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**Book Review**

**BETWEEN GOVERNING  
& GOVERNANCE**

**POUL F. KJAER  
OXFORD: HART, 2010**

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Poul Kjaer's *Between Governing & Governance* is a provocative contribution to contemporary theoretical debates on evolving forms of governance within the European Union (EU). Kjaer's contention is that over recent decades three new "governance structures" (following Kjaer, GS) have become increasingly prevalent within the EU – namely commitology, the open method of coordination (OMC) & independent regulatory agencies – and that these new GS can no longer be understood or explained by reference to the inter-governmental/supranational distinction that has traditionally been used to frame discussion. Instead, Kjaer seeks to suggest that EU governance is an evolving "hybrid structure" consisting of "networks" of traditional hierarchical organizations (such as the Commission, Council and Parliament), intermixed with new "heterarchical" organizational forms.

Kjaer seeks to provide both an analytical and normative framework for understanding these apparently disparate phenomena. In doing so, he draws on the conceptual vocabulary of systems theory and, in particular, the sociology of Niklas Luhman and legal theorists influenced by Luhman's work, such as Karl-Heinz-Ladeur, Gunther Teubner and Christian Joerges. One useful feature of the book is that it provides a comprehensive overview of important recent debates on the EU that have largely been conducted in the German language.

The main features of these GS are well documented. Commitology refers to the four hundred plus expert committees comprised of member state representatives who generate knowledge and issue expert opinion in order to assist the Commission in the process of policy formation. The thirty plus independent EU regulatory agencies (e.g., the European Food Safety Authority or the European Agency for Safety and Health at Work) operate on a limited mandate performing a range of functions including regulation, monitoring, information sharing, network management, and policy coordination. Finally, the OMC entails the comparison, evaluation and benchmarking at a EU level of national policy instruments that are not formally part of the EU policy ambit (notably social policy and issues relating to the information society). In the absence of a formal transfer of competence from a national to supranational level, the OMC fosters knowledge creation and policy experimentation, and thus generates a common basis, which can potentially serve as the basis for competence transfer that may occur later.

Although not obviously similar, Kjaer contends that all three GS promote a systematization, intensification and professionalization in EU policy-making. Moreover, they have common origins in that they are a “response to functional needs related to the handling of increased social complexity.”<sup>(47)</sup> There is a “fundamental asymmetry” between the functional demands for European actions and the capacity of the traditional hierarchically organized EU institutions, such as the Commission, to handle such demands. This “capacity deficit” of the EU has led to a mobilization of additional resources from outside the existing institutions – what Kjaer characterizes as “decisional outsourcing” - in the form of the GS. The EU is a hybrid organization in that it responds and operates between an “anarchic world society” and the hierarchically organized MS.

Kjaer’s account of this “capacity deficit” is particularly persuasive. He identifies shortcomings at three levels. Firstly, the EU does not have the cognitive

capacities to gather efficiently information on the full range of issues necessary and therefore EU institutions have a strong incentive to rely on MS and alliances with private actors to compensate for the inevitable information deficit. Secondly, the EU lacks effective control mechanisms, obliging the EU to rely on MS to ensure implementation and compliance. This creates strong incentive for EU institutions to establish institutionalized and stable relations with MS administrations, particularly with executive authorities. Finally, the EU has limited competence (i.e., limits on those areas where it has legal authority to act) and this creates incentives for the EU to promote the development of new GS, because such GS can be used to circumvent the often cumbersome decision making procedures found in the Treaties, and thus extend the scope of EU integration activities.

Kjaer's suggests that all three of the GS that he discusses are "reflexive structures" designed to "off-set" these structural deficits. Of course, this comes at some cost to the EU. Specifically, the heavy influence exercised by MS and private actors over policy outcomes combined with the delegation of authority to independent regulatory agencies results in a high degree of "decisional outsourcing" and a concomitant loss of control over the contents and direction of policy. To minimize the negative effects of this kind of trade-off, the EU – notably the Commission – seeks to identify mutual interests in a pro-integration policy agenda that builds on pan-European networks.

Following Teubner and Ladeur amongst others writing in this field, Kjaer uses the concept of networks in order to develop his argument. New GS may be very different, but what they have in common is that they "rely on networks" (62), that is to say they all involve structural couplings between organizational systems (or "inter-hierarchical networks"). These couplings reduce complexity, stabilize expectations and activate resources produced by the other systems. Moreover, they serve to minimize rationality conflicts arising between different functional systems within late modern society.

