



The changing contours of experimental governance in European health care



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ABSTRACT

For over a decade, beginning in the late 1990s, discussion over softer modes of governance animated academic scholarship in the fields of law, politics, and public policy. This debate was especially pronounced in Europe. Since the late 2000s, however, discussion of this approach has declined precipitously. Is the “soft governance” model dead? Or, more precisely, has the economic crisis killed it? This article argues that, to the contrary, the EU's austerity measures have made softer governance more relevant in two quite distinct ways. Administratively, new mechanisms of health policy coordination are able to provide policy solutions in a much more effective way than could more formal and rigid forms of legal harmonisation. Politically, it establishes a normative perspective which unifies actors across a number of administrative units and challenges the dominant ideological force of the market-based principles upon which the EU's austerity policies are constructed.

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For over a decade, beginning in the late 1990s, discussion over informal modes of political governance animated academic scholarship in the fields of law, politics, and public policy. This debate was especially pronounced in Europe. Since the late 2000s, however, discussion of this approach has declined precipitously. Is it simply the case that serious economic crises in Europe have focused attention away from softer political issues (such as forms of governance) in order to address more pressing issues of financial stability and economic growth? While the recession which began late in 2008 did, unsurprisingly, divert much political attention to economic issues, it did not eliminate interest in soft governance. Rather, these “softer” approaches remained quite relevant for two very discrete reasons: on the one hand, they provided a more efficient approach to policy development; on the other hand, they served as a political armature upon which to articulate normative alternatives to market-oriented principles.

The first section of this paper discusses the theoretical development of “experimental governance” (also known, *inter alia*, as “new governance,” “soft governance,” or “soft law”), and why it became particularly important in the field of health care within the European Union. It then explains how the restructuring of

economic governance mechanisms within the EU in the wake of the financial crisis appeared to supercede this approach. The subsequent sections argue that, while the manifestation of soft governance has metamorphosed considerably in the past decade, it has become far from irrelevant. To the contrary, it now performs two quite distinct functions. First, it provides a more efficient means to address complex health policy problems across overlapping jurisdictions. Second, it establishes a normative perspective which unifies actors across a number of administrative units and challenges the dominant ideological force of market-based principles upon which the EU's austerity policies are constructed. Conceptually, this analysis is informed by discursive institutionalism (Schmidt, 2008, 2013). However, it also suggests that discursive approaches tend to be rather weak in their explanation of how, precisely, politically contentious ideas are cultivated and diffused within specific institutional contexts to challenge dominant ideational approaches (and the consequent distribution of political power and economic goods). To this end, Sabatier's model of advocacy coalitions is employed in order to explain the ways in which political actors utilise the principles of soft governance for specific political ends. While this explanatory framework could potentially be applied to a number of institutional relationships outside of health care and even beyond the EU, the scope of this article is restricted to health policy within the EU.

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The methodology of this article combines qualitative methods of document and literature review with semi-structured key informant interviews of officials in European Commission Directorates and non-state actors in Brussels and Luxembourg from 2008 to 2013. The principal focus for interviews was DG-SANCO, as this Directorate has the most direct responsibility for health-related policy within the EU. Given the “snowball” methodology employed by the study, however, many officials within DG-EMPL were later added to the interview list. Ethics approval for this project was obtained from the author's university following the requirements outlined in the *Tri-Council Statement on Ethical Conduct for Research Involving Humans*. The funding sources for this project were the Canadian Institutes of Health Research (CIHR) and the European Union Centres of Excellence (EUCE).

1. What is “experimental governance”?

Formal legal systems require stability, predictability, and uniform applicability. Policy areas such as health care are highly complex, rapidly evolving, and involve actors with vastly different needs and capacities. The best institutional structures for modern health care governance often collide with the overarching constitutional structures that have evolved to address the broader political goals of conflict resolution and economic growth. The evolution of the European Union is one example of this disjunction. Designed to protect national autonomy over domestic affairs while promoting economic union and political amity between states, the laws and institutions of the EU were not constructed to facilitate the development of effective and sustainable health care policy. While contemporary health care increasingly requires greater collaboration and coordination across jurisdictions, the original provisions of the EU explicitly prohibited formal supranational coordination of health care across Member States. Because of this, European health policy from the late 1990s to the late 2000s witnessed the efflorescence of new experimental modes of governance that attempted to facilitate the sustainable development of European health policy within the more rigid framework of European law.

