

Social Europe and Experimental Governance: Towards a New Constitutional Compromise?*

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Experimental Governance and Social Europe

Overview

The EU is once again at a crossroads, hesitating over the terms of a new constitutional compromise.

To build an integrated continental market the Member States sacrificed some of their power to veto Union regulation. In return they got assurance that the regulatory choices submitted for their final approval would be shaped by a public-regarding process that filtered out proposals chiefly motivated by narrow self-interest. The classic Community Method, with the agenda-setting role of the Commission at its core, provided that assurance. This compromise transformed the EU from an association of states into a single legal community whose integrity was ensured by the European Court of Justice. Until now this community has worked well enough to assuage many of the most pressing concerns about its democratic legitimacy.

The potential new compromise regards Social Europe. Faced with the urgent, politically imperative task of reconstructing, separately but harmoniously, their welfare states, the Member States would relax the power accorded them by the treaties and Community Method to block EU intrusion into national systems of social protection. Again they would insist on institutionalization of a public-regarding process of agenda setting. This time that process would

* This chapter draws on a longer joint paper with Charles Sabel of Columbia University Law School, “Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe”, available online at <http://www2.law.columbia.edu/sabel/papers.htm>.

be embodied in new forms of experimental governance: the commitment to proportionality or framework legislation; comitology; networked administrative agencies; and the Open Method of Coordination – all underpinned by transparency as a procedural safeguard. These permit exploratory learning within and among Member States by contrasting different problem-solving strategies, each informed by a particular idea of the good, with the aim of both improving local performance and creating frameworks for joint action at the Union level. Through the ramifications of experimental governance, this compromise could transform EU lawmaking again, integrating it more fully into civil society. At the limit the compromise would help establish the EU as a new form of pragmatist democracy that sees problem solving and agonistic deliberation over ideals of the good as so indissolubly connected that effective learning becomes institutionalized in the continuing exploration of justice.

Roots of the New Compromise

The roots of this potential compromise are political and intellectual as well as administrative. Foremost among these, as Amitsis et al. (this volume) also emphasize, has been the progressive shift in both national and EU debates away from the goal of a single Social Europe as a regulatory counterbalance to the single market in favor of an alternative approach based on connecting welfare diversity within the European Social Model through mutual learning.

This shift in the debate reflects in turn a number of surprising empirical findings and novel conceptual developments. One is the limited incidence of social dumping or regulatory races to the bottom, coupled with evidence of races to the *top* in some well-documented cases, which has made the EU appear less constitutionally hostile to market-correcting regulation than originally feared.¹ A second is the discovery that there is not one welfare state in Europe, but several welfare-state families: what Anton Hemerijck and Jos Berghman (this volume), following Fritz Scharpf (2003), term “legitimate diversity”. Whatever their differences, moreover, members of each of these families have been struggling with similar challenges of adapting inherited institutions and programs to new distributions of social risk – some countries more successfully than others (Ferrera and Hemerijck 2003). These same developments suggest

¹ For evidence of “races to the top” in occupational safety and environmental protection, see Eichener (1997). For the more complex and controversial case of industrial relations, see Marginson and Sisson (2002).

that Europe might serve in a new way to enhance social protection in a period of increasing uncertainty by creating a forum for the discussing and generalizing the results of the different national strategies of adjustment.

OMC and Experimental Governance: Renewing the Community Method

This is where the new experimental governance comes in, above all the OMC. Because the OMC encourages convergence of national objectives, performance and policy approaches rather than specific institutions, rules and programs, it is particularly well suited to identifying and advancing the common concerns and interests of the Member States while simultaneously respecting their autonomy and diversity. By committing the Member States to share information, compare themselves to one another, and reassess current policies against their relative performance, the OMC is also proving to be a valuable tool for promoting deliberative problem solving and experimental learning across the EU. Hence this method has rapidly become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas where diversity among the Member States precludes harmonization but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.²

OMC processes have been rightly criticized for lacking transparency and discouraging broad participation by civil society – defects which if left uncorrected would limit their contribution to the new constitutional compromise. A theoretically promising response is that OMC procedures for ensuring full and open participation can be reformed by applying to them the same techniques of benchmarking and peer review that inform substantive policy judgements. And the growing emphasis within the social inclusion process and – more controversially – the European Employment Strategy on mobilizing all relevant bodies and stakeholders (including social partners, NGOs, national parliaments, and local/regional authorities) supports the practical validity of this view.³

² For overviews of research on the OMC, see in addition to Amitsis et al. (this volume), de la Porte and Pochet (2003), Zeitlin et al. (2004), and the voluminous materials posted on the University of Wisconsin-Madison European Union Center's online OMC Research Forum, <http://eucenter.wisc.edu/OMC/index.htm>.

