

# European Law in Times of European Governance

## A Legal Theory Inquiry into the Doctrinal Perceptions on European Law and European Governance

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### 1. GENERAL INTRODUCTION

How do legal scholars consider or conceptualise their object of study? That question, mostly amounting to what law is, has beguiled and defied generations of theorists<sup>1</sup>. Less considered however, yet at least equally important is the underlying question on the perception of legal principles, legal rules and even legal phenomena by legal scholars. For that will be the question that allows legal scholars to delineate their object of study and justify their own existence. Sociologists, economists and other scholars all entertain a specific perception on the conception of their field of study. And so, at least implicitly, do lawyers...

A perception of the legal field of study can be found in subdividing the law functionally and academically in different sub-fields. In that way, scholars have been granted room to argue and analyse specific issues in a coherent and generally reflective framework. Those sub-fields do all refer to the ultimate general field of "law", and ultimately consider law to bear specific essential common characteristics. Some sub-fields of the law tend however to erode in that respect. Social evolutions will indeed often trigger the law and thus legal scholars to reconsider, enlarge or focus their study objects. That is specifically the case in the field of European institutional law. Being constant work in progress, European Union legal scholars are often confronted with the boundaries of traditional law perceptions. This contribution will in that regard specifically focus on the interface between traditional EU law and so-called EU (new) governance. New governance initiatives are not formally considered

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<sup>1</sup> According to B. TAMANAHA, "Law", *St. John's University Legal Studies Research Paper Series* #08-0095, available at <http://ssrn.com/abstract=1082436>, 1

law by everyday practitioners (and thus by judges as well), yet nevertheless, legal scholars seem to approach the subject of governance techniques in ways similar as they would approach classical law. That finding thus triggers to dig deeper into the legal theoretical nature of legal scholarship and its extensions beyond traditional law. This contribution aims at investigating the underlying groundwork of scholarly perceptions with regard to law and governance. I will do so with regard to a field of EU policy in which traditional law and governance complement each other: the Lamfalussy approach in EU Financial Services.

## 2. LAMFALUSSY BETWEEN LAW AND GOVERNANCE

Regulating diverse policy compartments differently has become the modality of choice for EU activity in recent years<sup>2</sup>. New or newly perceived regulatory strategies thus appear in a wide variety of EU contexts. EU regulatory strategies are thereby centred on legislation or law<sup>3</sup>, as well as on so-called alternative (new) governance approaches<sup>4</sup>. With regard to the foregoing, it has been argued regulation in the European Union seems to constitute a mere patchwork of different regulatory approaches that could be framed as experimentalist and in that regard only show unity in their experimentalist EU outset<sup>5</sup>. Differences between policy sectors<sup>6</sup>, regulatory goals<sup>7</sup> and the involvement of actors concerned indeed seem to have justified the patchwork approach that is presented to European citizens (in as far as they might be concerned by those measures). That patchwork did however not impede scholars to question EU functions and roles, as well as the nature of EU

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<sup>2</sup> Based upon a quote by C. SCOTT in “Private Regulation in the Public Sector: A Neglected Facet of Contemporary Governance”, *Journal of Law and Society* 2002, 57: Regulation has become a modality of choice for State activity in recent years. It however appears the regulatory focus can be discovered within an EU setting as well. I will focus on EU regulation in this article.

<sup>3</sup> See on the complex socio-legal approach to legislation and its role in the regulatory process, R. BALDWIN and M. CAVE, *Understanding Regulation. Theory, Strategy and Practice*, Oxford, Oxford University Press, 1999, 363 p.

<sup>4</sup> The epitheton “new” as a way of expressing the different approach from classical Community “law”. See also R. COMELLA, “New Governance Fatigue? Administration and Democracy in the European Union”, *Jean Monnet Working Paper*, [www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org), already in her introduction referring to the use of new governance techniques. From her point of view, she is somewhat critical towards the high reluctance on new governance techniques, in spite of traditional, state-oriented legal techniques.

<sup>5</sup> C. SABEL and J. ZEITLIN, “Learning from Difference. The New Architecture of Experimentalist Governance in the EU”, *European Law Journal* 2008, 271-327

<sup>6</sup> See e.g. the approach considered in the Chemicals Sector (Registration, Evaluation and Authorisation of Chemicals or REACH), D. BOWMAN and G. VAN CALSTER, “Reflecting on REACH: Global Implications of the European Union’s Chemicals Regulation”, *Nanotechnology Law & Business* 2007, 375 et seq.

<sup>7</sup> Consider the goal of minimum harmonisation in the Consumer Protection Area, leaving room for Member States Actions. For a descriptive overview on minimum harmonisation, see M. DOUGAN, “Minimum Harmonisation and the Internal Market”, *C.M.L.Rev.* 2000, 853-885

cooperation in a more general way<sup>8</sup>. Theoretical inquiries into the nature of European integration as a matter of law have continuously been developed<sup>9</sup>. From a similar general perspective, this contribution will delve into the generalities of EU law by embarking upon a theoretical inquiry into the *cognoscibility*<sup>10</sup> of European Community “law”. Traditional conceptions of the concept of law<sup>11</sup> were considered to be impeded by the existence of different governance techniques that in themselves constitute a reaction against traditional law’s shortcomings. Incumbent questions therefore concern the capacity of formulating knowledge statements about European law’s validity and how those validity statements, constituting the core of scholarly legal research, are to be developed. In order to address that knowledge “problem”, a meta-reflection about European law validity statements will be developed. The major question thereby amounts to whether legal scholars’ validity statements with regard to law are merely limited to what is commonly understood as a hierarchical, authoritative system, the latter description traditionally used to identify a legal order. More precisely the question whether a “legal” cognoscibility frame allows a scholar to “know” governance approaches as well arises. In that respect, the recent “Lamfalussy”-approach to harmonisation of laws constitutes an ideal point of departure, as it introduces both law and governance in one regulatory approach.

“Lamfalussy” originated in the European Commission’s intentions to create and enhance an internal market in financial services (in the field of Banking, Insurance and Securities)<sup>12</sup>, the creation of which was believed to be

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<sup>8</sup> See writings by K. LENAERTS e.g. K. LENAERTS, E. DE SMIJTER, “The Question of Democratic Representation: On the democratic representation through the European Parliament, the Council, the Committee of the Regions, the Economic and Social Committee and the National Parliaments”, in J.A. WINTER, D.M. CURTIN, A.E. KELLERMANN & B. DE WITTE (ed.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague, Boston, London, Kluwer Law International, 1996, 173-197 and K. LENAERTS & A. VERHOEVEN, “Institutional Balance as a Guarantee for Democracy in EU Governance”, in C. JOERGES & R. DEHOUSSE (ed.), *Good Governance in Europe’s integrated Market*, Oxford, Oxford University Press, 2002, 35-88

<sup>9</sup> Inter alia N. WALKER, see e.g. “Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe” in G. DE BÚRCA and J. SCOTT, *Constitutional Change in the EU. From Uniformity to Flexibility?*, Oxford, Hart, 2000, 9-30

<sup>10</sup> Dictionaries refer to cognoscibility as the capacity of being cognoscible. In this contribution, I refer to cognoscibility, cognoscible or cognisable in order to express the way in which lawyers know the law as law; in other words, in what way lawyers understand law to be law and thus to be their object of study. The framework based upon which knowledge of law is made possible therefore constitutes the cognoscibility framework.

