

**New Governance and Legal Regulation:
Complementarity, Rivalry or Transformation**

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In the State of Wisconsin environmental regulators are experimenting with a new approach to ensuring that air remains clean and waters pure. While maintaining detailed clean air and water regulations, the Department of Natural Resources, under its “Green Tier” program, will waive or defer standard enforcement procedures for regulated industries that agree to develop different ways to achieve environmental goals as long as the chosen methods lead to results that exceed legally mandated standards. The result is a hybrid system in which innovation, negotiation and self-monitoring are fore-grounded while regulatory enforcement remains in the background as a default option.

Wisconsin’s Green Tier is just one example of how new processes to carry out public objectives are changing the law. Where regulatory goals have traditionally been sought exclusively through statutory enactments, administrative regulation, and judicial enforcement, we now see new processes emerging which range from informal consultation to highly formalized systems that seek to affect behavior but differ on many ways from traditional command and control regulation. These processes, which we will collectively label “new governance” may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.

There is a vigorous debate about new governance. Some think that these innovations should be used only in a very limited way to supplement traditional forms of regulation in areas where it is not effective. Others think that we are witnessing a major transformation in law and policy, and that the new governance “revolution” will end up changing law as we know it.

We do not try to resolve this debate. But we recognize that something very significant is happening and that we are in a period in which change is occurring. The purpose of this paper is to help us understand the nature of that change and its implications for a yet to-be-glimpsed legal future.

In this paper, we begin the task of mapping relationships between conventional forms of regulation and a number of new governance approaches. As new forms of governance emerge in arenas regulated by conventional legal processes, a wide range of configurations is possible. When, as in Green Tier, the two processes are consciously yoked together in a hybrid form, we might speak of a real *transformation* in the law. In other cases, the two systems may exist in parallel but not fuse together in a single system. Where both systems co-exist, there are numerous possible configurations and relationships among them. Thus, one might simply be used to launch the other, as when formal law is used to mandate a new approach. Or, they might operate independently yet both may have an effect on the same policy domain. Finally, in some areas one system may take over the field, either because new governance methods replace traditional law altogether, or because opposition to innovation halts efforts to employ new approaches. The purpose of this paper is to examine all such relationships using examples drawn from the European Union and the United States.

I Varieties of Coexistence

Our analysis uses stylized concepts of “new governance” and legal regulation or “law”. We contrast systems that rely on top-down control using fixed statutes, detailed regulations, and judicial enforcement on the one hand, with a wide range of alternative methods to solve problems and affect behavior, on the other. We recognize that these stylized concepts mask real complexities and empirical variation. We use them in a provisional and arbitrary way and we recognize that substantial further work needs to be done to clarify terminology, secure empirical information, and develop a more sophisticated typology. We hope this paper points the way to such work.¹

There are now many instances in which we can see new governance and law operating in the same policy domain. We call that situation *coexistence*. There are three basic ways they can coexist. When each is operating at the same time and contributing to a common

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

objective but they have not merged, we describe them as *complementary*. When the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems, we speak of *rivalry* between the co-existing processes.

There is, however, a third category that we refer to as *transformation*. In this paper, we use that term to describe configurations in which new governance and traditional law are not only complimentary; they also are integrated into a single system and the functioning of each element is necessary for the successful operation of the other. Because such hybrids represent the emergence of a new form of law, they are of special interest. Green Tier is an example of planned hybridity and thus of transformation.² Table 1 shows these options.

Table 1
Varieties of Coexistence

| | |
|----------------------------|---------------------------------------|
| Complementarity | Two systems working for common goals |
| Rivalry | Two systems competing for dominance |
| Transformation (hybridity) | Systems merge into new hybrid process |

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

² It is important to note that some others, including us in earlier papers, use the term hybridity to refer to a broader range of situations including all forms of complementarity. See Trubek and Trubek 2005; de Burca and Scott, 2006). In this paper we use the term to refer only to situations of real integration and mutual dependence in order to highlight the transformative potential of hybridization.

as when the creation of a newer mode makes it so hard to deploy traditional modes that they wither away. In such situations, we speak of rivalry. In this paper, we look at the dynamics of co-existence and explore complementarity, rivalry, and transformation. In this analysis, we have classified US and EU examples according to the typology in Table 1. This classification, based often on limited data, is provisional and subject to correction as we secure more information about these developments

