Constitutionalising Expertise in the EU: Anchoring Knowledge in Democracy

Stijn Smismans

1. Introduction

Constitutional theory builds bridges to democratic theory and to sociological concepts such as identity and citizenship. However, as far as it is concerned with democratic procedure, it has mainly focused on democratic electoral representation and aggregating interests. At the same time it has neglected the question of the role of expertise and knowledge in policy-making. Political science and regulatory literature, as well as science and technology (STS) literature, have increasingly paid attention to expertise in policy-making while policy-makers themselves have developed discourses and procedures aiming at "sound evidence" and "scientific expertise". However, the exact relation between knowledge and democracy, and between the aggregation of evidence and the aggregation of interests requires still further normative investigation.

In relation to the EU, the multi-level constitutionalism debate has reflected about sovereignty, democratic design, identity, and citizenship beyond the nation state, but again paid little attention to the role of expertise and knowledge in European governance. Yet, debates about the place of (scientific) expertise and sound evidence have emerged in other parts of the literature, and among policy makers, in particular from the mid 1990s onwards, and have intensified since the 2000s. However, arguments about expertise have been patchy and been made in relation to particular institutional settings. More holistic arguments about the place of expertise in democratic governance, in a way one would ideally expect from a constitutionalism perspective, have been rarely made. Moreover, different strands of the literature have focused on different institutional settings of European governance. Hence, arguments about expertise are rarely "cross-referenced".

In this chapter I will first place the debate on multi-level constitutionalism within the context of a wider tendency in EU studies to focus on the aggregation of interests and the

way the EU's institutional set-up accommodates national diversity rather than on how expertise is channelled and functional diversity accommodated. I will then investigate further those parts of the literature, beyond constitutionalism, which have dealt with the role of expertise and knowledge in European governance, and set out three dimensions along which these parts of the literature differ from each other.

The following two sections analyse how arguments about expertise and knowledge have been framed specifically in relation to different European governance mechanisms. Debates on expertise have developed in relation to three institutional settings in particular, namely, European agencies, integrated impact assessments, and the open method of coordination (OMC). Section 3 deals with the debates on both agencies and impact assessments (IAs). These debates emerged at different moments in time, and the debate on IAs picked up where the one on agencies had left off, and more particularly extended the discussion on expertise from the implementation stage to the legislative stage. Despite their differences, these two debates have much in common, both in relation to their inspirational origin, and the "rational technical" approach to conceiving the place of expertise in governance, relying mainly on a traditional understanding of democracy focused on aggregating interests via parliament. The debate on the OMC instead is very different in nature. Section 4 analyses how arguments on expertise and democratic accountability have been made in relation to the OMC, both in the (normative) literature and in institutional discourse. In the concluding section I reflect on whether a more holistic argumentation on expertise in European governance can be made, beyond the specific settings of agencies, IAs and OMC, and whether the language of constitutionalism is the appropriate solution for that.

2. Expertise and (European) constitutionalism

The debate on constitutionalism in the EU has long been framed in terms of "multi-level constitutionalism" and "constitutional pluralism", which mainly focused on the relationship between the legal orders of the EU and its member states, and the resulting constitutional dialogue between the Court of the Justice of the EU (CJEU) and national constitutional courts.[1] The "multi-level" or "pluralist" adjective mainly refers then to the way in which the

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[1] Ingolf Pernice, "Multilevel constitutionalism in the European Union", *European Law Review* 27 (2002); Ingolf Pernice, "The Treaty of Lisbon: Multilevel constitutionalism in action", *Columbia Journal of European Law* 15 (2009); Neil Walker, "The idea of constitutional pluralism", *Modern Law Review* 65 (2002); and Neil Walker,

EU's institutional design accommodates national diversity. The constitutionalism debate thus reflects a broader trend in EU studies which is characterised by two elements.

First, the predominant focus of EU studies on studying the way the EU has tried to accommodate *national* diversity has overshadowed questions about how European governance deals with functional differentiation. That modern society is increasingly characterised by functional differentiation is a well-established insight of social theory, going back to Weber, and particularly Talcott Parsons[2] and Niklas Luhmann's systems theory.[3] However, the consequences of such functional differentiation for governance in the European Union remain strongly understudied, and this despite the functionalist and "sector-by-sector" origin of the European integration project. Certainly, neo-functionalism featured as the front runner of European integration theory,[4] but its institutional and democratic consequences have not been thought through, while normative debate on the EU were increasingly framed in terms of accommodating national differences, through the focus on intergovernmentalism versus supranationalism and the democratic deficit debate which evolved from "no demos" argumentation[5] to conceptualising the European polity in terms of demoi-cracy.[6] The limited attention to questions of functional differentiation within EU studies may be understood by the fact that sociology and social theory, in which theories of functional differentiation are routed, have played a less prominent role in EU studies than political science or law. It must be said, though, that even the (limited) sociological studies of the EU have tended to focus on the "vertical" multi-level challenges of the European polity, dealing with topics as European citizenship or the European public sphere,[7] although sociological approaches to European

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"Multilevel Constitutionalism: Looking Beyond the German Debate", in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari, (Farnham: Ashgate, 2010).