<sup>11</sup> I would like to distinguish indeed between the concept and conceptions of law. Since the EU originates from state-based actions and since its developments have always been ignited by State-based or state-accountable structures, the state-originating concept of law cannot as such be neglected. That does not mean to say however the specific conceptions of that concept, the way they are applied within a specific state or policy sphere, will be considered similar in all circumstances. In that respect, it will be argued a different conception of the traditional concept of law might appear within an EU context.

<sup>12</sup> See the Action Plans developed by the European Commission: a Financial Services Action Plan in 1999 and a White Paper on Financial Services 2005-2010

accompanied by the development of a new European regulatory procedure in order to be successful. A new approach, that would allow for fast and flexible yet coherent regulation<sup>13</sup>... Taking that perspective, a Committee of Wise Men presided over by Belgian banker and Professor Alexandre Lamfalussy developed a regulatory strategy that included both traditional legislative and new governance techniques in a coherent whole. Both attention had been paid to institutional legitimacy through European Parliament as to regulatee legitimacy by ascertaining “civil society” or at least those actors or groups of actors involved would interfere in the process<sup>14</sup>.

More specifically, four levels of regulatory action have been endorsed. Level 1 regulation thereby determines general political principles while level 2 measures implement those principles in detailed provisions. Regulatory action on those levels operates within the general framework of lawmaking provided for by the European Treaties. Level 1 decisions are being taken within the so-called co-decision procedure provided for in Article 251 EC Treaty, while Level 2 measures’ institutional design consists of Comitology proceedings as provided for in the Comitology Decision<sup>15</sup>. Level 3 comprises a network committee of national supervisory authorities<sup>16</sup>. The latter meet in a formalised setting, without however constituting a European *Institution* according to the Treaty<sup>17</sup>. Level 3 Committees<sup>18</sup> define concrete application and implementation measures and ensure regulatory convergence as well as supervisory convergence by national supervisory authorities. Those Committees produce “soft-law” standards<sup>19</sup> exclusively that are not formally part of national law or European law, yet do play an important role, since they are binding upon the Committee’s members, i.e. the national supervisory

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<sup>13</sup> *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, [http://ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wisemen\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wisemen_en.pdf), 115 p.

<sup>14</sup> In other words, a kind of authority should have been granted through providing legitimacy. The use of a similar conception of legitimacy as authority both within a parliamentary setting as within the correct involvement of civil society actors, might already indicate similarities between law and governance that will be touched upon later on.

<sup>15</sup> Decision 1999/468/EC

<sup>16</sup> Such as the Belgian Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA) or the Dutch Autoriteit Financiële Markten (AFM).

<sup>17</sup> It took however a Commission Decision to create those Committees. The role of level 3 Committees is indeed rather ambiguous and raises questions from a legal protection perspective. That topic will however constitute the subject of another paper, entitled *Individuele rechtsbescherming in Lamfalussy Transgouvernementele Netwerken*.

<sup>18</sup> A notable example is the Committee of European Securities Regulators or CESR. Other Committees include the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pension Supervisors (CEIOPS).

<sup>19</sup> At least according to the general tendency, see D. FISCHER-APPELT, “Does the EU need a single European securities regulator?” in H. HOFMANN and A. TÜRK, *EU Administrative Governance*, Cheltenham, Edward Elgar, 2006, 261; it could even be argued those standards constitute less than law as the Committees do not play a role within the legal system (however, that already indicates a specific perception towards a cognoscibility framework).

authorities. What is even more, the involvement of regulatees<sup>20</sup> has been formalised in the Committees' deliberation standards, thus allowing for input checks and balances. That specific Level 3 approach triggers the question as to how one should understand (and thus know) a concept of law in the European Union, as it appears Level 3 rather relies on what is called alternative or experimentalist<sup>21</sup> techniques of new governance beyond the traditional legal framework. Level 4 consists in coordinated enforcement of *legislative* (i.e. levels 1 and 2) standards<sup>22</sup>.

“Lamfalussy” sought to develop the regulatory four-level division and a transparent division of competences *as an ideal contribution* to better regulation in the EU, while at the same time being in conformity with the foundational or constitutional European Union law<sup>23</sup>. In that regard, “Lamfalussy” makes both a contribution to respect European law as proclaimed in the Treaties as it tries to implement new approaches encompassing (new) governance techniques. That is remarkable since law and governance have traditionally been contrasted by legal scholars<sup>24</sup>. At the same time however, questions about “Lamfalussy”'s own constitutional status have arisen. Could “Lamfalussy” itself be considered law? What constitutes law in the European Union? Those questions immediately trigger reflection about the nature of law in the European Union. Since some scholars however seem to consider law and new governance irreconcilable, questions arise concerning cognoscibility of European law in the first place and its relationship towards governance strategies' cognoscibility. I will argue clarifications concerning cognoscibility will eventually lead towards clarifications as regards the nature of European law.

Before embarking upon the actual foundational research in European Law, Governance and Lamfalussy, it should again be stressed the approach in this article consists in determining whether and how one can understand European Law to be cognisable. As European Law has been applied specifically in Lamfalussy, its cognoscibility is considered as well. Can “Lamfalussy” be called law? It seems it could, as legal contributions have been developed

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<sup>20</sup> Stock exchanges, investment services providers, but consumers as well, see CESR Public Statement on Consultation Practices, December 2001, CESR 01/007c, <http://www.cesr-eu.org/index.php?page=workingmethods&mac=0&id=>

<sup>21</sup> C. SABEL and J. ZEITLIN, note 5 (specifically 304)

<sup>22</sup> A more complete description of the new approach can be found best in N. MOLONEY, *EC Securities Regulation*, Oxford, Oxford University Press, 2002, 843-871

<sup>23</sup> Indeed, the Final Report of the Wise Men considered this new approach to be most suitable for developing a European internal market in financial services from that perspective. See Final Report, 20

<sup>24</sup> See indeed G. DE BÚRCA and N. WALKER, “Reconceiving Law and New Governance”, EUI Working Paper 2007-10 (De Búrca and Walker), published as “Reconceiving Law & New Governance”, *Columbia Journal of European Law*, 2007, 519-537. Subsequent references will be made to the EUI essay. See as well N. WALKER, “EU Constitutionalism and New Governance” in G. DE BÚRCA and J. SCOTT, *Law and New Governance in the EU and the US*, Oxford, Hart, 2006, 15-36

exclusively analysing the entire “Lamfalussy” process and its intertwinements between law and governance<sup>25</sup>. The latter contributions did however not delve into the foundational problem of legal cognoscibility. How should legal knowledge thus be conceived and how does governance fit in that knowledge frame?

I will thus elaborate upon the foundational relationship between law and governance in order to answer the question of how jurists develop legal knowledge in a European context. Since law is the starting point, it could be inferred that traditional law’s predominance is presupposed, whit governance constituting a mere impediment. That would however neglect the specific strategy I intend to follow in this article. Indeed and on the contrary, both law and governance foundations will be touched upon in order to find out the foundations of law in “Lamfalussy”. It will therefore be argued that European law might constitute more than the traditional conception of law as taken for granted by EU scholars and judges! The following sections will therefore touch upon that traditional concept of law in the European Union, yet as well on governance and “Lamfalussy” as a trigger for EU regulation. In a final section, I will argue “European Regulation” as such might be considered a new standard for EU law’s cognoscibility and might thus constitute the foundations of a renewed “European law” cognoscibility frame. Jurists could play a primary role in that respect.

