WHAT IS THERE TO LEGITIMIZE IN THE EUROPEAN UNION … AND HOW MIGHT THIS BE ACCOMPLISHED?

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'Legitimacy' is one of the most frequently used and misused concepts in political science. It ranks up there with 'power' in terms of how much it is needed, how difficult it is to define and how impossible it is to measure. Cynically, one is tempted to observe that it is precisely this ambiguity that makes it so useful to political scientists. Virtually any outcome can be "explained" (*ex post*) by it – especially by its absence – since no one can be sure that this might not have been the case.

For legitimacy usually enters the analytical picture when it is missing or deficient. Only when a regime or arrangement is being manifestly challenged by its citizens/subjects/victims/beneficiaries do political scientists tend to invoke lack of legitimacy as a cause for the crisis. When it is functioning well, legitimacy recedes into the background and persons seem to take for granted that the actions of their authorities are "proper," "normal" or "justified." One is reminded of the famous observation of U.S Supreme Court Justice, Lewis Powell, with regard to pornography: "I don't know what it is, but I know it when I see it." With regard to legitimacy, it would be more correct to say: "I may not be able to define (or measure) it, but I know it when it is not there."

Now, if this is true for polities – i.e. national states – that have fixed boundaries, unique identities, formal constitutions, well-established practices and sovereignty over other claimants to authority, imagine how difficult it will be to make any sense of the legitimacy of a polity that has none of the above! The European Union (EU) is, if nothing else, a "polity in formation." No one believes that its borders and rules are going to remain the same for the foreseeable future. Everyone "knows" that it is not only going to enlarge itself to include an, as yet undetermined, number of new countries, but it is also very likely to expand the scope of its activities and to modify the weights and thresholds of its decision-making system. If this were not enough, there is also the fact that the EU is an unprecedented experiment in the peaceful and voluntary creation of a large-scale polity out of previously independent ones. It is, therefore, singularly difficult for its citizens/ subjects/victims/beneficiaries to compare this *object politique non-identifié* with anything they have experienced before. No doubt, there exists a temptation to apply the standards that they are already using to evaluate their respective national authorities, but eventually they may learn to use other normative expectations with regard to EU behavior and benefits.

PART I: LAYING THE CONCEPTUAL FOUNDATIONS

One Definition and Five Implications

First, let us try to define legitimacy in a way that is generic enough to allow us to apply it to the widest possible range of polities.

Legitimacy is a shared expectation among actors in an arrangement of asymmetric power such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to pre-established norms. Put simply, legitimacy converts power into authority – *Macht* into *Herrschaft* – and, thereby, establishes simultaneously an obligation to obey and a right to rule.

From this, I draw the following implications:

(1) The basis upon which these norms are pre-established can vary from one arrangement to another – not only from one country or culture to another, but also within a single country/culture according to function or place. While it is often claimed that in the contemporary context "democracy" provides the exclusive basis for exercising authority, this denies the possibility (and obvious fact) that particular arrangements within an otherwise democratic polity can be (and often are) successfully legitimated according to other norms.[1] It also obscures the fact that "democracy" can be defined normatively and institutionalized historically in such a different fashion that power relations that are legitimate in one democracy would be regarded as quite illegitimate in another. The "coincidence" that all of the EU members are self-proclaimed democracies, recognize each other as such and require of new members that they conform to the same institutional pattern does not eo ipso provide the norms for its legitimation – indeed, well-entrenched differences among its members may actually make it more difficult.

(2) The unit within which relations of sub- and super-ordination are being voluntarily practiced can vary in both time and space. While there is a tendency in the political science literature on legitimacy to accept passively the sovereign national state as the "natural" and "exclusive" site, there is no reason why other (sub- or supra-national) "polities" – provided that they have sufficient autonomy in making and implementing collective decisions – cannot have their own normative basis of authority. In the case of the EU, the problem is compounded by the simultaneous need to legitimate not only what the unit should be, i.e. to define what "Europe" is, but also the regime that should govern it, i.e. what its institutions should be.

(3) The norms must be "shared" by the actors, both those who rule and those who are ruled. This implies, first of all, that they must know who they are and what their respective roles are. It also implies that the exercise of authority is "systemic," i.e. that it is embedded in a collectivity that is sufficiently interdependent and mutually trustful so that disputes over the validity of rules can be (and usually are) resolved by the intervention of third parties within them. Institutions such as courts specialize in this "referential" behavior, but

most of the contestation over rules involves less formal interactions within civil society and between firms in which the intervention of outsiders (actual or potential) is sufficient to produce a mutually accepted outcome. The citizens/subjects/victims/ beneficiaries of the EU do not yet know who they are – and not all of them are members of it and, therefore, entitled to participate in its government. Moreover, they remain anchored in relatively independent polities of varying size and power whose roles within EU institutions have yet to be established definitively. Nor have they achieved the level of social interdependence that allows them to rely on informal – "pre-political" and "extra-juridical" – means for resolving disputes legitimately.