[2] Talcott Parsons, *The Social System*, Routledge (first published 1951; new edition 2005).

[3] Niklas Luhmann (translated by J. Bednarz Jr. and D. Baecker), *Social Systems*, Stanford: Stanford University Press, 1995; Niklas Luhmann (translated by Peter Gilgen), *Introduction to Systems Theory*, Polity, 2012; Machael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law*, Palgrave, 2003.

[4] Ben Rosamond, "Performing Theory/Theorizing Performance in Emergent Supranational Governance: The 'Live' Knowledge Archive of European Integration and the Early European Commission", *Journal of European Integration* 32 (2015).

[5] Joseph H.H. Weiler, "Legitimacy and democracy of Union governance", in *The Politics of European Treaty Reform*, eds. Geoffrey Edwards and Alfred Pijpers (London: Pinter, 1997).

[6] James Bohman, "From Demos to Demoi: Democracy across Borders", *Ratio Juris*, 18(3) (2005); Kalypso Nicolaïdis, "The New Constitution as European 'Demoi-cracy'?", *Critical Review of International Social and Political Philosophy*, 7 (2004); Francis Cheneval, Sandra Lavenex and Frank Schimmelfennieg, "Demoi-cracy in the European Union: principles, institutions and policies", *Journal of European Public Policy* 22 (2015).

[7] Maurice Roche, *Exploring the Sociology of Europe* (London: Sage, 2010); Klaus Eder and Berhard Giesen, eds., *National Legacies and Transnational Projects* (Oxford: Oxford University Press, 2001).

studies are now on the rise[8] and sociology of knowledge[9] as well as attention to functional differentiation is slowly trickling into the debate.[10]

Secondly, the EU's institutional debate's focus on the way national diversity is accommodated is related to a focus on conceiving politics and reflections on its democratic nature in terms of aggregating interests, whether territorially or functionally defined. The debate has focused on aggregating national, or other territorially defined levels of interests, via electoral representation, and expressed through parliament at European, national or regional level. In addition, the political science literature has paid extensive attention to functional interest aggregation via lobbying or civil society activity.[11] However, modern governance is as much about knowledge-based claim making as about interest-based claim making.

The role of "knowledge" or "expertise" is discussed in several strands of the literature dealing with European policy making. However, it is not dealt with in a normative and holistic fashion in a way a constitutionalism perspective would provide. More particularly, the democratic challenges related to expertise and knowledge are only dealt with in the literature in a patchy way rather than by addressing the issue more systemically at the level of the polity as a whole. In the following sections, I will analyse how arguments about expertise and knowledge have been made in relation to specific European governance institutions. As will be illustrated in that institutional analysis, the different strands of literature can be distinguished by three different key dimensions of addressing the question of expertise and knowledge in European governance.

First, the focus can be either on expertise or on knowledge. Expertise assumes a level of authority, the possession of knowledge others don't have, giving the privileged position to speak as an expert. Literature on expertise may focus on how experts are appointed and on the institutional settings authorising some actors to speak as experts, as well as on the relation

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[8] Sabine Saurugger and Frédéric Mérad, "Does European integration theory need sociology?", *Comparative European Politics* 8 (2010).
[9] Rebecca Adles-Nissen and Kristoffer Kropp, eds., *Making Europe: The Sociology of Knowledge Meets European Integration*, Special issue, *Journal of European Integration* 37(2) (2015).
[10] Stijn Smismans, "European Constitutionalism and the Democratic Design of European Governance: Rethinking Directly Deliberative Polyarchy and Reflexive Constitutionalism", in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari (Farnham: Ashgate, 2010).
[11] For a literature review on the topic, see Rainer Eising, "Interest groups in EU policy-making", *Living Review in European Governance* 3(4) (2008), doi: 10.12942/lreg-2008-4; Eva G. Heidbreder, "Civil society participation in EU governance", *Living Review in European Governance* 7(2) (2012), doi: 10.12942/lreg-2012-2.

between different types of experts and expertise. The literature on knowledge in policy making instead is most often framed in terms of learning; knowledge is not the privilege of a particular group of experts, and the debate is particularly focused on the conditions under which learning occurs among the diversity of actors involved in policy making.

Secondly, studies of the role of expertise and knowledge in governance may be either analytical or normative. Hence, literature may deal with whether the inclusion of experts or the institutional setting for knowledge gathering ensures more efficient governance. At the same time, normative models have been proposed which place knowledge at the centre of democratic design.