### 3. THE LEGAL THEORY CONCEPTION OF LAW IN THE EUROPEAN UNION: KELSEN, HART AND WALKER

Approaching the conception of law as an object of scientific research within a European *polity*<sup>26</sup>, the point of view of what law is and how jurists are capable of knowing it has traditionally been found in Kelsen’s Pure Theory of Law and in Hart’s Concept of Law. Both scholars developed conceptions of knowing the law as authoritative and thus cognisable. Critics did however argue those conceptions are ill-adapted to functioning in a supranational framework, in which national and supranational orders are to play a role in concurring or heterarchical relationships. In order better to be capable of understanding those arguments, I will briefly sketch Kelsen and Hart’s conceptions of the concept of law. Subsequently, I will argue those conceptions do remain valuable when considering supranational law cognoscibility.

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<sup>25</sup> The best example in that regard could be E. FERRAN, *Building a European securities market*, Cambridge, Cambridge University Press, 2004, 304 p. or B. VACCARI, ““Le processus Lamfalussy : une réussite pour la comitologie et un exemple de “bonne gouvernance européenne””, *Revue du droit de l’Union européenne* 2005, 803

<sup>26</sup> A polity being considered a political organisation: I believe that is at least how one could denominate the European Union: comprising of an elected parliament, accountable executive organs and a judicial protection system do seem to justify the existence of the EU as a political organisation

Kelsen considered law to consist of a set of legal oughts that are distinct from moral or extra-legal oughts<sup>27</sup>. The approach thus taken by Kelsen seems to imply something or someone is dividing oughts developing them as legal or not, thus rendering them cognisable as legal norms. Legal norms in that respect are norms that can be validated by referring it to a higher, i.e. more general norm in a pyramidal structure<sup>28</sup>. *Beyond* the top of that pyramid of norms, a Basic Norm is to be found, constituting the final authority to which the validity of all particular norms can be traced back, without that norm itself being validated or questioned as a part of the legal system<sup>29</sup>. That approach implies that, contrary to what lawyers traditionally consider, the (written) constitution does not as such equal the Basic Norm. Applied from a European Union perspective, a European regulation or even national legislation being the implementation of a European Directive would in that respect be valid if it is in conformity with perhaps a higher-ranking framework directive which itself is in conformity with the European Treaty, which itself seems to constitute the highest norm, the highest ought expressed by a polity. However, as the Basic Norm can never be an act of will *within* the legal system, but rather an act of thinking, not being part of positive law<sup>30</sup>, it can as such never be defined as the Treaty Framework within the European Union. In other words, the Basic Norm Kelsen focuses on, presupposes an act of thinking *beyond* the existing Treaty Framework as to why European Law should be obeyed, from which all law-related action, including the development of the Treaty Framework, arises. The question in that respect could be turned towards what underlying values or norms can be found within that system. The Basic Norm being a prerequisite to “know” the law, to be able to study the law from a specific angle, does indeed legitimize the entire legal system, yet cannot be considered less than the “basis on which such claims, agreements or verdicts can be valid as norms in the strict sense”<sup>31</sup>. That however seems to imply the existence of underlying values beneath the surface of that Basic Norm, thus amounting to pre-legal values that appeared in developing such a Basic Norm.

Similar, yet different, Hart’s Concept of Law appears. When considering legal rules (to be distinguished from other rules, since they are enforced by physical sanctions (one might consider that approach to be very broadly and could define those sanctions more specifically; that is however a political normative exercise)), Hart considers a distinction between primary and secondary rules. Primary rules consist of rules constraining anti-social behaviour<sup>32</sup>, rooted in an

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<sup>27</sup> M. TEBBITT, *Philosophy of Law, An Introduction*, London, Routledge, 38

<sup>28</sup> H. KELSEN, *Pure Theory of Law* (translated by Max Knight, 2003), Union, The Lawbook Exchange, 2003, 200

<sup>29</sup> *Ibidem*, 203

<sup>30</sup> *Ibidem*, 203

<sup>31</sup> These words were copied from B. VAN ROERMUND, Notes and Readings on Principles of Law, Tilburg University, 25

<sup>32</sup> M. TEBBITT, note 27, 41

obligation<sup>33</sup>. Those constitute the great bulk of the positive laws constituting a legal system<sup>34</sup>. Primary rules are added by Secondary Rules. The latter are part of any legal system, bringing primary rules into being, revising them, upholding them or changing them<sup>35</sup>. The most fundamental rule in that respect is the Rule of Recognition, to which all authority is referred. That Rule provides for authority to settle uncertainties with regard to the law<sup>36</sup>. The Rule of Recognition is not considered the ultimate ought-statement; rather it is a *fact* and a rule within the legal system that allows jurists to frame law as law, thus guaranteeing a scientific approach towards the law<sup>37</sup>. In that respect indeed, it can hardly be argued that such a Rule of Recognition is a rule of “positive” law, since it itself provides for the sources to posit the law. It rather constitutes the source of law being part of the legal system. Again, while not being the Basic Norm, it seems to found a legal order in practice as well. As I understand, the Rule of Recognition can neither be questioned: it is some kind of presupposed fact instead of a presupposed norm. That factual Rule of Recognition might be said to appear within the practice of courts, legislatures, officials or private citizens<sup>38</sup>. In that regard, it has been noted that grounding the Rule of Recognition in officials’ behaviour amounts to circular reasoning, since determining officials as officials already requires a Rule of Recognition indicating them to be officials<sup>39</sup>. Therefore, the Kelsenian Basic Norm seems better apt to ground authoritative claims, since it does not constitute a part of the legal system, but it has been interpreted neither to constitute some “norm” outside the legal system (a norm that would have to be posited like any norm within the system). Instead, the Basic Norm rather constitutes a vanishing point of reference which makes it intelligible a specific norm is seen as being higher than others, assuming authority. In that respect, it should be noticed the Basic Norm allows those involved to see the legal order from a specific dimension and thus from a set frame<sup>40</sup>, thus allowing for statements concerning the validity of norms from a point of view *outside* that legal order.

Being a fact or a norm, the inside-outside perspectives retained by Hart or Kelsen do not neglect that some values granting law its authority (and thus

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<sup>33</sup> H. HART, *The Concept of Law*, Oxford, Clarendon, 1961, 79 et seq.

<sup>34</sup> *Ibidem*

<sup>35</sup> *Ibidem*, 91

<sup>36</sup> See its description in *Ibidem*, 106: rules of recognition identify particular rules of the system; the rule itself is only an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour was generally accepted as a standard and was accompanied by those features which distinguish social rule from mere convergent habits.

<sup>37</sup> I. CHIU builds upon that concept when constructing a new approach to the identification of a European Legal norm. I will refer to CHIU later on as well. I. CHIU, “On the Identification of a European Legal Norm”, *Yearbook of European Law*, 193-217. By using Hart from the outset, the contradiction with regard to the origins of the rule of recognition however remains. It would have been better to frame this situation using a Kelsenian approach.