³ For the social inclusion process, see Council of the European Union, "Fight Against Poverty and Social Exclusion: Common Objectives for the Second Round of National Action Plans", 14164/1/02 REV 1 SOC 508, Brussels 25 November 2002; Duffy (2003); Armstrong (2003). On the limited but expanding participation of non-state actors

Critics of the OMC often express the fear that its soft-law procedures could subvert existing and future hard EU law produced through the classic Community Method.⁴ But this objection seems both empirically and conceptually misplaced. In more and more policy areas, such as hazardous waste or occupational health and safety, hard-law directives increasingly tend to incorporate provisions for completion and periodic revision of standard-setting through soft-law OMC procedures.⁵ In most OMC processes, too, the common objectives play a pivotal role in linking EU policy making upwards to the core values and goals of the Union (as set out in the Treaties and the Charter of Fundamental Rights) on the one hand, and downwards to more specific programs and practices pursued by the Member States on the other.⁶ Hence the OMC

in the first five years of the EES, see Zeitlin (2002), de la Porte and Pochet (2003), and Jacobsson and Vifell (2003). In response to criticism from sub-national governments, NGOs, and the European Parliament, the Commission proposed that “all main stakeholders”, including civil society and local and regional actors, “should play their full part” in the next phase of the EES. But the Member State representatives in the Employment Committee insisted on deleting any explicit reference to civil society from the 2003 Employment Guidelines, acknowledging only that “relevant actors in the field of employment at national and regional level have important contributions to make”. Compare European Commission, “The Future of the European Employment Strategy (EES): ‘A Strategy for Full Employment and Better Jobs for All’”, COM (2003) 6 final, Brussels, 14.1.2003, p. 18, and European Commission, “Proposal for a Council Decision on Employment Policies of the Member States”, Brussels 8 April 2003 COM (2003) 176 final, <http://register.consilium.eu.int/pdf/en/03/st08/st08459en03.pdf>, p. 14, with “Council Decision of 22 July 2003 on Guidelines for the Employment Policies of the Member States” (200/578/EC), *Official Journal* 5.8.2003, L 197/21. The Commission’s communication on “streamlining” of OMC in social policy proposes that the emphasis on openness and involvement of a wide range of actors (social partners, NGOs, and sub-national governments) should be extended from social inclusion to “the entire range of the future social protection process”: see European Commission, “Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the Field of Social Protection”, Brussels xxx COM (2003) yyy final, p. 10.

⁴ See for example Goetschy (2003), Scharpf (2002), Chalmers and Lodge (2003).

⁵ For the example of industrial waste, see European Convention, Secretariat, “Coordination of National Policies: The Open Method of Coordination”, 26/9/02, WG VI, WD 015; for occupational health and safety, see European Commission, “Adapting to Change in Work and Society: A New Community Strategy on Health and Safety at Work 2002–2006”, COM (2002) 118 final, Brussels, 11.03.2002. In other cases, such as the regulation of atypical forms of employment, legal scholars increasingly observe an “integral continuity” between the legally binding norms embodied in EU framework directives (sometimes themselves the product of formal agreements through the European Social Dialogue procedure) and the “soft” commitments of the EES guidelines: Freedland and Davies (forthcoming), quoted in Kilpatrick (2003). For a general discussion of the hard law-soft law debate, see Trubek and Trubek (2004).

⁶ Thus, for example, in defining accessibility along with quality and financial viability as long-term of objectives of EU policy coordination in health care, the Commission and the Council referred explicitly to the “right of access to preventative health care and...medical treatment” proclaimed by the Charter of Fundamental Rights (article 33). In establishing an action program to support the Social Inclusion OMC, similarly, the Council and the Parliament highlighted the right to protection against poverty and social exclusion enunciated by the Charter of Fundamental Rights and the European Social Charter (de Búrca, 2003). The annual employment guidelines begin by invoking the objective of “promoting economic and social progress and a high level of employment” defined in Article 2 of the Treaty on European Union: “Council Decision of 22 July 2003 on Guidelines for the Employment Policies of the Member States” (200/578/EC), *Official Journal* 5.8.2003, L 197/13.

can be seen as one element in a larger emergent system of experimental governance within the EU that blurs the distinction between hard and soft law.