Thirdly, and partially related to the two previous points, part of the literature fits with a societal understanding close to systems theory; while another part of the literature does not, or even explicitly distances itself from it. Indeed, a systems-theory perspective naturally raises questions in terms of expertise. The difficulties of communication between different sub-systems implies that expertise is located within each sub-system and rules of authorisation and recognition of expertise abide by the norms of each sub-system. Contrary to that, pragmatic approaches to reflexive governance ignore or deny the systemic nature of society and are based on the belief that learning can emerge among all policy actors; knowledge rather than expertise is the key word in this literature.

In the following section I will analyse how arguments regarding expertise and knowledge have been made in relation to different European governance mechanisms, exemplifying how different strands of the literature have remained rather separate.

3. The debates on European agencies and impact assessments

1. *From agencies to impact assessments*

Expertise has always been central to the European integration process. The functional approach to European integration considered the participation of actors with particular expertise in the areas of sectoral integration more important than wider public participation, with the initial parliamentary assembly not being directly elected and only having advisory power. However, as a topic of both institutional and academic debate, expertise only really emerged during the 1990s. Particularly following the Bovine Spongiform Encephalopathy

(BSE) crisis, the EU's regulatory framework was strongly contested for not respecting scientific standards and being biased by the interests of member states. In fact, the comitology system is based on a collaboration between the Commission and comitology committees which are composed of representatives from the national administrations. In the case of the "mad cow crisis", the UK had managed through comitology to keep the European market open to its beef, which would not have been the case if decision making had relied more heavily on the available scientific evidence.

Both the institutional and the academic debates that followed have focused on the importance of "independent expertise", which was assumed to be found in the creation of independent agencies. However, the European agencies, which multiplied from the 1990s onwards, have not taken the form of independent regulatory agencies. They have no regulatory powers but act as executive or information agencies, either giving advice to the European Commission and comitology, or as a network of exchange of information aimed at improving implementation at a national level. Nevertheless, insofar as European agencies have a role in European regulation, their creation is based on a distinction between risk assessment and risk management. Agencies are supposed to provide "neutral", "independent" risk assessment, while it is up to the political decision makers to ensure risk management by taking into account a broader variety of factors which includes both the independent risk assessment and consideration of other (national, functional) interests. Risk management is thus to be ensured by the European legislator (Commission, European Parliament (EP), and Council), or (much more regularly) by the Commission in interaction with comitology procedures. The relation between expertise and democracy in this case is based on the idea that information can be gathered neutrally and is then made available to politically accountable decision makers. The democratic process is ensured through the aggregation of interests via directly electoral representation (EP) or indirectly electoral representation (Council); or the mandate given by the legislator to the Commission. While most of the democratic accountability argument has focused on such territorial representation, it has also been recognised that aggregation of interests can be organised in a functional way, by way of consultation with stakeholders. However, from the "risk assessment/risk management" perspective, such participation should not be institutionalised via the agencies, which are supposed to gather "neutral" scientific advice (although some agencies have some stakeholders on their board). It is up to the European Commission to organise wider stakeholder participation; and it is up to the discretion of the Commission, and subsequently

the EP and the Council (for legislation), or comitology committees (for comitology), to decide to what extent "neutral" information gathered through agencies and interest-based arguments gathered through Commission consultation procedures are taken into account in the final political decision.

During the first decade of the twenty-first century, the debate on expertise in EU policy has shifted from the focus on agencies during the 1990s to a debate on sound evidence in the context of the Better Regulation agenda and, more particularly, the use of impact assessments. The debate on the European agencies, which function mainly as networks of national administrations rather than independent regulatory agencies, has more recently been framed in terms of the development of an "EU executive order", "European administrative space", or "European regulatory space"[12], rather than in terms of their centrality in providing independent expertise for European regulatory action. At the same time, with the Better Regulation debate, the attention for expertise has turned to EU legislative action, whereas it was previously focused on delegated legislation, with the critique on comitology, and then on the implementation stage as it became centred around the role of the European agencies. The Better Regulation debate emerged gradually during the 1990s as a concern with the regulatory burden of EU intervention, but was placed higher on the political agenda in the context of the 2000 Lisbon Strategy, merging different concerns; namely, regulatory burden, sound evidence for policy making, and more participatory procedures (the latter particularly also influenced by the parallel debate on the White Paper on European Governance).[13] The most important instrument of the Better Regulation agenda has been the system of integrated impact assessments, which the Commission has systematically applied since 2003. Integrated IAs, considering the economic, social and environmental impacts of new proposals, are required for all main policy initiatives, and legislative action in particular.