<sup>38</sup> *Ibidem*, 104

<sup>39</sup> B. VAN ROERMUND, “Instituting Authority. Some Kelsenian Notes”, *Ratio Juris* 2002, 206

<sup>40</sup> *Ibidem*, 213-214

validity) can be found behind the actual rules of law. While Kelsen argues the presupposed constitution-creating act of will requires obedience to the pyramid oriented system of legal norms, Hart contains that the social fabricated Rule of Recognition (applied by officials) in fact amounts to an obligation to obey the constitutional settings developed according to secondary rules. It has thus been recognised that law and the possibility of legal doctrine is entirely dependent upon a political order of some extent. Hart's factual Rule of Recognition did show some circularism since the existence of officials presupposes a Rule of Recognition, while Kelsen's Basic Norm could be interpreted as providing a *vanishing point of reference* from which knowledge claims concerning law can be made. In that respect, the vanishing point approach might mitigate circularism. The presence of an assumption outside the normative structure cannot simply exist without a specific legal order either. Both authors in that regard seem to presuppose the existence of a specific State structure beyond the legal orders the validity of which they try to prescribe<sup>41</sup>, with which a specific constitution and sovereignty are connected<sup>42</sup>. The question therefore remains whether one might indeed consider the cognoscibility of law using traditional state-law cognoscibility models that include notions as sovereignty and constitutionalism. I will argue the Kelsenian model (as well as the Hartian, although its foundations seem weaker) could be used for determining legal norms' cognoscibility. I will thereby use Neil Walkers' writings and subsequently focus on Kelsen.

In his contribution on legal theory in the European Union, Walker discusses the existence and the scope of European Union Legal Theory approaches and thereby concludes that with regard to authority and unity of EU law questions arise concerning inter-systemic coherence between EU and Member States and intra-systemic coherence within the EU. In that respect, he claims that both coherence questions "*clearly cast doubt on the plausibility of a traditional Kelsenian or Hartian notion of a legal order as a hierarchical structure of norms organized around a point of legally self-validating sovereignty assumed or claimed to be grounded in social or political authority*"<sup>43</sup>. That quote is misleading from the outset I intend to follow in this article, since it could be derived that any scientific knowledge of law following the Kelsenian or Hartian models would be *ab initio* impossible in an EU context. Yet that approach would be quite short-minded and would do harm to both Kelsen's and Walker's theories. Indeed, while Walker proclaims the inadaptability of the classical theories of law in a European context in a very straightforward way, he seems to consider them rather from a content perspective than from their capacity to provide knowledge (statements concerning their validity)

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<sup>41</sup> Indeed, Kelsen explicitly refers to territory when discussing the Basic Norm, H. KELSEN, note 28, 199

<sup>42</sup> See H. HART, note 32, 103. It should however be clear that state-based conceptions can never be entirely transferred into a supra-state situation.

<sup>43</sup> N. WALKER, "Legal Theory and the European Union. A 25<sup>th</sup> Anniversary Essay", Oxford J. Legal Studies 2005, (581), 592

about legal norms. In that respect, the content introduction is indeed important but seems however to be grounded in a proper Kelsenian approach itself. The Kelsenian cognoscibility framework is somehow presupposed in order to arrive at the above-mentioned contents. In other words, discussing the contents of a constitutional framework and a scheme for validity statements concerning legal norms are two different approaches.

I will therefore clarify legal knowledge according to Kelsen. Kelsen considered knowledge of law to be possible as it had been intermediated by an authoritative concept of the Basic Norm, the essential obligation to obey the law. Out of the Basic Norm conception, the idea of a constitution as a beacon for validity of lower norms arises. The Basic Norm thereby functions as a vanishing point of reference with respect to the legal order. In that regard, Kelsen did not consider the constitution to be the Basic Norm, as the latter is no part of the legal order itself. The constitution of a particular polity is indeed *subordinate* to the Basic Norm from a descriptive hierarchical point of view. The constitution therefore does not appear as uncontested or unchangeable from the vanishing point of reference point of view. Rather on the contrary, it seems the constitution and its concrete interpretations or applications can be contested according to legal scientific arguments or claims concerning constitutional scope validity. In other words, constitutions can themselves be part of the scientific enterprise in law and can thus be interpreted throughout, while statements towards the validity or invalidity of those constitutional approaches can indeed be considered. The Basic Norm in that respect grants the possibility of including a hypothetical approach as far as constitutionalism as such is concerned. The situation appearing in the European Union does not seem to differ all that much from the classical state legal knowledge approach, since it is rather uncontested the EU constitutes a proper legal order (specifically in the First Pillar). The way in which the constitution is framed concretely however, is rather more contested than it is in traditional nation states<sup>44</sup>.

Indeed and perhaps contrary to the above-mentioned quote, by delving into an EU constitutional concept and by focusing on the concrete normative models that might support such a constitutionalism beyond the State<sup>45</sup>, Walker implicitly admits he endorses Kelsen's model as far as cognoscibility of law is concerned. Since cognoscibility of law as considered by Kelsen rests upon the hierarchy of norms, as norms being objectified contents of acts of will<sup>46</sup> and

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<sup>44</sup> At least at first sight: it could be interesting to actually consider the constitutional frameworks and divergent interpretations by scholars with regard to those constitutions

<sup>45</sup> See Walker's contributions concerning the EU Constitution and its meta-approaching, N. WALKER, note 9, "Taking Constitutionalism Beyond the State", *Political Studies* 2008, 519-543; "Europe's Constitutional Momentum and the Search for Polity Legitimacy", *International Journal of Constitutional Law* 2005, 211-237 and "The Idea of Constitutional Pluralism", *Modern Law Review* 2002, 317-359

<sup>46</sup> H. KELSEN, note 28, 5

thus comprising ought-statements to be linked within the hierarchical setting, the hypothesised constitution flowing from the Basic Norm could be the object of legal knowledge claims as well. In that regard, the extra-legal nexus of law's knowledge (as a vanishing point of reference) allows for the possibility of hypothesising the constitutional aspects of the European legal order and even the extent whether or not the existence of a separate legal order appears, can be discussed thereon. The Kelsenian model of cognoscibility does not oppose its application in a context beyond the traditional state, although the concrete hypothesised content of the European constitution as a valid or invalid "set" of norms will of course differ from a traditional state approach. In that regard, a concrete hypothesised constitution might indeed create possibilities for new governance techniques to intermingle with traditional law. Indeed, as the possibility of legal validity claims originates from a vanishing point and not from within the legal order itself, it could be argued the traditional "legality" scope could be enlarged if and when the constitutional contents allow for such a broadening of constitutional boundaries. Concrete constitutional applications thereby constitute the guiding framework.

Walker did propose a constitutional application in that respect. His point of departure consists in a conception of constitutional pluralism. Constitutional pluralism has been described as a position which holds that states are no longer the sole locus of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority, most prominently (though by no means exclusively) and most relevantly those situated at supra-state level, whereby the relationship between state and non-state sites of constitutional authority is better viewed as heterarchical rather than hierarchical<sup>47</sup>. Walker in that respect considers the constitution of the European legal order to be described and normatively founded as being a pluralist amount of diverse legal spheres, according to which each and every sphere, including the supranational European one, casts authority, without there being one über-authority, with authority over authorities<sup>48</sup>. In order to frame the authority concept on a descriptive and on a normative level, Walker embarks upon the concept of sovereignty by developing the conception of late sovereignty. He defines sovereignty being the "*discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity*"<sup>49</sup>. When ascribing the epitheton "late" to sovereignty, Walker intends to focus on the continuation of the sovereignty concept yet within a context of constitutional pluralism. In that regard, he considers new political

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<sup>47</sup> N. WALKER, "Late Sovereignty in the European Union" in N. WALKER (ed.), *Sovereignty in Transition*, Oxford, Hart, 2003, 4; (Late Sovereignty) on the notion of constitutional pluralism see as well "The Idea of Constitutional Pluralism", *Modern Law Review* 2002, 317-359

<sup>48</sup> N. WALKER, "Legal Theory and the European Union. A 25<sup>th</sup> Anniversary Essay", 592

<sup>49</sup> N. WALKER, "Late Sovereignty", 6

values and virtues might indeed flourish through traditional sovereignty conceptions<sup>50</sup>. It is in the same vein Walker normatively describes the sovereignty dependent features and indices of constitutional polity formation: responsible self-government existing within a reflexive and publicly approbated constitutional discourse, broad jurisdictional scope (including a general mandate of multi-functional governance and the capacity to consider, balance and co-ordinate the various public goods and private interests implicated in that broad programme), interpretive autonomy (as a means of ensuring consistency and reasoned and accountable application of norms), institutional depth and breadth, citizenship and representation mechanisms<sup>51</sup>. In that regard, Walker as well referred to different types of metaconstitutional frames that allow to consider the variety of forms appearing with respect to law beyond the state<sup>52</sup>.