At a deeper level, the Community Method can be itself interpreted along the lines suggested by Paul Margette (2000) and others as a deliberative agenda-setting mechanism through which the EU, despite its diversity, provides for public- or other-regarding decisions, thereby inducing Member States to relax their sovereign veto powers. Interpreted in this way, the EU's emergent system of experimental governance, with the OMC at its center, amounts to a renewal rather than a replacement of the Community Method. By directly engaging local administrative units and civil society actors as well as Member States in joint problem solving, this new Community Method can further be understood as a form of pragmatic democracy in which the routine comparison of different practices deliberately raises and helps address doubts about apparently commonsense solutions and the meaning of fundamental values.⁷

The European Convention: Towards a New Constitutional Compromise?

The Convention and Social Europe

The Convention on the Future of Europe might have taken stock of these changes in the Community Method and acknowledged the new compromise of experimental governance as the constitution of Europe. In practice, it did not do so. The achievement of the Convention was to have avoided any recourse to traditional forms of constitutionalism that might fundamentally obstruct the innovations in EU governance. Its failure was its inability to give due constitutional form to these innovations.

The debate over Social Europe at the Convention quickly stalemated in a way that reflected the limits of the traditional agendas of right and left in the EU. The right tried to keep Social Europe off the agenda altogether, while resisting any increase in the Union's social competences and powers. The left pressed for its historic goal of a single Social Europe, based on parity of the EU's social and economic objectives, together with extension of Union competences and qualified majority voting to all areas of social and employment policy. But the

⁷ For a fuller elaboration of this argument, see Sabel and Zeitlin (2003), and Cohen and Sabel (2003).

right could not prevent a broad front of Socialists and Christian Democrats from obtaining a Social Europe Working Group, while the group's internal deliberations quickly revealed the lack of broad support even within its own ranks for a single Social Europe. Nordic Social Democrats and British New Labourites joined with conservative liberals and Christian Democrats to oppose granting new competences or stronger powers for the EU in sensitive policy areas bearing directly on the core functions of national welfare states.⁸

New Compromise or Anti-Climax?

This impasse could have been resolved in two distinct ways. One would have been for the Convention to do little or nothing, including little or no harm to innovative institutions, while simplifying the Treaties and tidying up constitutional loose ends. The alternative would have been formally to constitutionalize the new Community Method in a way that redefines the compromise between deliberative decision making and relaxation of veto powers. Such a new compromise would involve two elements. The first is a substantial strengthening within the Constitutional Treaty of references to the EU's social values and objectives, which would place them on an equal footing with Union's economic goals. The second is the anchoring in the Treaty of new governance mechanisms such as the OMC, which enhance the Union's capacities to take effective action in pursuit of its social objectives.

The Convention made significant progress towards the first element of this new compromise. The Social Europe Working Group recommended adding a long list of items to the catalogue of values and objectives in Articles 2 and 3 of the draft Constitutional Treaty. The Presidium, intent on keeping the opening "constitutional" section of the revised Treaty to the barest essentials, proposed a much shorter and less expansive list of social values and objectives.⁹ The final version, which incorporates numerous amendments from the floor, goes a long way towards achieving a new parity between the EU's social and economic goals. In particular, it declares that:

⁸ See the reports of the Economic Governance and Social Europe Working Groups, CONV 357/02 (21 October 2002) and CONV 516/1/03 REV 1 (4 February 2003) respectively, and the detailed working documents of both groups, available on the Convention website, http://european-convention.eu.int/doc_wg.asp?lang=EN. For useful commentary, see also the reports by Cécile Barbier of the Observatoire Social Européen in *Tomorrow Europe*, <http://www.ciginfo.net/demain/en/default.htm>, especially nos. 11 ("Results of the First Working Groups", December 2002) and 12 ("European Convention: What About Social Europe?", February 2003).

The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment...It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights. It shall promote economic, social and territorial cohesion, and solidarity among Member States....” (Article I-3, CONV 850/03).

And this strengthening of the EU's social values and objectives will be further reinforced by the incorporation into the draft Constitutional Treaty of the Charter of Fundamental Rights.

The fate of the other key element of the emergent compromise – constitutional anchoring of the OMC – is more ambiguous. The Social Europe Working Group endorsed the inclusion of the OMC in the draft constitutional treaty (as did three other Working Groups that considered the question) provided that, as one summary of its conclusions put it, “the provision would not replace existing normative procedures or make the open method of coordination rigid in cases where there is no specific legislative method of procedure.”¹⁰ These provisos reflected fears among some members of the Working Group that constitutionalization of the OMC could undermine its flexibility and among others that it could subvert the use of the EU's existing Treaty powers to legislate in the social field.