(4) The actors involved may be individuals or collectivities of various sorts. The literature conveniently makes the liberal assumption that the unique judges of legitimacy are individual human beings. This allows it to rely heavily on notions of family socialization, "moral sentiment" and personal responsibility as the source of norms and the mechanism for their enforcement. And this in turn tends to lead one to the conclusion that it is only in polities that have previously established a high degree of cultural homogeneity – i.e. nation-states – that legitimate political authority is possible. When one introduces, however, the heterodoxical idea that most of the exchanges in modern political life are between organizations and, moreover, that these organizations share norms of prudence, legal propriety and "best practice" that transcend individual preferences and even national borders, it then becomes more possible to imagine how a "non-national" and "non-state" polity such as the EU might be able to generate valid and binding decisions. Which is not the same thing as to say that it will be easy for it to come up with such norms – given all the caveats introduced above, plus the fact that in such a "multi-layered" and "poly-centric" arrangement it may be very difficult to trace the origin and responsibility for them.

(5) The basis for voluntary conformity is presumably normative, not instrumental or strategic. In a legitimate polity, actors agree to obey decisions that they have not supported made by rulers whom they have not voted for. They also agree to do so even if it is not in their (self-assessed) interest to do so – and they are expected to continue to do so even when the effectiveness of the polity is in manifest decline. Needless to say, it will not always be easy to assess if this. Rulers often can control the means of communication and distort the flow of information to make it appear as if they were following prescribed norms; the ruled may only be pretending to comply in order to build up a reputation that they can subsequently "cash in" for material or other self-regarding purposes. Conversely, resistance to specific commands – whatever the accompanying rhetoric – may have nothing to do with challenging the legitimacy of the authority that issued them, just with disputes over the performance of individual rulers or agencies. Needless to say, in the case of the EU the compellingness of norms is even more difficult to observe. The intergovernmental nature of its key institutions virtually licenses actors to pursue national interests exclusively – or, at least, to proclaim to their citizens that they are doing so. The confidentiality of its many committees makes it almost impossible to detect when interaction produces a shared norm rather than a strategic compromise or a hegemonic victory. Add to all this, the

propensity for national rulers who can no longer "deliver the goods" by themselves to blame the obscure and distant processes of European integration when they have to take unpopular decisions and you have a polity that is bound to appear less legitimate than it is.

One (Interim) Conclusion and Two (Very Important) Implications

From this conceptual analysis, I draw the following conclusion:

If we are to make any sense of the present and future legitimacy of the European Union, we have to reach a consensus concerning the apposite criteria – the operative norms – that actors should apply when establishing their presumably shared expectations about how its authority should be exercised.

[I say "should" because it is abundantly clear that in the present circumstance both scholars and actors within the integration process tend to presume an isomorphism between the EU and their respective national polities. This unavoidably leads to the conclusion that the EU suffers from a "democratic deficit."[2] And this, in turn, implies that the only way of filling that deficit is to insert "conventional democratic institutions" into the way the EU makes binding decisions, e.g. assert parliamentary sovereignty, institute direct elections for the President of the Commission and, above all, draft and ratify a "federal" constitution.[3] It is that interpretation that I wish to contest, although I am aware that the more that the EU uses distinctive criteria in the design and evaluation of its institutions, the more difficult it will be initially to convince its citizens that what it is doing is "really" democratic. Nevertheless, this is a political paradox that will have to be tackled – and, like many such paradoxes, it is only by learning from experience that the apparent contradiction is resolved.]

I am taking two things for granted at this point: (1) that the apposite criteria for the legitimation of the EU (whatever they may be) should be "democratic" in some fundamental/foundational sense; (2) that the individual citizens and collectivities that are members of the EU, now and for the foreseeable future, share a "reasonable pluralism" in the interests and passions that they wish to satisfy through the integration of Europe.

Just a bit of explication of both points:

(1) The meaning and, hence, the institutions and values of democracy have changed radically over time. Robert Dahl has spoken of several "revolutions" in its past practice (often without its proponents being aware of it) and argued that "democracy can be independently invented and reinvented whenever appropriate conditions exist."[4] The European Union is unavoidably part and parcel of these changes. Not only must it reflect transformations in the nature of actors (from individual to collective citizens) and role of the state (from redistribution to regulation) that are well underway in the 'domestic democracies' of its member states, but it must also recognize and adapt to its uniqueness as a non-national, non-state, multi-level and poly-centric polity

that encompasses an unprecedented (for Europe) variety of cultures, languages, memories and habits and is expected to govern effectively on an unprecedented scale – all this, with very limited human and material resources.