What conclusions can be drawn from the foregoing with regard to the cognoscibility of law in the European Union? If one considers law to be cognisable following the Kelsenian model, a statement as to the validity of norms could be made within a pluralist constitutional concept and the mandates granted therein as referred to by Walker. In order to judge upon the validity of legal norms (that could be considered, for present purposes, to be classical Community instruments that have been provided for by the Treaty framework), plural constitutional spheres, within different authoritative frameworks of constitutionalism within and beyond the States will have to be considered. The State concept is in that respect not demised; rather it aspires to be part and parcel of a new pluralist legal order. In order to make validity claims in that regard, jurists will simply have to look through the variety of constitutional rooms and within the pluralist frame will be able to judge norms as valid or invalid. From that very same perspective, room is left for deliberation on and hypothesising the boundaries of the constitutional framework in light of which legislation is to be judged upon.

Three remarks remain however, since it would be unwise to accept the pluralist model without further reflection. On the one hand side, one remark refers to the hypothetical content of the Constitution and the sovereignty approach. It has to be noted in that respect that sovereignty does not only comprise the approach given as a source of authority towards legal action within its "late" mode as provided for by Walker. Rather on the contrary, the constitutional boundaries are thoroughly (yet fully aligning with the legal knowledge model) discussed. In that respect, Neil MacCormick argues the concept of sovereignty is too intimately connected to State polities. It should therefore better be abandoned when discussing supra-state initiatives. In that way, the conception

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<sup>50</sup> *Ibidem*, 31

<sup>51</sup> *Ibidem*, 32

<sup>52</sup> N. WALKER, note 9, 21

(or the era) of post-sovereignty appears<sup>53</sup>. Alternative outlines are thus possible, as is shown by reference to the approach applying the sovereignty concept as such and trying to focus on unity albeit to a disaggregated or multi-level extent<sup>54</sup>.

The model elaborated upon by Walker clearly reflects the interdependence that exists between law and politics. A political order and the underlying assumption of authority as might be granted in that political order will indeed justify legal norms and will eventually provide us with possibilities of legal knowledge. Without a body politic that would have installed at least some legal order (assuming that order to be present in the European Union), it would not be possible to determine or hypothesise constitutional premises and limitations. In that regard, politics do create and limit the cognoscibility of law. As Walker himself described when proposing his late sovereignty approach, the existence of a broad jurisdictional scope (a general mandate of multifunctional governance and a capacity to consider, balance and ordinate public goods and private interests) could be hypothesised within the European context. That approach already precludes a role that might be considered for governance from an EU perspective in a political order.

Finally, the approach Walker and other scholars do follow in this context is not merely about understanding the law's normativity<sup>55</sup>, nor in establishing the law's cognoscibility. In that regard, Walker indeed specifically mentions the Kelsenian Basic Norm or the Hartian rule of recognition as establishing state-centred or domestic metaconstitutional frameworks, as opposed to more desirable cosmopolitan metaconstitutionalism, a framework of authority not nested in the state as the ultimate source of validity<sup>56</sup>. Even and perhaps specifically when framing law as the Treaty framework and the derived legislative instruments flowing from that Treaty framework, the cognoscibility of the law is not dependent upon such a cosmopolitan frame. Rather on the contrary, such a cosmopolitan frame seems operating as a way of hypothesising the constitutional content *within* a model of cognoscibility and in that respect within a framework of knowledge about the law. It therefore could be considered Walker does not refute the knowledge model and its assumption of obedience that triggers legal knowledge about the law underlying Kelsen's Basic Norm structure, but instead discusses its content and the pyramidal approach as a *presentation* of a legal order (and thus not as a model for statements about validity or invalidity) from the viewpoint *beyond* the traditional State centres of law.

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<sup>53</sup> N. MacCORMICK, "Questioning Post-Sovereignty", *European Law Review* 2004, 852-863; see as well N. MacCORMICK, *Questioning Sovereignty*, Oxford, Oxford University Press, 2001, 210 p.

<sup>54</sup> See the overview in Walker Legal theory 25th Anniversary Essay, 592-594

<sup>55</sup> Something in which Kelsen nor Hart succeeded according to S. DELACROIX, *Legal Norms and Normativity*, Oxford, Hart, 2006, xxii – xxiii

<sup>56</sup> N. WALKER, note 9, 15

#### 4. EUROPEAN GOVERNANCE AND LEGAL KNOWLEDGE REVISITED

Knowledge of law, in search for a valid norm and thus a statement about the validity of norms applying the Kelsenian framework<sup>57</sup> has been contrasted to some extent by the approach taken within so-called new governance. In that respect, I will first of all elaborate upon that new governance concept, explaining why it is *prima facie* to be framed as factual instead of normative. Looking beyond the surface however, it will be argued that jurists, traditionally subsuming governance to law or proclaiming the incompatibility of law and governance actually err in correctly considering governance approaches. It will be defended that governance methods or approaches indeed constitute test-cases not for judging the true or false nature of government action beyond the state, but rather constitute norms that provide a basis for judging the validity of specific approaches adhered to in concrete cases. In that regard, the conception of governance could be said to be similar to the one provided by law. The traditional distinction between law and governance therefore seems blurred... from the point of cognoscibility and the involvement of legal “science”. It will therefore be argued that jurists (in their capacities as *legal* scholars) can develop statements concerning the validity of traditional legal norms as well as concerning governance normative approaches.

New governance as part of the governance conception is used in a specific way as to distinguish it from traditional law in an EU context, yet without actually leaving behind the law as point of reference. In that respect, governance has been granted the epitheton new in order to emphasise the different premises and values it incorporates compared with law<sup>58</sup>. It is however not without risk to describe what new governance is exactly comprised of, since different authors do seem to consider its conception differently. According to the Commission’s White Paper on European Governance, the concept of governance can be interpreted as constituting “*rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence*”<sup>59</sup>. In that regard, governance is only described as to what and why it could be distinguished compared with traditional law without actually

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<sup>57</sup> I.e. in a way that could be transposed to the level of the European Union, taking stock of different approaches towards hypothesising the constitution and the most ideal way of filling the constitutional spot respecting the Basic Norm

<sup>58</sup> That approach already refers to law being part of a larger set of regulatory instruments

<sup>59</sup> White Paper on European Governance, 8 (footnote 1). That conception of governance seems to have been applied by Iris Chiu, note 37. In that contribution, some thought-provoking meta-insights on European legal norms, including governance approaches, are being worked out. See Chapter 5 as well.

providing for a definition<sup>60</sup>. In a seminal contribution on law and new governance, Scott and Trubek indeed consider the classical Community Method (i.e. European law) to contrast emerging alternatives or new approaches to governance<sup>61</sup>. Those authors do even distinguish between new forms of governance proper and new old governance, in order to indicate true alternatives or modifications of the European law method<sup>62</sup>. That however did establish an explanation for the epitheton new, but did not explain the governance concept as such. In that regard it has been stated that “*the language of governance rather than government in itself signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically government actors or the traditional framework of government*”<sup>63</sup>. More specifically, the involvement of civil society, impact assessment and recurring evaluation of norms’ effectiveness, soft-law approaches and greater transparency issues while at the same time assuring democratic legitimacy in a dynamic and swiftly adaptable framework are presupposed<sup>64</sup>, contrary to authority, rigidity and validity of law. It could be claimed effectiveness is contrasted to validity as being basic premises of governance and law. In that respect, the difference between classical law and new governance appears in the following distinctions that presume a gap between law and governance at first sight.

