a tool of social policy in the EU. Some commentators fear that this development will effectively preempt efforts to use hard law to create an EU-wide social safety net. They think that if soft law methods are permitted in key policy domains, it will be harder to get support for efforts to create truly effective forms of EU regulation. While it is not at all clear that this is the case, or that it would undermine social goals if it were, this situation shows the possibility of displacement.⁶

Another area of potential displacement can be seen in the treatment of medical error in the US. Although the traditional route of tort law and physician licensing still exists, the newer processes that combine managerial/quality improvement methods to reduce error and alternative processes for victim compensation are gaining strength and may at least partially displace the older system.

d) Rivalry leads to a transformation of one or the other mode

This is a largely speculative category, but one that in a sense is the most interesting. As a result of the rivalry between new and old systems, one or the other may adapt aspects of

⁶ The view that “soft law” drives out hard law in this area is discussed in Trubek and Trubek, 2005.

the other, leading to a transformed process that is more than just complementary coexistence. Such a transformation might occur if a new governance process were strengthened by the addition of justiciable rights to participation and to more effective forms of accountability. And some have suggested that management-based regulations that encourage self-regulation be seen as legal regulation transformed by ideas from new governance. (Coglianese and Lazar, 2003). Similarly, EU framework directives that leave discretion to actors within clear limits represent a transformation of the classic community method. (Scott and Trubek, 2002)

VII What explains the outcomes?

For those who are interested in both the theory and the practice of the coexistence of new governance and the law, the most important questions are: what explains the success and failure of integrated or “hybrid” configurations? What factors lead one mode to displace the other? Answers to these questions will require significant empirical research. At this stage, we can only list a few factors that seem especially salient.

a) Complementary Systems

One set of factors help explain the success of efforts to yoke new governance process and traditional legal regulation in areas that have been heretofore regulated by command and control systems.

Inclusion of key stakeholders in new participatory mechanisms -- If important and affected groups are left out of the process, it is likely to lose legitimacy. This may mean that special efforts have to be made to ensure participation of under organized and underrepresented groups, and to be sure that well-organized groups see it in their interest to participate. The failure to include workers in the new OSHA processes may explain their limited success. The failure to get the social partners to engage fully in the EES has hindered its effectiveness.

Genuine and effective commitment to social objectives – In some cases, it may appear that the move to new governance is not a way to increase the effectiveness of social protection, but rather a smokescreen behind which what actually occurs is deregulation and abandonment of commitments. To the extent this is perceived to be case, the effort at integration is likely to fail. One way to ensure that that perception does not take hold is to demonstrate the effectiveness of the new procedures.

Maintenance of legal remedies as a default position – Often, new governance mechanisms are introduced as an alternative to command and control regulation because they appear to be more flexible, revisable, experimental, and/or participatory than traditional legal remedies. One way to guarantee that these process are not a form of covert deregulation is to keep the legal remedies in place as a fall back so that those who currently benefit from legal rights have the confidence that they will not lose if they accept the new governance alternatives.

b) Displacement

There a number of factors that can explain why co-existence fails and one system is displaced by the other. Among them are:

Low cost effectiveness of one system compared to the other – This can explain why new governance displaces law, or vice versa. New governance systems may prove to be significantly more cost effective than traditional regulation. But the opposite can also be the case: new governance processes may seem to be very time consuming and not sufficiently effective to serve as a viable alternative.

Resistance of key actors to change: When new governance is put forward whether as part of an integrated system, or as an alternative to legal regulation, key actors may sabotage the effort either because they fail to understand the new processes or think they will lose if they are introduced. Such “foot-dragging” may come from bureaucracies that play a central role in legal regulation or from interest groups convinced that the governance innovations are disguised efforts to weaken their position.

Conclusion

This paper has developed a typology of situations in which new governance and legal regulation may co-exist, at least temporarily, outlined some of the dynamics that ensue, and stated a few factors that may explain these dynamics. It is meant to point the way to further analysis and research on an issue that is becoming increasingly important as more and forms of new governance emerge in areas that have been, or might, be governed by traditional forms of law.

References

- Coglianesi, Cary and David Lazar, 2003 “Management-Based Regulation: Prescribing Management to Achieve Public Goals”, 37 Law and Society Review No. 4 p. 691
- Christianson, Andy and Ben Smith, 2004, “New Approaches to Regulation: Wisconsin’s Green Tier”, unpublished student paper, UW Law School.
- De Burca, Grainne and Joanne Scott, eds 2005 forthcoming Law and New Approaches to Governance in the European Union and the Unites States (Hart)
- Kilpatrick, Claire, 2005 “New EU Employment Governance and Constitutionalism” Forthcoming in de Burca and Scott, eds., Law and New Approaches to Governance in the European Union and the Unites States (Hart)
- Lobel, Orly, 2005 “Beyond Experimentation: Governing Occupational Safety in the United States (or -Core and Periphery in Regulation and Governance)” forthcoming in de Burca and Scott, eds., Law and New Approaches to Governance in the European Union and the Unites States (Hart)
- Sabel, Charles and William Simon, 2004 “Destabilization Rights: How Public Law Litigation Succeeds”, 117 *Harvard Law Review* 1015
- Scott, Joanne and Jane Holder, 2005 “Law and ‘New’ Environmental Governance in the European Union”, forthcoming in de Burca and Scott, eds., Law and New Approaches to Governance in the European Union and the Unites States (Hart)
- Scott, Joanne and David Trubek, 2002 “Mind the Gap: Law and New Approaches to Governance in the European Union”, 8 *European Law Journal*. 1.
- Synder, Francis 1994 “Soft Law and Institutional Practice in the European Community”, in S. Martin (ed.), The Construction of Europe (Kluwer 1994)
- Trubek, David and James Mosher, 2003 “New Governance, EU Social Policy, and the European Social Model”) in J. Zeitlin and D. Trubek, eds, Governing Work and Welfare in a New Economy: European and American Experiments (Oxford 2003)
- Trubek, David and Louise Trubek (2005) “Hard and Soft Law in the Construction of Social Europe: The Open Method of Coordination”, 11 *European Law Journal* 343
- Trubek, David, Patrick Cottrell and Mark Nance *Hard and Soft Law in European Integration* –forthcoming in Scott & de Burca, Law and New Approaches to Governance in the European Union and the Unites States (Hart)

Trubek, Louise (2005), “New Governance Practices in US Health Care” in Scott and de Burca, eds, , Law and New Approaches to Governance in the European Union and the Unites States (Hart)

Trubek, Louise and Maya Das 2003 “Achieving Equality: Healthcare Governance in Transition”, 29 *American Journal of Law and Medicine* 2-3, p. 395