As in the agencies debate, the IA debate also (and particularly the official discourse about IAs) has to a great extent been framed in terms of a dichotomy between ensuring expertise on the one hand, and ensuring democratic participation and the aggregation of interests on the other. According to the 2015 Commission Guidelines on Better Regulation:

> Impact assessment is about gathering and analysing evidence to support policy making. In this process, it verifies the existence of a problem, identifies its underlying causes, assesses whether EU action is needed, and analyses the advantages and disadvantages of available solutions. IA promotes more

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[12] Mark Thatcher and David Coen, "Reshaping European Regulatory Space: An evolutionary analysis", in *Towards a New Executive Order in Europe?,* eds. Deirdre Curtin and Morten Egeberg (Routledge: London, 2009).

[13] Claudio Radaelli, "Whither Better Regulation for the Lisbon Agenda?", *Journal of European Public Policy* 14 (2007): 194.

> informed decision-making and contributes to Better Regulation which delivers the full benefits of policies at minimum cost while respecting the principles of subsidiarity and proportionality. However, IA is only an aid to policy-making/decision-making and not a substitute for it.[14]

Similar statements were found in the previous iterations of the IA Guidelines, indicating that IAs provide "neutral" information which is then passed on to the political decision-making level.

Expertise for IAs is gathered in different ways: with "internal expertise" the Commission refers to knowledge available within the Commission itself, which can be gathered by the creation of an IA Steering Group, bringing together officials from Directorates General (DGs) relevant to the issue.[15] "External expertise" is instead expected to come from expert groups and, in particular, scientific committees set up by the Commission and EU Agencies, while experts on the Commission expert website SINAPSE can also be used.[16] At the same time, the EU's system of IAs does recognise a role for interested parties within the IA process. In fact, compared to other countries and international organisations, the EU's system of impact assessments pays more attention to ensuring the participation of stakeholders during the drafting of impact assessments.[17] "Consultation with interested parties" is said to be:

> an essential tool for producing high quality and credible policy proposals. Consultation helps to ensure that policies are effective and efficient, and it increases the legitimacy of EU action from the point of view of stakeholders and citizens.[18]

However, while it is acknowledged that stakeholders or "interested parties" can provide evidence, and can contribute to, for instance, "finding new ideas (brainstorming), collecting factual data, and validating a hypothesis", their involvement also comes with the warning that "it is important to distinguish evidence from opinions".[19] Information provided by stakeholders is considered partisan and not objective, and it is therefore said that DGs should ensure "peer-reviewing, benchmarking with other studies and sensitivity analysis" in order to "significantly enhance the quality of data" and ensure "the robustness of the results".[20] At the same time, DGs should be sure to "engage all affected stakeholders" and "consult all relevant target groups". Such wide involvement seems to have a representative dimension; it is only through wide participation of all stakeholders that the feasibility and legitimacy of policy proposals is ensured. The EU's system of IAs thus does not entirely rely on "independent

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[14] European Commission, Commission Staff Working Document, *Better Regulation Guidelines*, COM(2015)215 final, 16. Similar statements were found in previous versions of the Impact Assessment Guidelines.
[15] 2009 Commission Guidelines on IAs, 18.
[16] Ibid., 19.
[17] Radaelli, "Whither Better Regulation", 194.
[18] 2009 Commission Guidelines on IAs, 19.
[19] Ibid., 20.
[20] Ibid.

expertise", but also on expertise provided by interested parties. At the same time, it is assumed that some actors, such as scientific committees and agencies do provide such independent expertise (not requiring a similar check of "robustness" as in relation to information from stakeholders) and that the DG drafting the IA can provide a neutral overview of stakeholders' position which can then be forwarded to the political decision-making level, which can use this information at its discretion.

2. *Common features and differences of the agencies and IA debates*

Despite the time lapse between the start of the European agencies and the IA debates, they have many common features. More precisely, both debates struggle with two "pitfalls" that have structured the argumentation in a particular way; namely, a strong inspiration in the US experience with these governance tools, and a solid belief in the rational technical model of policy-making.

Both the debates on agencies and IAs at EU level have been strongly influenced by arguments concerning these governance tools in the US, where they have been used for a longer time. The debate on European agencies was strongly influenced by arguments about the assumed advantages of using independent regulatory agencies as a governance technique, particularly through the work of Giandomenico Majone.[21] However, as the European agencies did not develop into real independent regulatory agencies, the American-inspired debate on the independence of expertise often sounds out of context. Many European agencies function as networks of national administrative authorities. The latter might also be institutionalised outside the main administration of ministries, on the basis of arguments of independence and expertise. However, such networks do not provide the EU agencies with regulatory decision-making power. Although some agencies have executive decision-making power, and some agencies may de facto weigh heavily on regulatory decisions due to their expert advice, the (final and formal) regulatory decision-making power remains in the hands of the political decision-making bodies, most often the Commission in interaction with comitology committees representing the member states' interests.