This gap takes a variety of forms. Thus, for example, whereas a traditional conception of law looks for a unitary source of ultimate authority, new governance is predicated upon a dispersal and fragmentation of authority, and rests upon fluid systems of power sharing. Whereas a traditional conception of law posits hierarchies and places courts at the centre of systems of accountability, new governance posits heterarchy, and often looks outside of the courts in seeking to secure real accountability. A traditional conception of law appears to rest upon a clear distinction between rule making on the one hand, and rule application and implementation on the other. New governance, on the contrary, accepts that this distinction must break down as indeterminate and flexible rules are adapted to meet new challenges and resolve unexpected problems. Related to this, while a traditional conception of law might see itself as predicated upon existing knowledge, new governance places emphasis upon

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<sup>60</sup> BLACK in that regard considers definitions of both law and regulation often to constitute nothing more than mere descriptions, without any explanatory value, see J. BLACK, “Critical Reflections on Regulation”, *Discussion Paper* Centre for the Analysis of Risk and Regulation, LSE 4 (2002), 27 p. (published in *Australian Journal of Legal Philosophy* 2002, 1-37 as well). She argues there is no settled definition of law nor of regulation. Even stating what it is and how it is distinguished from other forms of norm-based social ordering is still contested (p. 23).

<sup>61</sup> In order to express contradictions that appear between law and governance, their contribution is titled “Mind the Gap: Law and New Approaches to Governance in the European Union”, *European Law Journal* 2002, 1-18 (specifically already in 1)

<sup>62</sup> *Ibidem*, 2-5

<sup>63</sup> G. DE BÚRCA and J. SCOTT, “Introduction” in their *Law and New Governance in the EU and the US*, Oxford, Hart, 2006, 2

<sup>64</sup> In that respect, the Commission White Paper on European Governance has intensified the debate about bringing new governance approaches into the arena of European decision-making.

the need to facilitate the continuous generation of new knowledge(s). There is then a gap between the premises and values of a traditional conception of law and the premises and values of new governance<sup>65</sup>.

The traditional conception of law emphasises authority and thus competence. That traditional approach was deemed desirable with a view to developing a “fully-fledged” constitutional order in the EU. According to Scott and Trubek, the premises underpinning EU law have a symbolic value, and their ‘tainting’ with the values of new governance might be seen to threaten not merely the integrity of the law as such, but the broader dynamics of integration<sup>66</sup>. Taking the latter as the general argumentation by jurists, different theses on the relationship between law and governance have been developed.

The *gap* thesis presumes a distinction between law and governance exists as (constitutional) law is reduced in its capacity of enhancing authority by governance initiatives, while at the same time it has been argued that law approaches themselves resist or impede the rise of new governance<sup>67</sup>. The *hybridity* theses consider a more constructive relationship in a way that new governance cannot be considered otherwise than as a complement to law, as a means of developing existing legal norms or an addition to the general basic law regime<sup>68</sup>. The *transformation* thesis argues new governance provokes a reconceptualisation of our understanding of law and of the role of lawyers, arguing both previous theses are too formalistic in their approaches to law<sup>69</sup>. With respect to the latter thesis, Walker and De Búrca considered a normative approach in which law and new governance indeed mutually transform the traditional conception of “law”, beyond traditional formalism.

Walker considered the law and governance relationship to be dependent on constitutional understanding. He argued different conceptions of constitutionalism appearing might either offer too little or too much to new governance<sup>70</sup>. Therefore, Walker proposed a model of reflexive constitutionalism: authoritative constitutional ordering without however simply reconfirming the rigid normative and institutional hierarchy and comprehensive self-containment. The core focus of that proposal lies in creating interdependence between EU constitutionalism and new governance by nurturing it a quality which it shares with such experimentalist new governance, i.e. reflexivity<sup>71</sup>. In that way, reflexive constitutionalism should be a kind of constitutionalism incorporating the collective awareness and

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<sup>65</sup> J. SCOTT and D. TRUBEK, note 61, 8

<sup>66</sup> J. SCOTT and D. TRUBEK, note 61, 9

<sup>67</sup> *Ibidem*, 6

<sup>68</sup> *Ibidem*, 7-9

<sup>69</sup> *Ibidem*, 9

<sup>70</sup> N. WALKER, note 24, 29

<sup>71</sup> *Ibidem*, 33; Reflexivity is framed as capable of bending or turning back on itself

imaginative resources necessary to secure a conceptual anchor which specifies the default generative structure and normative priorities of the whole without reverting to the State-centred notion of a rigid and inflexible constitutional hierarchy that would confront new governance with false choices such as total hierarchy or none<sup>72</sup>.

Arguing that the law's conceptual hegemony and approaches towards constitutionalism and legal orders led to the detachment of law and new governance, Walker and De Búrca argue both law and new governance have some essentialities in common: they both are members of a genus normative order. Each of them denotes a special rule-based form of practical reasoning – a method of arriving at conclusions as to what to do in the world that relies on the provision and application of general norms. Besides, both law and new governance are articulated and acknowledged as binding or authoritative by those affected and operate within the same institutional framework. At the same time, both norms have to be promulgated in a timely fashion<sup>73</sup>. They state both normative approaches operate in a framework of reflexive universalisability, presupposing and implying a like conclusion or prior guidance in all cases. Reflexivity appears in both instances as a consideration of the norm afresh in each context of application in the light of past experience<sup>74</sup>. Both law and governance reflect that attitude. Law and governance are therefore being considered part of a normative spectrum of which law and new governance are parts and appear at different points of reference<sup>75</sup>.

What does the foregoing imply for the cognoscibility of European governance? It seems that at first sight an elaboration on the theorists that considered the conception of law and governance constitutes a trigger to leave the traditional viewpoint of law exclusively being cognoscible in terms of validity while governance approaches would be the object of factual scientific claims. As Walker and De Búrca noticed (and I agree with that perception) new governance approaches are regulated via norms that will be used in order to develop statements considering the validity of concrete governance projects. The latter thus implies governance norms exist that could be rendered cognisable by jurists. Both law and governance are part of the normative “field” in which a jurist finds its data to develop validity statements. The large body of jurists approaching governance methods as being part of legal research indeed confirms that cognoscibility framework.