What, exactly, is meant by “soft” or “experimental” approaches to governance? Despite the huge volume of literature written in this area, there is still little agreement on how to define it or how to approach it analytically (Köhler-Koch and Rittberger, 2006; Tömmel and Verdun, 2009; Benz, 2009). While the term actually encapsulates a huge variation of principles and processes, at its most basic the concept simply refers to approaches that are not reducible to hierarchical command-and-control models. And, as Hervey and McHale write, while soft-law norms have always played a part in EU policy-making, it is nonetheless possible clearly to differentiate between “old-style legislative harmonisation” and “new approach harmonisation” (2004: 48–62). The distinction between hard and soft forms of law and governance is often represented in binary form: static/transformational; substantive/procedural; rigid/flexible; prescriptive/informative; demanding of uniformity/accepting of diversity; stable and lasting/provisional and revisable, and so on (Scott and Trubek, 2002; Eberlein and Kerwer, 2004; Walker and de Búrka, 2007; Sabel and Zeitlin, 2010; Armstrong, 2011). The problem is that what is considered under the rubric of “soft governance” is, in consequence, quite disparate and often contradictory. One encompassing definition of new governance has been articulated by Klein (2008: 10), who states that

[i]nstead of a top-down, hierarchical rule-based system where failures to adhere are sanctioned, or unregulated market-based approaches, the new governance school posits a more

participatory and collaborative model of regulation in which multiple stakeholders, including, depending on the context, government, civil society, business and nonprofit organizations, collaborate to achieve a common purpose. In order to encourage flexibility and innovation, “new governance” approaches favor more process-oriented political strategies like disclosure requirements, benchmarking, and standard-setting, audited self-regulation, and the threat of imposition of default “regulatory regimes” to be applied where there is a lack of good-faith effort at achieving desired goals.

What explains the explosion of new governance literature from the mid-1990s to the end of the 2000s? Intellectually, political scientists were beginning to move away from the study of formal institutions to a more discursive approach focussing on the construction of ideas (Schmidt, 2008), and from the study of “government” to the process of governing (Bell et al., 2010; Bakvis, 2010). This movement away from simple institutionalism was also influenced by schools of thought that focused upon collective action analysis (e.g., Ostrom, 1990). All of these analytical frameworks focused upon the role of *negotiation* between political actors as a complement to both market-oriented processes and formal hierarchical relationships.

But it was the evolution of a more integrated European Union following the Treaty of Maastricht in 1993 which gave these analytical tools so much immediate relevancy. The deeper integration of an increasing number of states meant that the “classic Community method” of harmonisation through binding legal texts was becoming more cumbersome and unwieldy. The European Union has always relied upon a softer form of governance compared to sovereign states (Tömmel and Verdun, 2009), as it depends upon Member States to adopt and enforce the myriad of “resolutions, recommendations, opinion, notices, communications, action programmes or plans, declarations, and communiqués” that comprise a significant part of its policy-making role (Hervey and McHale, 2004: 61). But the European Union was, like most sovereign states, experiencing a declining capacity to execute effective policy and provide public goods in an increasingly complex and rapidly changing social context (Sand, 1998). At the same time, the growth of complicated and distant bureaucratic processes led to a political backlash by European citizens against the institutions of the European Union itself; and by the mid-1990s the European Commission began to address the perceived democratic deficit of the EU (Decker, 2002). By embracing a rhetoric of consultation and collaboration, the European Commission hoped to shift public focus on the EU to a more innovative and inclusive democratic experiment in place of the source of impenetrable bureaucratic dictates to the EU (Hix, 1998).

A separate political motivation for the endorsement of new governance approaches within the EU stemmed from the explicit market-oriented agenda of the EU as an institution. Those Member States which valued a more solidarity-based “European social model” became increasingly concerned that the legal framework supporting greater economic integration would undermine their ability to operate more distributive social programmes in policy areas which had been considered matters clearly under national jurisdiction. In response to greater economic integration, these states entered into what has been termed a “constitutional compromise”. Counteracting market-based strategies by ceding authority on social issues to unelected bureaucrats within the EU was just as unpalatable as the problem itself. But by accepting a common process that would coordinate social policy without undermining formal political authority, Member States could counterbalance the inherently fragmentary tendencies of free-market policies without relinquishing national authority (Dawson, 2010).

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