II The Emergence of New Governance

Much has been written on the reasons for the emergence of new governance. Thus, these developments may be attributed to very basic changes in economy, polity and society, as well as to more technical innovations in public administration. In these accounts, as society becomes more complex and problems harder to solve, there is a need for more experimentation. Because stakeholders often have the knowledge needed to solve problems, increased participation becomes desirable. Because society changes and knowledge grows so that all solutions to problems are provisional, it seems better to develop broad frameworks but let stakeholders develop concrete solutions based on easily revisable rules. Because traditional forms of democratic legitimacy may fail, it becomes necessary to provide other methods to ensure accountability. And because new technologies make it easier to secure data, get input from stakeholders, and monitor progress, new methods become possible that were not previously available.³

As a result, policy makers have introduced a number of reforms. For example, as Scott and Trubek point out (2002), in the EU we can see a wide range of policy innovations that are designed:

- To create more effective forms of participation
- To coordinate multiple levels of government
- To allow more diversity and decentralization

³ See, e.g. Lobel, 2004, Sabel and Zeitlin 2006; de Burca 2006, Scott and Trubek 2002, Trubek and Trubek 2005.

- To foster deliberative arenas
- To allow more flexibility and revisability
- To foster experimentation and knowledge creation

Similar developments can be seen in the US as the rise of new governance is facilitated by such factors as 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 and promote the same goals.⁴ These can occur in situations in which a complex social problem requires a variety of different forms of intervention.⁵

A leading example of 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 (EES), 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

⁴ This analysis draws heavily on de Burca and Scott (2006) 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. But they employ a broader definition of hybridity. For the reasons we have chosen to narrow the term and refer to hybrids as instances of transformation, see TAN 2, *supra*.

⁵ A somewhat similar situation occurs when various "soft" or non-binding mechanisms are used to develop normative commitments that eventually lead to the creation of "hard law" either through judicial interpretation or statutory innovation situations where new governance leads to new forms of traditional law. This is the classic use of "soft law" in international and EU Law (Synder, 1994). As these functions succeed one another, they don't neatly fit into the category of "co-existence".

hand, is a new governance process that 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 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 increase the degree of complementarity. (Kilpatrick, 2006).

Another example of possible *ex post* 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 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 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.⁶

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. But if the Social Dialogue were to be used in a significant number of cases it could replace the Community Method in the domains in which it operates.

⁶ Some commentators see much of new governance as a covert form of deregulation, designed to mask reduction of environmental standards and social protection. They see the introduction of such systems as a "poisoned chalice".

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.

c) Law creates unacceptable standards; new governance is available as a way to avoid them

This is an idea put forth by Sabel and Zeitlin (2006). They refer to situations in which the legally mandated outcomes are so undesirable that regulated entities have very strong incentives to chose to use new governance as an way to opt out. Although in some cases this may imposition of draconian legal results have been intentional, it seems the authors

are largely referring to cases where the inability of traditional law to frame workable solutions forces stakeholders to seek ways out of the regulatory vise.

V Transformation—a functional typology

The most interesting area of coexistence is when law is, in effect, transformed by its relationship with new governance. We can identify several such constellations:

- 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 does not use binding norms or sanctions, it may require participation by reluctant providers.⁷
- 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.
- 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

⁷ A similar situation exists under Medicare in the US, where statutes and contracts mandate new processes.

meaning to the norms. This process occurs under EU Framework Directives, and could be used to develop fundamental rights (De Burca, 2006).⁸

- 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.

VI Transformation—case studies

- a) Integration planned *ex ante*

The clearest case of the complementary co-existence of new governance and legal regulation is when these different processes are consciously designed from the beginning 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. This kind of planned co-existence often leads to transformation.

An example 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

⁸ For a similar process in the US, see Coglianese and Lazar, 2003

also includes the Excessive Deficit Procedure by which the European Council can impose sanctions if a country exceeds the Pact's strict quantitative 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, 2006)

A second example of designed complementarity can be seen "Green Tier". 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; Bernstein et. al. 2005) 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.⁹

b) Ex post integration

Some hybrids emerge *ex post* in the course of the implementation process. While transformation may not have been consciously planned, it evolves as need is perceived and new processes are crafted. An example can be found in environmental governance in Europe. Scott and Holder identify cases in which legally binding framework directives (laws that are binding, but leave discretion to Member States as how they are to be carried out) are combined with new governance mechanisms for their implementation.

⁹ This is similar to what Sabel and Zeitlin (2006) refer to as "penalty default" but here the penalty is merely strict scrutiny by the regulator under traditional law.

For example, the EU Water Framework Directive (WFD)¹⁰ 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).¹¹ The CIS was developed after the fact to facilitate implementation of what is a very general legal mandate.