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[21] Giandomenico Majone, *Regulating Europe*, London: Routledge, 1996; Giandomenico Majone and Michelle Everson, 'Independent agencies, oversight, coordination and procedural control', in O. De Schutte, N. Lebessis and J. Paterson (eds), *Governance in the European Union*, Brussels: European Commission, 2001.

In a similar way, the experience with IAs in the US has been regularly referred to as reference point in the European debate,[22] but IAs in the EU turned out to play a very different role than what they have traditionally been used for in the US. In the US, IAs are particularly used as a way to curb the enthusiasm and initiative of the regulatory agencies. It is a way for the President, accountable to the legislature, to control delegated regulation by independent agencies, a control mechanism which is particularly inspired by a deregulatory philosophy. In the EU, by contrast, IAs are not to be drafted by the agencies (which do not have the regulatory power) but by the European Commission. However, this applies in particular when the Commission takes legislative initiatives, unlike in the US where the legislator does not have to draft IAs. This raises very different constitutional questions than in the American case, as IAs in the EU are not simply a way in which the executive (regulatory independent agency) has to justify itself, but is a way of framing the legislative debate itself. It can be argued that IAs oblige the Commission to justify its initiatives in front of the co-legislators, which are the European Parliament and the Council. At the same time, the Commission (protected by its near exclusive right of legislative initiative) thus sets out the cognitive framework within which legislative proposals will be debated. Of course, the EP and Council can bring in totally different arguments. However, in the battle over "sound evidence" and "appropriate knowledge", the EP and Council are modestly resourced in counter-arguing the expertise set out in IAs by the Commission. In an effort to counterbalance the Commission's expertise, the EP created a Directorate for Impact Assessment and European Added Value in January 2012, which became in 2014 part of a new European Parliamentary Research Service with 200 staff to support Members of Parliament with more evidence. While this may improve the EP's ability to engage in the legislative debate on the basis of "sound evidence", the Better Regulation agenda of the new Juncker Commission, presented in early 2015, may lead to the EP not even being able to put forward its "sound" arguments. The new Commission is strongly committed to a thinner regulatory agenda. Armed with IA and evaluation reports, the Commission First Vice-President, with the responsibility for Better Regulation, will proactively block initiatives from Commission DGs if considered not fitting the thin regulatory agenda. Hence, "sound evidence" provided in IA and evaluation reports,

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[22] While the EU's broader Better Regulation debate has also been inspired by national experiences (particularly from the UK and the Netherlands), the debate on IA got particularly coloured by its American references. See Jonathan B. Wiener, "Better Regulation in Europe", *Current Legal Problems* 59 (2006): 453.

particularly in terms of cost-benefit analysis,[23] may be used against EU intervention without the EP having even a say over it.

The second common pitfall in the debates on agencies and IAs is the belief in a the rational technical model of policy making, in which a clear line can be drawn between the gathering of neutral expertise and the subsequent political decision-making stage. Such a dichotomy between expertise and aggregating interests fails to acknowledge the many insights from science and technology studies, sociology of science and policy analysis, so that such a strict distinction does not stand the test of reality.[24] Interest-based participants also possess knowledge and evidence and definitely make knowledge-based claims. There has also been an increased "politicisation of science" as opposed interest groups make claims on the basis of contradictory scientific arguments using only those supporting their position.[25] In turn, this development makes public that science does not provide the single truth. As a consequence, the neutrality of science and expertise cannot be assumed, and there is plenty of evidence that science can be bent by special interests.[26]

The IA debate has acknowledged that interest groups also provide information, but while it is cautious about the bias of such information, it is less critical of the politics of the gathering of assumed neutral and scientific expertise and interests at play therein. In the agency debate, the belief in the separation of knowledge gathering and interest politics is even more clear-cut. Yet, over the last years, criticism from civil society organisation and from the Court of Auditors and the European Ombudsman on issues of conflict of interest in the functioning of the European agencies has undermined the normative underpinnings of the agencies institutional set-up.

4. The debate on the OMC

While the debates on agencies and IAs show many similarities in their arguments on expertise, a very different approach to expertise in European governance emerged in the

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[23] On the deregulatory risks of the Commission's recent commitment to an "evaluation culture", see Stijn Smismans, "Policy Evaluation in the EU: the challenges of linking ex ante and ex post appraisal", *European Journal of Risk Regulation* 6 (2015).

[24] Sabine Maasen and Peter Weingart, eds., *Democratization of Expertise? Exploring Novel Forms of Scientific Advice in Political Decision-making* (Dordrecht: Springer, 2009); Sheila Jasanoff, *Designs on Nature. Science and Democracy in Europe and the United States* (Princeton, NJ: Princeton University Press, 2005).

[25] Maasen and Weingart, ibid., 4; Michelle Everson and Ellen Vos, "The scientification of politics and the politicisation of science", in *Uncertain Risks Regulated*, eds. Michelle Everson and Ellen Vos (Abingdon: Routledge, 2009), 8.