The effectiveness concern underlying the governance approach in that respect does not seem to be as unique as originally conceived. Every legal order is known by an underlying effectiveness claim as well, for it to be or to remain

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<sup>72</sup> N. WALKER, note 24, 35

<sup>73</sup> G. DE BÚRCA and N. WALKER, note 24, 14

<sup>74</sup> *Ibidem*, 15

<sup>75</sup> *Ibidem*, 16

valid. Kelsen's point of view concerning the relationship between validity and effectiveness seems elusive in that regard: a relationship between the ought of the legal norm and the is of physical reality consists in that the norm to be valid must be created by an act which exists in the reality of being. In other words, the Basic Norm itself presupposes the effectiveness of a legal order. Legal orders as a whole cannot be considered valid when they cease to be effective. The effectiveness is not the reason for its validity, since that reason lies in the Basic Norm, which itself implies effectiveness<sup>76</sup>. In other words, effectiveness is an underlying value in the scope of the Basic Norm, but as argued before, that basic norm is presupposed and allows for different hypotheses about the legal order and the constitution to be developed. In that regard, it could be deemed a legal norm is valid albeit ineffective, as long as the legal order is valid because of its constitutional basis showing to be effective. Of course the issue of effectiveness has been rather emphasised in governance since the governance approaches claim norms that are to encompass or at least reflect the effectiveness requirements more expediently. Yet even those norms remain norms that are rendered cognisable through statements concerning their validity. The development of those statements is the jurist's essential assignment instead of measuring effectiveness.

The relationship between law and governance as appearing within the concrete constitutional setting remains to be hypothesised. In that regard, it could be argued, as Walker and De Búrca contend, that new governance norms reflect reflexive universalism as well as traditional legal norms do. Besides, those norms are being developed by European institutions having been granted specific competence in order to exercise authority within the scope of a legal order in which legal norms can be made cognisable. Whether or not the institutions should use the traditional Treaty framework procedures instead of its governance approaches, in what circumstances and how those approaches might relate to the actual constitutional framework (which is of course more than just a traditional constitutional document) existing in the legal order or to pluralism, are all questions that appear essential with regard to the concrete applications and hypotheses that can be developed following the Basic Norm point of reference. When one conception of the constitution of a legal order is shared which includes the new governance approaches to some extent, it is a matter of scientific approach to determine validity statements about governance approaches as well in light of higher ranking norms concerning good governance, being part of the constitutional framework.

In that respect, the much debated distinction between law and governance merely amounts to hypothesising the content of the constitution of the European legal order presuming such an order exists following a Basic Norm vanishing point. The distinction between law and governance thus encompasses a distinction between norms that, from a Kelsenian

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<sup>76</sup> See more detailed H. KELSEN, note 28, 211-212

cognoscibility point of view, could both be framed “law”, since both are considered to bring about validity statements with respect to norms in an authoritative legal order. As both practices are derived from the same source of authority, it seems non-sense to distinguish law and governance conceptually in a model of cognoscibility. As a matter of semantics, in order to avoid confusion when dealing with “law” as a matter of cognoscibility, I will refer to the conception of “European Regulation”<sup>77</sup> in the following. Yet it should be borne in mind that European Regulation could be understood as “law” in the sense of the object of study upon which validity statements can be made with respect to a constitutional order of higher and lower norms and within which the constitutional setting itself can be debated and hypothesised. European Regulation does only provide a semantic alternative in order to overstep the classical law and governance distinctions and to consider cognoscibility on a supranational level.

## **5. LAMFALUSSY, LAW AND GOVERNANCE: NOTHING BUT “REGULATION”**

It has been argued in the previous chapter that preliminary contradictions between law and (new) governance are merely based on a misperception that law is only cognisable as being valid within strict boundaries while governance approaches aim at providing an effective, and not that much valid legal order. As argued, effectiveness can be linked both to law as it can to governance and what is even more important, both approaches can be rendered cognisable in terms of validity and authority within a similar constitutional framework. I therefore defend the presupposed antithesis between law and new governance could be overcome at the EU level by framing all regulatory initiatives within the realm of “European law”, a concept that is to be rendered cognisable following Kelsen’s model of validity and hierarchy in order to allow for statements about norms’ validity. In order to contrast that “European law” model with the traditional superficial subdivision between law and new governance, I decided to frame the conception of “European law” as “European Regulation”. Of course, that is only a matter of semantics. In this part, I will show that model is applicable when considering “Lamfalussy”.

The approach called “Lamfalussy” originates, as much as new governance techniques often did, from a document created by (an expert organ appointed by) the European Commission. From a traditionalist point of view, such a

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<sup>77</sup> I am however fully aware of the ambiguities that appear with the notion of regulation. I only refer to regulation instead of law, to describe a broader normative framework, including governance norms as well. Since those norms are quite similar to traditional legal norms, I believe they can be captured by one single notion. One should however look beyond semantics, as regulation might lead to wrong interpretations. Regulation however does in my view encompass authoritative normative activity and might thus be apt in its latter conception.

document does not constitute law, compared with the legal instruments that have been provided for in the Treaty Framework. Of course, that point of view implies a specific hypothetical determination of the constitution. It could indeed be defended, taking stock of Walker's conceptions of the law (and constitutionalism) in the European Union, "Lamfalussy" could however be framed as European law, if one considers European constitutionalism to allow for norms concerning new governance as well. What is even more, it is clear from the outset the "Lamfalussy" model both considers using traditional law techniques in combination with new governance approaches<sup>78</sup> and thus seems to be an illustration of the importance held by authoritative institutions in both law and governance approaches when considering the existing constitutional frame. In that way, the "Lamfalussy"-approach does indeed bring together both law and new governance.

The convocation of law and (new) governance without considering law to be dominant is apparent as well from the fact that the decisions to implement the procedure have only partially been confirmed by traditional law. Indeed, in the financial services sectors, a European directive confirmed a new institutional framework was to be applied, referring to ... the report developed by the Wise Men and acknowledged by the Commission<sup>79</sup>. From a similar point of view, the development and creation of an intermediary regulatory level between national and supranational via Level 3 regulatory Committees can be mentioned<sup>80</sup>. In that respect, it indeed seems to illustrate both sets of norms are appearing in one heading of "European Regulation". That will of course have repercussions for us to "know" whether "Lamfalussy"-regulation is valid.

Considering the Basic Norm as a vanishing point of reference and the legal order that could be hypothesised evolving into one regulatory framework in which norms are being created both as a matter of traditional law and as a matter of governance, it can indeed seem highly preferable to evaluate "Lamfalussy" in that regard. How will jurists know whether a level 3 standard is valid? Or could they even proclaim any statement concerning its validity? By following the regulation cognoscibility model, I believe that constitutes an option indeed. The standards developed at level 3 can be judged upon their

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<sup>78</sup> In that way, Lamfalussy aligns with the New Old Governance concept developed above.

<sup>79</sup> Directive 2005/1 of the European Parliament and the Council of 9 March 2005 amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organisational structure for financial services committees, *O.J.* 24 March 2005, L 79, 9-17

<sup>80</sup> Those Committees do produce binding norms, entailing some authority. See on problems concerning accountability and judicial enforcement, N. MOLONEY, "Law-making Risks in EC Financial Market Regulation after the Financial services Action Plan" in S. WEATHERILL (ed.), *Better Regulation*, Oxford, Hart, 2007, 321-368; I am currently preparing a theme course paper on this subject as well entitled "Self-Standing Regulatory Mechanisms in EU Financial Regulation Architecture. Subdividing Levels of Regulation beyond the National and Supranational Axe?"

validity to the level 3 installation decisions and working procedures<sup>81</sup> and the limitations that level 3 committees themselves adopted with regard to their regulatory framework<sup>82</sup>. A level 1 Directive will be stated valid if it complies to the general Treaty law-making framework as well as to the requirements posed by the “Lamfalussy”-report and the general governance standards such as transparency and openness. In that regard, the validity statements that are allowed to be made can be easily confined to a hierarchy of norms, in which the scope of higher ranking norms is conceived more broadly than the traditional approaches would allow for.