A similar situation exists in the interrelations between the EU's Race Discrimination Law and the Action Plan against discrimination. de Burca (2006) notes that these initiatives were originally conceived and executed separately but over time have begun to coalesce into what might become a genuine hybrid. The Race Directive contains a very broad requirement that Member States pass legislation to combat racial discrimination, but leaves many decisions on how to define discrimination and deal with it to the Member States. At the same time, through the Action Program the EU has helped create networks of regulators and NGOs, supported the production of data and indicators, and established fora in which Member States and others can discuss progress toward the broad goals of the directive and exchange ideas on obstacles and best practices.

At first glance the Race Discrimination case seems to differ from the employment discrimination story as told by Kilpatrick in ways that would allow us to classify the former as transformation and the latter merely as complementarity. In both cases the two systems were initially developed independently. In employment discrimination, they seem to *operate* independently as well, performing different but complementary functions. Each could do its work without the other. But in the Race case, one system seems to be needed for the other to become effective. In this situation, the open-ended nature of the legal obligations created a need for mechanisms to give these concepts effective meaning and specificity. Without some such mechanism the Directive's broad

¹⁰ Directive 2000/60/EC

¹¹ See Scott and Holder (2006.) See also the discussion of instrumental/developmental hybridity in de Burca and Scott (2006). 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)

mandate would have little effect. The several new governance modalities described by De Burca create a process in which specific obligations and rules can be developed and changed over time. As the Directive with its broad norms and the various new governance processes become more integrated, a true hybrid system of new governance and traditional regulatory law methods might be emerging. (De Burca, 2006). Table 2 shows that there are examples of complementarity, rivalry and hybridity on both sides of the Atlantic:

Table 2—Coexistence in the EU and US

| | EU | US |
|---------------------------------------|---|--|
| Complementarity | --EES & Employment Discrimination Directive | --Racial and Ethnic Disparities Litigation and Medical Quality |
| Rivalry | --Social Dialogue | --Tort Litigation vs. Quality & Administration |
| Transformation (hybridity) | --Race Discrimination (?) --Water Quality --Stability and Growth Pact | --Green Tier --OSHA |

VII 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
- co-existing systems become integrated *ex post*

- co-existing systems continue to operate independently
- rival new governance forms displace traditional regulation
- traditional regulation blocks emergence of rival forms of new governance

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 may lead 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 and failure of *ex post* integration

de Burca (2006) describes ways in which the EU's Race Directive and Action Plan Against Discrimination, initially designed as separate systems, appear to be moving together in ways that could lead to a hybrid system *ex post*. In this system, new governance methods are combined with a broad framework directive to develop standards, encourage experimentation, and monitor progress. While this process of integration is not complete, de Burca thinks it may well lead to true hybridity and transformation.

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, 2006)

c) Coexistence without integration

Another type of complementarity is the continuing presence of law and new governance in the same domain with each performing separate functions that each contribute to a common goal. This can be seen in 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 Employment 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, 2006)

d) 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.¹²

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.

e) Rivalry leads to a transformation

This is an important issue in the analysis of hybridity and transformation but one that remains speculative. The idea is that in some cases rivalry may lead to the transformation of law and/or new governance and thus to the creation of a hybrid. Thus, for example, it might be that tension between a new governance system and traditional ideas of

¹² The view that “soft law” drives out hard law in this area is discussed in Trubek and Trubek, 2005.

legitimacy might lead to the restructuring of new governance processes by the addition of justiciable rights to participation and to more effective forms of accountability.¹³

VIII 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) Integrated 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

¹³ For a discussion of such a transformation, see L. Trubek, 2006

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 processes 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 are 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.

IX: Towards a “new governance theory of law”: rethinking functions, values, and actors

This paper has argued that the emergence of new governance in some cases is transforming law by allowing the creation of new forms of law that differ from traditional top-down, command and control systems. We have offered a preliminary typology that would allow us to identify and analyze such “transformed” systems a few examples of the new forms of law that are emerging.

We hope this paper will lead to a more thorough and ambitious inquiry that would allow us better to understand these developments and assess their significance. We see such an effort as having several dimensions. These include a critical analysis of the failures of traditional regulation, an empirical inquiry to identify transformations, a sociological analysis that would explain why these changes are occurring and trace their impact on various interests and groups, a theoretical analysis that would the relation between new forms of law and traditional legal values, and a policy analysis that explores both the feasibility and desirability of greater use of such hybrid forms and the role of various actors in such efforts.

In any such inquiry, we would need to examine such values traditionally associated with law as accountability, transparency, fairness, equality, participation and the stabilization of expectations. At the same time, we have to look at the values said to flow from deploying new governance: these include an ability to handle diversity, facilitate experimentation, promote learning, and allow flexibility and revisability. And we would have to rethink some of the traditional categories in legal thought such as principal-agent accountability and separation of powers while asking what role traditional legal actors, from courts and agencies to practicing lawyers, might play in a transformed legal order.

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