

КОНСТИТУЦІЙНЕ ПРАВО НЕ ГАЛУЗЬ, А ОСНОВА НАЦІОНАЛЬНОГО ПРАВА

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General Theory of Law. Experimentalist Law-Making in the EU

Governance becomes a subject of interest when traditional mechanisms of parliamentary legislation and the administrative state are under pressure. Experimentalist governance is a theory of how complex, multi-level systems – such as the European Union – can govern effectively and how knowledge-intensive domains can be regulated effectively. It describes governance as a recursive process of provisional goal-setting, implementation, feedback, and revision, rather than as a fixed hierarchy of rules.

EU legislature sets general objectives and metrics in a policy domain, e. g. climate, banking, competition, procurement (framework goals). Member States or other implementing actors (agencies, regulators, private bodies) are granted discretion to pursue these goals in ways adapted to their contexts (decentralised Implementation). Member States and other actors must report regularly on results achieved and on problems encountered, usually through peer review or benchmarking (monitoring and reporting). EU legislature reviews the reports, compare performance, and revise goals, procedures, or indicators – starting a new round of experimentation (revision and learning).

Experimentalist law-making in the context of the EU as a multi-level organization

EU directives operate as institutionalised frameworks of experimentalist law-making. They combine legally binding objectives with significant national discretion. They embody a hybrid legal form that couples binding obligations with reflexive elements. Rather than prescribing uniform measures, directives set framework goals and require Member States to determine the appropriate means of implementation, subject to reporting, peer review, and periodic revision. This recursive architecture transforms harmonisation into an ongoing process of learning by monitoring. The Water Framework Directive (2000/60/EC) and the financial-services directives such as CRD IV/V exemplify this approach: they institutionalise feedback loops through implementation reports, comitology committees, and European agency networks. This recursive cycle institutionalises “learning by monitoring”. Such mechanisms enhance adaptability under conditions of uncertainty, diversity, and rapid change.

Experimentalist law-making in knowledge-intensive domains

In knowledge-intensive domains, legislators often are distant from events, circumstances and situations. This leads to a knowledge gap between legislators and implementing actors (regulatory bodies and private actors in industry). Moreover, legislators as well as primary

actors often do not know to respond to current or emergent situations (uncertainty). Experimentalist law-making has evolved as an institutional response to the such complexity and uncertainty. In areas such as financial stability, data protection, or environmental risk, the relevant knowledge is distributed, constantly evolving, and context-dependent, making it impossible for a single central authority to prescribe detailed, *ex ante* rules. Experimentalist architectures replace hierarchical control with recursive processes of framework rule-setting, decentralised implementation, monitoring, and revision. These mechanisms enable regulators and regulated entities to engage in learning by monitoring, thereby continuously adjusting norms to empirical feedback and technological change. Within the EU, this logic is visible in regimes like banking supervision (CRR/CRD IV-V, SSM) and digital governance (GDPR, DMA).

Experimentalist law-making offers a solution to the problem of governing under complexity. It transforms regulation into an adaptive, reflexive process rather than a fixed command structure. Yet it also raises normative questions about accountability and legal certainty, as iterative adaptation may obscure responsibility and blur the distinction between rule-making and rule-implementation.

Forward-looking vs. rule-following accountability

Experimentalist law-making comes along with a shift in how the relationship between legislator and administration is conceived. In traditional, rule-following accountability, the administration acts as an agent strictly bound by the principal's (the legislator's) predefined mandates, with performance measured by compliance with established rules. Under conditions of uncertainty and complexity, however, this principal – agent relation is inverted: the agent's efforts at implementation begin to reshape the principal's goals themselves. The agent's obligation is no longer limited to executing given instructions but extends to exploring feasible means of achieving the legislator's objectives and advising on their possible modification. In such contexts, accountability becomes forward-looking – evaluated not by adherence to prior rules, but by the capacity to learn, adapt, and justify actions in light of evolving circumstances. When this inversion occurs, accountability understood merely as rule – following ceases to be adequate.

Criticism

Critics argue that experimentalist governance may erode democratic legitimacy, as accountability becomes indirect, mediated through technocratic or networked processes. National parliaments and citizens have little control over iterative expert deliberation. The “many hands” problem makes attribution of responsibility nearly impossible. This may lead to a shift from government by the people to governance by experts.

On the other hand, experimentalist mechanisms can enhance transparency and participatory legitimacy. Procedures have to be embedded in representative and judicial oversight frameworks (as they are by EP scrutiny, ECJ review).