[26] Thomas McGarity and Wendy Wagner, *Bending Science. How Special Interests Corrupt Public Health Research* (Cambridge, MA: Harvard University Press, 2010).

debate on the Open Method of Coordination (OMC). The core of this debate developed in the first half of the 2000s,[27] and thus somewhat in between the key moments of attention of the agency and IA debates. In 2000, the Lisbon Summit had put the OMC centrally on the agenda as a new governance tool. Instead of relying on binding EU intervention, the OMC is based on the definition of European guidelines, for which the member states then have to set out national action plans explaining how they intend to implement or have implemented these guidelines. These action plans are subsequently assessed at the European level (which may lead to revision of the guidelines) and may be combined with a process of specific recommendations addressed to the member states. This cyclical process is combined with the definition of benchmarks and measurable indicators allowing comparison of best practice. Moreover, the OMC is said to be based on a "fully decentralised approach", in line with the principle of subsidiarity in which the Union, the member states, the regional and local levels, as well as the social partners and civil society, are actively involved, using variable forms of partnership.

In both the institutional and academic debates on the OMC, the question of "expertise" is, rather, framed in terms of knowledge and exchange of information. The OMC is conceptualised as a process of learning. From this perspective, all actors in the process are assumed to learn and be capable of providing knowledgeable input. Unlike in the agency and IA debates, there is no strong normative argumentation on the assumed benefit of separating the "neutral gathering of expertise" from the political decision making. Both are assumed to emerge through the same bottom-up process. In fact, within the OMC, it is difficult to oppose the traditional democratic aggregation of interests based on an electoral mandate to the neutral gathering of expertise, since parliamentary involvement in the OMC is weak. At EU level, the OMC is driven by the Commission and the (European) Council, with the EP almost entirely absent. One has therefore argued in favour of strengthening the role of national parliaments in the OMC.[28] However, while they can be involved in the implementation of the OMC at the national level, ensuring involvement in the drafting of the EU level guidelines is much more difficult. Hence the OMC's discourse on the importance of bottom-up participation and stakeholder involvement. Whether the OMC's decentralised setting really ensures at the same time the gathering of knowledge and the representative involvement of all

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[27] For an overview of the main topics in the numerous pages written on the OMC in that period, see Sandra Kröger, ed., *What we have learnt: Advances, pitfalls and remaining questions in OMC research*, Special Issue 1, *European Integration online Papers* 13 (2009), doi: 10.1695/2009005.

[28] Francesco Duina and Tapio Raunio, "The open method of coordination and national parliaments: Further marginalization or new opportunities?", *Journal of European Public Policy* 14 (2007).

stakeholders has been an issue of academic inquiry, with some evidence of increased stakeholder participation, but leading to an overall picture of an OMC that is mainly technocratically driven by administrators at national and EU level.[29]

At the same time, a more theoretical academic debate on the OMC developed around ideas of reflexive governance and the model of directly-deliberative polyarchy (DDP). Reflexive governance has been discussed in both policy analysis, particularly in environmental policy, and legal theory, particularly based on Gunther Teubner's autopoietic theory of reflexive law.[30] The common ground is the focus on policy and law making as a cyclical and permanent learning process in which experience with the policy or law in practice leads to amendment of that policy or norm (first-order learning) and in which the process of policy and law making itself can be revised (second-order learning).[31] Most authors on reflexive law and governance stress the importance of a wide decentralised participation in these learning processes. At the same time, theories on reflexive governance or law are often proposed as analytical, describing the changing nature of modern policy and law making. When they are more normative, it is mainly in proposing the conditions under which learning would best occur. Arguments about the democratic nature of reflexive governance are often made implicitly rather than explicitly. Decentralised and participatory processes ensure the required knowledge and expertise for learning. That they ensure at the same time democratic involvement is often assumed but not strongly argued.

However, the OMC has also been said to be an example of DDP. The model of DDP is explicitly proposed as a design for modern democratic governance. DDP is a democratic ideal that is based on the idea that:

> local-, or more exactly, lower-level actors (nation state or national peak organizations of various kinds; regions, provinces or sub-national associations within these, and so on down to the level of whatever kind of neighbourhood the problem in question makes relevant) are granted autonomy to experiment with solutions of their own devising within broadly defined areas of public policy. In return they furnish central or higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them, and agree to respect in their actions framework rights of democratic procedure.[32]

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[29] Kerstin Jacobsson and Åsa Vifell, "Soft governance, employment policy and committee deliberation", in *Making the European Polity. Reflexive integration in the EU*, ed. Erik Oddvar Eriksen (London: Routledge, 2005); Evelyne Léonard et al., *New structures, forms and processes of governance in European industrial relations* (Luxembourg: European Foundation for Living and Working Conditions, 2007), 70.