Following that model, the “Lamfalussy”-report does itself constitute regulation upon which validity statements can be made concerning its compliance to higher ranking standards in the EU framework, thus considering “Lamfalussy” as being a norm itself. It cannot however be denied and will accordingly be argued by other scholars that “Lamfalussy” is more than just a norm of itself. The approach taken by jurists does however seem to require legal scholars to take that perspective in order to fulfil their core function: arguing and analysing validity statements taking stock of the vanishing point of reference. The latter point of view could be inferred from Chiu’s *On the Identification of an EU legal norm* as well. In that article, Chiu tries to reflect upon a hypothetical constitutional framework broadening the conception of an EU legal norm: an EU legal norm is a norm that proceeds from a recognized institutional process for legislation production (or even judicial precedent)<sup>83</sup>. Institutional origins consist of accepted centres and processes for norm-creation: as Chiu argues, those centres and processes are to be considered a Hartian Rule of Recognition<sup>84</sup>. The traditional Rule of Recognition frames the factual framework for legal decision-making as provided for in the Treaties. In that respect however, EU governance is characterised by pluralism, i.e. by the existence of different centres of governance that are not all included in the Rule of Recognition as sources of legal norms<sup>85</sup>. Legal pluralism does indeed urge the acceptance of those plural, unrecognized centres and processes as sources for norm-creation<sup>86</sup>. Mentioning different examples, “Lamfalussy” level 3 measures by CESR are being considered to constitute norms flowing from an unrecognized centre or process.

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<sup>81</sup> Encompassing procedures on deliberation, civil society involvement that have all be set in norms without simply falling back to the traditional treaty based law and out of the blue governance initiatives. Indeed, a self-standing regulatory level appears...

<sup>82</sup> CESR e.g. did limit its own competences in its Level 3 Evaluative Report, see CESR, “The Role of CESR at level 3 under the Lamfalussy Process”, [www.cesr.eu](http://www.cesr.eu). Its contents could constitute norms as well.

<sup>83</sup> I. CHIU, note 37, 194-195

<sup>84</sup> *Ibidem*, 195: the latter intake might seem aligning with the approach followed in this paper. However, taking the Rule of Recognition as a starting point implies opting for a factual rule within the legal order already founding that very same legal order. It would therefore have been better simply to adhere to Kelsen’s point of view as interpreted by scholars as the basic norm constituting a vanishing point of reference.

<sup>85</sup> *Ibidem*, 196

<sup>86</sup> *Ibidem*, 197

As Chiu indicates, the distinction between hard law and soft governance seems blurred to some extent: the question in that respect is what centres or processes are being used to frame those norms<sup>87</sup>. Chiu however does refer to the distinction between hard law and soft law. As I understand, the dichotomy between hard and soft law seems non-sensical from a semantic point of view since in both instances references to “law” are being made. At the same time, legalisation theorists construed law as norms, the hardness or softness of which only reflects certain attributes of the norm, without denying the existence of a legal norm<sup>88</sup>. As that viewpoint appears, a reconceptualisation of the traditional EU legal norm conception seems unavoidable. Chiu therefore proposes a meta-legal principle of norm identification to move away from accepted centres and processes, thus considering a Rule of Recognition that is capable of recognizing that there is a variety of governance methods and processes that might be liable to change<sup>89</sup>. Characterising that Rule of Recognition, she considers certain characteristics to be manifested within the legal framework the Rule of Recognition provides for. When identifying legal norms, Chiu applies the criteria as developed by Fuller. Taking that approach, it could be argued that “Lamfalussy” level 3 “soft law” standards could be granted a more prominent legal status, including the capacity of judicial review and liability<sup>90</sup>. In that way, Chiu actually moves one step beyond the approach taken in this article and reflects upon hypothesising the constitutional structures in the European Union. It could be defended in that perspective that the current legal framework indeed allows for governance methods to be considered law, since validity or invalidity claims can be made according to what I have called the Kelsenian cognoscibility model. Therefore, the ideas included by Chiu that the dichotomy between hard and soft law can no longer hold, already express that validity claims are rendered possible both within and beyond the traditional legal framework, but still within a normative framework. In that respect, it might even be argued that legal doctrine could play a pivotal role. By emphasising and expressing validity claims concerning traditional legal and new governance norms, legal scholars could create a forum through which all “European Regulation” is to be rendered cognisable; that might entail practical consequences for practitioners and judges introducing the parallel between law and other governance norms into the concrete framework of adjudication and legal protection. The first step will however have to be taken by jurists, rendering both law and governance cognisable.

Inversely, it could be argued “Lamfalussy” might influence the conceptions that are commonly held with regard to law and governance as well. As a matter of describing those influences however, the norm-statement approach

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<sup>87</sup> Ibidem, 205-206

<sup>88</sup> Ibidem, 194

<sup>89</sup> Ibidem, 215

<sup>90</sup> Ibidem, 216

presented here might not be the best answer. Rather on the contrary, its influence could be studied along factual lines, such as the involvement of civil society and the legitimacy that is gained from the new approach. Those are however topics that require sociological intakes and thus cannot as such be the object of the scientific study of legal norms. What is more, even if one were to describe the influences the conceptions undergo, the basic definitions of those conceptions will be grounded in the hypothetical constitutional frameworks and discussions and will, from a jurist's point of view, always amount to a hypothetical (validity) exercise. The cognoscibility model as such considered does therefore serve as a mere tool of developing validity statements from the European legal order point of view.

## **6. CONCLUSION: IT'S UP TO JURISTS OR LEGAL SCHOLARS**

Referring to law in a supranational context engenders a more thorough reflection on authority and its relationship to law. I argued the cognoscibility model developed by Kelsen holds as a model to develop validity statements concerning norms within a hypothesised legal order, that originates from a Basic Norm which is neither part of nor as such external to the legal order. From a vanishing point of reference, the creation of the legal order and the hierarchies (or even heterarchies) confined thereto can be considered and hypothesised. Since the traditional concept of law and the new approaches towards governance both consist in norms, it has been argued statements concerning validity can be made for both. As similar institutions develop those norms within their (hypothetical) scope of authority and "Lamfalussy" measures are judged upon both in terms of valid "traditional legal norms" as valid "new governance norms", I argued law and new governance are both part of a regulatory or legal playing field that could be deemed the constitution of the European legal order. Within that constitutional sphere, different hypothetical contents have been argued or discussed. Validity or invalidity statements concerning law and governance are in that respect dependent on the way the constitution has been hypothesised. It therefore seems those norms can be rendered cognisable as either valid or invalid.

Concerning the issue of authority, the question remains as to how its conception should be considered in a pluralist framework the European Union seems to have brought about. That question however does not as such involve the cognoscibility framework of European law; rather it is connected to viewpoints that might be held with regard to the concrete framework applications. Legal doctrine will continue to hypothesise and discuss the sources of the legal system, just like the Basic Norm enabled it to do. This article took one step back from the traditional legal scholarly approach trying to hypothesise the constitution. In that respect, it has been emphasised the

cognoscibility model is applied both from a traditional law and new governance perspective: indeed, the body of legal scholars intermingling law and new governance in their legal writings seems growing. That could indeed be due to focus laid on a similar knowledge framework. I defended legal scholars could indeed play a prominent role in this debate, referring to both law and governance in their writings. Those scholarly evolutions might stimulate reconsiderations in practice, by (European and national) judges of the conceptions of law in a supranational context. It is however fundamental for jurists to continue to hypothesise the actual boundaries in a European context, before practitioners will notice the important changes that could be brought about in that regard. In other words, it is up to jurists to develop the future of European Regulation...