These differences, as Gráinne de Búrca and I have proposed (de Búrca and Zeitlin 2003), could be reconciled by a generic provision of the Constitutional Treaty defining only the fundamental aims and basic elements of the OMC; declaring that OMC processes be determined flexibly, subject to review by Parliament and other actors, unless specified otherwise by the Treaty; and disclaiming any intention to replace existing normative procedures by OMCs. In addition, this provision could be linked to the procedural safeguards emerging in the new governance by requiring in all OMC processes transparency and broad participation of all

⁹ CONV 516/1/03 REV 1, paras. 6-22; CONV 528/03, articles I-2, I-3.

¹⁰ Aoife Halligan, “Convention Debates Social Europe”, European Policy Center, <http://www.theepc.net/home.asp>, 21 February 2003. For a comparison of the various Working Group recommendations, see de Búrca and Zeitlin (2003).

relevant bodies and stakeholders (social partners, NGOs, national parliaments, local/regional authorities) in accordance with national laws and practices.¹¹

In the event, however, the Convention Presidium itself deadlocked along similar lines to the Social Europe Working Group and decided not to bring forward a proposal to incorporate the OMC into the draft Constitutional Treaty. Instead, article I-14 of the draft constitution gives the Union general powers to coordinate the economic, employment, and social policies of the Member States (with explicit reference to guidelines in the first two cases). In addition, article I-16 allows the EU to take “supporting, coordinating, or complementary action” in a series of other areas (industry; protection and improvement of human health; education, vocational training, youth, and sport; culture; civil protection) without harmonizing Member States’ laws or regulations. Part III of the draft constitution then sets out specific procedures for the coordination of national policies in different areas, incorporating the existing treaty provisions for the Broad Economic Policy Guidelines and the European Employment Strategy. But this part of the draft constitution also provides for the application of key features of the OMC in social policy, research and technological development, public health, and industry, without referring to it by name. In these areas, the Commission (“in close contact with the Member States”) is charged with taking “initiatives aimed at the establishment of guidelines and indicators, the organization and exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation”, about which the European Parliament “shall be kept fully informed” (Articles III-107, 148, 179, 180).¹²

Apart from the incongruity of referring covertly to what is supposed to be an *open* method of coordination, what difference, if any, will the likely failure to anchor it explicitly in the constitution make to the future of the OMC?¹³ There is no clear answer. Constitutional

¹¹ For related proposals, see Vandenbroucke (2003); and European Parliament Resolution A5-0143/2003 on analysis of the open coordination procedure in the field of employment and social affairs, and future prospects, 5 June 2003.

¹² These provisions were added to the draft Constitutional Treaty at the last minute as a result of an intensive lobbying campaign orchestrated by Maria João Rodrigues, the “mother of the OMC”: see Cécile Barbier, “Final Amendments to the Constitution”, *Tomorrow Europe* no. 17 (July 2003).

¹³ The European Parliament has passed two resolutions calling for the OMC to be incorporated into the Constitutional Treaty and for an inter-institutional agreement with the Council and the Commission, “laying down rules for governing the selection of policies for open coordination”, together with “a procedure for developing the open method of coordination into the Community Method”, which could be formalized by the Intergovernmental Conference. See European Parliament Resolutions A5-0143/2003 on analysis of the open coordination procedure

provisions undoubtedly matter in the EU, and the EES in particular has benefited from the added legitimacy conferred by its Treaty base in relation both to the Member States and to the Broad Economic Policy Guidelines. But other OMC processes which have a weaker Treaty base such as social inclusion have also taken off quite rapidly, eliciting broader participation from civil society at both national and European level. And even where Member States remain reluctant to acknowledge the Europeanization of sensitive domestic policy areas by creating formal new OMC processes, they increasingly make use of closely related procedures in addressing urgent common problems, as in the case of recent developments in policy domains as different from one another as health care and the fight against terrorism.¹⁴

The apparently staid Community Method has almost always run ahead not just of constitution making but also of constitutional theory in the EU. The ungainly but workable compromise reached by the Convention, which neither advances nor obstructs the EU's new experimental governance, offers little reason to think that the legal and constitutional hare will soon overtake the institutional tortoise.

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¹⁴ On the evolution of EU "policy cooperation" in health care, see Baeten (2003); and for peer evaluation of national anti-terrorism arrangements, see Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation in the fight against terrorism (2002/996/JHA), *Official Journal* 24.12.02. I am grateful to Gráinne de Búrca for the latter reference.

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