[30] Erik Oddvar Eriksen, ed., *Making the European Polity. Reflexive integration in the EU* (London: Routledge, 2005); Jan-Peter Voss, Dierk Bauknecht and René Kemp, eds., *Reflexive Governance for Sustainable Development* (Cheltenham: Edward Elgar, 2006); Olivier De Schutter and Jacques Lenoble, eds., *Reflexive Governance. Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010).

[31] Voss, Bauknecht, and Kemp, ibid.

[32] Oliver Gerstenberg and Charles Sabel, "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?", in *Good Governance in Europe's Integrated Market*, eds. Christian Joerges and Renaud Dehousse (Oxford: Oxford University Press, 2002), 291.

The system is "directly-deliberative" since "citizens must examine their own choices in the light of the relevant deliberations and experiences of others"[33] – in contrast to other discursive ideas of democracy of deliberation by an administrative or political elite. The system is "polyarchic" due to the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units.[34] The democratic claims of DDP are akin to ideas of participatory democracy[35] and deliberative democracy in that it focuses on direct participation and deliberation in terms of rational argument. DDP aims at decentralization "down to the level of whatever kind of neighbourhood the problem in question makes relevant",[36] and postulates "direct participation by and reason-giving between and among free and equal citizens"[37] as a normative ideal. "There is a presumption in favour of equal membership for affected parties – open meetings, with equal rights to participate in discussion and decision-making for all affected parties."[38]

DDP does not fit well with the concept of expertise. Instead, knowledge is to emerge through a bottom-up process in which all actors can learn. However, DDP underestimates the systemic nature of knowledge and society. As argued in systems theory, society is constituted of sub-systems with their own language, making interaction between these sub-systems not entirely impossible but very difficult. Gerstenberg and Sabel argue instead that:

> local knowledge is neither tacit nor fully and self-referentially systematic. Co-ordination among local collaborators is necessary because of the diversity of their views and possible because . . . the exploration of the ambiguities internal to each shades into exchange with the others. But as local co-ordination yields new ambiguities of its own, there is both need and possibility for inter-local exchange through a new centre that frames discussion and re-frames it as results permit.[39]

However, the evidence of governance practices, in particular in the context of the EU, shows that the heterogeneity of participants[40] within local units emerges far less spontaneously than DDP seems to suggest, given the systemic expertise that is required. Moreover, a new centre at a higher level that allows inter-local exchange may indeed provide opportunity to reframe discussion, but the (partial) self-referentiality of sub-systems implies that, if not consciously institutionalised, there will be a tendency for such a higher-level centre to be created within the sub-system rather than creating deliberation across sub-systems. As the OMC illustrates, European governance tends to occur through auto-referential deliberation between functional

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[33] Joshua Cohen and Charles Sabel, "Directly-deliberative polyarchy", *European Law Journal*, 3 (1997): 314.
[34] Gerstenberg and Sabel, "Directly-Deliberative Polyarchy", 292.
[35] Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).
[36] Gerstenberg and Sabel, "Directly-Deliberative Polyarchy", 291.
[37] Cohen and Sabel, "Directly-deliberative polyarchy", 1.
[38] Ibid., 15.
[39] Gerstenberg and Sabel, "Directly-Deliberative Polyarchy", 340.
[40] Cohen and Sabel, "Directly-deliberative polyarchy", 333.

actors structured by the language of each sub-system, rather than as a bottom-up process based on citizen participation and a rather spontaneous process of cross-system interaction.

5. Conclusion: Back to constitutionalism for a holistic approach to expertise?

The analysis above shows how arguments about the role of expertise and knowledge in European governance have been made in relation to specific institutional settings and by different parts of the literature which have not interacted much. Set on track with the debate on European agencies, which was focused on the (regulatory) implementation stage, the debate on expertise got extended to the legislative stage by the topic of IAs. In both cases, normative discourse has been based on the idea of a separation between the democratic aggregation of interests on the one hand, and ensuring the input of independent expertise in policy making on the other. A different approach predominated in relation to the third European governance structure that engendered arguments about expertise and democracy, namely, the OMC. In this context, both expertise and interest representation are assumed to emerge bottom-up through the same process.

None of the three governance mechanisms around which arguments of expertise have developed received much attention in the debate on constitutionalism. This raises the question whether constitutionalism can provide a more holistic approach to the patchy arguments about expertise and democracy which have been framed in function of specific institutional settings and by separate literatures.