Kjaer's concept of networks is functional, that is to say structural couplings between organizations facilitate a stabilization of expectations. The existence of a network between Organization A and Organization B, for example, allows Organization A to assume that Organization B is engaged and will engage in activities that are necessary for the continued operation of Organization A. Networks can be understood as a mode of monitoring the environment, in which expectations are institutionalized and stabilized, and in which trust substitutes cognition. Networks reduce the cognitive capacities that an organization needs to deploy in order to continue operating: i.e., if I can expect/trust you to do X, then I don't need to constantly monitor you to see whether you are actually doing X. As such, networks promote efficiency and reduce costs. Moreover, networks can function as information hubs, gathering information from different functional systems, reorganizing that information and then redistributing it. Networks reduce negative externalities by linking rationalities from scientific, economic, legal and political systems.

This general concept of networks is then used by Kjaer to provide a definition of the new GS within the EU, namely "institutional formations relying on the network form and characterized by organizational and legal heterarchy, which act as structural couplings between hierarchically organized organizations, increasing the reflexive capacities of the organizations in question and thereby off-setting the structural deficits of one or more of those organizations" (82). Kjaer goes on to re-describe the GS using this framework and provides two detailed case studies in order to illustrate his theoretical model.

Since they combine elements of command and control with persuasion and coordination, the new GS often exist in a legal grey zone between hard and soft law. This has made some commentators nervous – notably lawyers - and Kjaer concedes that they may in some contexts have negative effects in addition to their normative shortcomings. Nevertheless, the book defends these GS since they provide a more effective means of coordination between different types of

“rationality conflict” that Kjaer suggests are inevitable in late modern societies. Written before the Greek sovereign default crisis, Kjaer’s optimism on this point may seem overstated, but he nevertheless makes a convincing case.

Kjaer seeks to further alleviate anxieties surrounding the evolving GS of the EU by offering a normative justification for this trend. In doing so, he seeks to build on the “conflict of laws” approach to EU constitutionalism, associated with Christian Joerges. The broad contours of Joerges’ argument are clear: as a result of the fact of increasing inter-dependence within Europe, policies adopted by one member state are likely to have spillover effects on citizens of other member states. These externalities are problematic from the viewpoint of classical legal and political theory because, within such accounts, law should be self-legitimizing, i.e., the law only achieves legitimacy when the addressees of a law (all those whom it affects) are also its authors (included in the decision-making process, e.g., by electing law-makers). When a gap exists between decision-makers (citizens of one member state) and those affected by that law (citizens of another state) then that law lacks democratic legitimacy, at least on the classical modern narrative. MS are increasingly characterized by a new kind of democratic deficit, as they do not include in policy formation process citizens of other MS countries who will be affected, either directly or indirectly, by their policies.

Joerges suggestion is to claim that EU law can perform a compensatory function in the sense that it can ameliorate the external effects of those policies that lack legitimacy. EU law can ensure that extra-territorial effects of actions are taken into account. EU constitutionalism is thus complementary to nation state constitutionalism, as its objective is to ensure a reduction in negative externalities arising from the operations of national political systems.

Kjaer takes up this challenge of post-national constitutionalism by identifying two limits in Joerges account. Firstly, Joerges is insufficiently sensitive to fact

that the increased interdependence from which the “conflict of laws” approach departs is a direct result of the activities of the EU itself. As such, there is a circularity problem in which the EU creates the interdependence, which provides the normative justification for the development of EU meta-norms. The second limitation is more serious, however. Kjaer argues that Joerges focuses exclusively on “horizontal conflicts” between member states and not the other types of conflict that arise within the context of the EU. Accordingly, Joerges fails to appreciate the plurality of authority structures and his account remains too state-focused. In particular, Kjaer identifies the “horizontal conflicts” that arise between functionally differentiated transnational spheres of society (e.g., between science and politics or economics) or “vertical conflicts” between the EU and the MS. The book ends with some challenging suggestions regarding the importance of developing a “three dimensional” account of constitutionalism that is able to provide a normative justification for EU-level action that seeks to resolve conflicts of this kind. Kjaer points to the limits of the concept of democracy in such an account, and the arising need to identify the “functional equivalents of democracy” to justify action at the transnational level. Although thought provoking, this part of the argument remains somewhat opaque and underdeveloped, and few clues are provided as to the type of concepts that provide an alternative to democracy. Nevertheless, this an important and interesting issue that requires further study.

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