Neil Walker describes the essence of constitutionalism by its "meta-political function of shaping the domain of politics broadly conceived – of literally constituting the body politic."[41] It is:

> that species of practical reasoning which, in the name of some defensible locus of common interest, concerns itself with the organization and regulation of those spheres of collective decision-making deemed relevant to the common interest in a manner that is adequately informed by the common interest.[42]

Within the context of the nation state, constitutionalism functioned as a cluster concept, accumulating various distinct layers of situated constitutional practice, namely, juridical (self-constituted legal order), politico-institutional (idea of a secular delimited political realm, free from deference to particular interests), popular (democratic self-constitution), and societal

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[41] Neil Walker, "Multilevel Constitutionalism: Looking Beyond the German Debate", in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari (Farnham: Ashgate, 2010), 152.
[42] Ibid.

(idea of an integrated society, whether "thin" political society or "thicker" cultural society).[43] However, much of contemporary governance does not correspond to the expectation of such holistic constitutionalism.

The debate on multi-level constitutionalism has indeed more recently evolved from multi-level constitutionalism *senso stricto* (focused on the EU; and with the option to anchor the multi-levels within democratic processes of the nation state) to multi-level constitutionalism *senso lato*, paying attention to the complexity of modern governance which is often global, transnational, partially based on private regulation, and characterised by heterarchical networks (often difficult to anchor within the hierarchical nation state democratic process). The debate on such multi-actor (rather than multi-level) constitutionalism has so far mainly been initiated in relation to transnational private regulation.[44] However, multi-actor governance plays at all levels, including within the nation state, and where public and private sectors interact. In fact, the key challenge of modern governance may well be how knowledge, expertise, and cognitive frameworks, which are often functionally defined and increasingly transnational, influence policy making. Put differently, the challenge of multi-actor constitutionalism is how to regulate the interaction between the provision of knowledge and expertise on the one hand, and interest-based politics which answers to the meta-constitutional principle of self-governance on the other. So far, the literature on multi-level constitutionalism *senso lato* has not been framed in these terms.

At the same time, the literature on transnational private regulation raises also the question how far the language and meta-political function of constitutionalism can reach. In a special issue on transnational private regulation of the *Journal of Law and Society*, the guest editors, Colin Scott, Fabrizio Cafaggi and Linda Senden, investigate the constitutional challenge of such private governance.[45] They argue that private-regulatory power can significantly enhance capacity for developing and implementing public-regarding norms. The legitimacy of such private governance may often not be found in public law forms that traditionally justify regulatory intervention (above all linkage to electoral politics, but also proceduralisation and judicial accountability), but in private law forms and competitive structures. However, while these might provide legitimating discourses, they do so in a much

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[43] Ibid, 154-155.
[44] For example, the special issue of the *Journal of Law and Society* 38(1) 2011.
[45] Colin Scott, Fabrizio Cafaggi and Linda Senden, "The Conceptual and Constitutional Challenge of Transnational Private Regulation", *Journal of Law and Society* 38 (2011).

more sectoral way, and one wonders whether it can really live up to the constitutional meta-political function of providing a framework ensuring the common interest. Although the authors refer briefly to the meta-principle of the right to self-governance,[46] which they argue might be organised also in ways other than electoral politics, most of the proposed legitimating discourses stand far from traditional constitutional guarantees.

The analysis by Bomhoff and Meuwese in the same special issue may therefore appear more honestly modest but is at the same time even more disappointing from a constiutitonalist perspective.[47] Here the constitutionalist language is entirely absent. They analyse the meta-norms that develop through different disciplinary and professional lenses, looking in particular at private international law and Better Regulation. However, in the absence of a constitutionalist discourse as benchmark, it may be too easily taken for granted that such meta-norms (for instance, on consultation requirements in Better Regulation) live up to democratic benchmarks.

Bringing this back to the analysis above, the debates on agencies, IAs and OMC have all engendered legitimating discourses and, in the language of Bomhoff and Meuwese, meta-norms among the policy makers involved. None of them, though, has provided a broader normative framework in a way holistic constitutionalism would have done. Not only are these legitimating discourses limited to a narrow range of actors, but neither do they reach as far as a narrative "constituting the body politic". In the agency debate at least, the broader constitutional challenge has partially been raised with reference to principles of (global) administrative law (which finally links into electoral politics), while the democratic concern in the context of the OMC has been raised via reflexive governance and deliberative democracy. The Better Regulation debate, instead, has largely developed its own meta-norms, largely independent from constitutionalist language and concerns. In the absence of the constitutionalist language, such narratives risk providing simply a legitimating discourse for functional governance captured by particular interests.

At the same time, given the complexity of modern governance (heterarchical and often transnational), "traditional" holistic constitutionalism is clearly a framework from the past. The challenge is to rethink constitutionalism in such a way that its core meta-function of shaping the domain of politics in the common interest can be ensured, based on the

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[46] Ibid., 14.
[47] Jacco Bomhoff and Anne Meuwese, "The Meta-regulation of Transnational Private Regulation", *Journal of Law and Society* 38 (2011).

acknowledgment that policy making is as much about knowledge-based as about interest-based claim making.

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