(2) Despite the heterogeneity of its national and sub-national components and, hence, the strong likelihood that major actors will not be "naturally" in agreement on either identical rules of the game or substantive goals, its members are "reasonably pluralistic," i.e. the range of their differences is limited and they are pre-disposed to bargain, negotiate and deliberate until an agreement is found. To use another expression of Rawls, those who participate in the EU enjoy an "overlapping consensus." [5] Moreover, they understand and accept that the outcome of the process of integration will itself be pluralistic, i.e. it will protect the diversity of experiences rather than attempt to assimilate them into a single "European" culture or identity.

Based on this (interim) conclusion, I am first convinced that it is neither feasible nor desirable to try to democratize the European Union *tutto e sùbito* -- completely and immediately.[6] Not only would the politicians not know how to do it, but there is also no compelling evidence that Europeans want it. Nothing could be more dangerous for the future of an eventual Euro-democracy than to have it thrust upon a citizenry that is not prepared to exercise it, and that continues to believe its interests and passions are best defended by national not supranational democracy.

Moreover, the EU at this stage in its political development neither needs, nor is prepared for a full-scale constitutionalization of its polity. The timing is simply wrong. In the absence of revolution, coup d'etat, liberation from foreign occupation, defeat or victory in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the ancien regime and/or major economic collapse, virtually none of its member states have been able to find the "political opportunity space" for a major overhaul of their ruling institutions.[7] The fact that they all (with one exception) have written constitutions and that this is a presumptive *sina qua non* for enduring democracy indicates that at some time this issue will have to be tackled -- if the EU is ever to be democratized definitively -- but not now!

However, as I have explored in a recent book, it may be timely to begin sooner rather than later to experiment with improvements in the quality of embryonic Euro-democracy through what I call "modest reforms" in the way citizenship, representation and decision-making are practiced within the institutions of the European Union.[8] Even in the absence of a comprehensive, i.e. constitutional, vision of what the supra-national end-product will look like, specific and incremental steps could be taken to supplement (and not supplant) the mechanisms of accountability that presently exist within its member states. Since, as seems obvious to me, the rules and practices of an eventual Euro-democracy will have to be quite different from those existing at the national level, it is all the more imperative that Europeans act cautiously when experimenting with political arrangements whose configuration will have

to be unprecedented, and whose consequences could prove to be unexpected – perhaps, even unfortunate.[9] . [10]

I will not enter into the details of the twenty-some "modest (and some not so modest) reforms" that I proposed in this book for the simple reason that I am not convinced that, even in the unlikely event that all of them were to be implemented, their joint impact would succeed in legitimizing the EU. Introducing one or another of them *au fur et à mesure* might improve selected aspects of the regime's capacity to invoke voluntary compliance, but given the "systemic" aspect that was mentioned above, one should not expect miracles – least of all *hic et nunc*. For one thing, it would take some time for any of them to produce their intended effects – especially, since several of them are calibrated to take into consideration the pace and extent of Eastern Enlargement. All of them, despite their modesty, entail unforeseeable risks and are likely to generate unintended consequences – indeed, the entire exercise was predicted upon exploiting these political externalities to press gradually and stealthfully toward further democratization.

The second ("very important') implication is that marginal and attainable improvements in the legitimacy of the European Union are much more likely to come from changes in the admittedly "fuzzy" but innovative practices of **governance** than from reforms in the much more clearly delineated and conventional institutions of **government**.

While it may have been revived by the opportunistic manipulations of the World Bank and may have initially been focused in an over-optimistic fashion on improving the performance of politics in sub-Saharan Africa, use of the concept of governance has spread with astonishing rapidity and is being applied by both academics and practitioners in a very wide range of settings – up to and including the European Union where it is about to become the subject of an official pronouncement, i.e. a "White Paper." Despite the inevitable oversell and vagueness in such a fashionable concept, there must be something to it – or it would not have met with such success. I am convinced that behind all that capaciousness is a distinctive method/mechanism for resolving conflicts and solving problems that reflects some profound characteristics of the exercise of authority that are emerging in almost all contemporary societies and economies -- and, not just in those that are trying to catch up to the more developed ones.

Governance is not a goal in itself, but a means for achieving a variety of goals that are chosen independently by the actors involved and affected. *Pace* the frequent expression, "good governance," resort to it is no guarantee that these goals will be successfully achieved. It can produce "bads" as well as "goods." Nevertheless, it may be a more appropriate method than the more traditional ones of resorting to public coercion or relying upon private competition. Moreover, it is never applied alone, but always in conjunction with state and market mechanisms. For "governance" is not the same thing as "government," i.e. the utilization of public authority by some subset of elected or (self-)appointed actors, backed by the coercive power of the state and (sometimes) the legitimate support of the citizenry to accomplish collective

goals. Nor is it just another euphemism for the "market," i.e. for turning over the distribution of scarce public goods to competition between independent capitalist producers or suppliers. It goes without saying that, if this is the case, the legitimacy of applying governance to resolving conflicts and solving problems will depend upon different principles and operative norms than are used to justify the actions of either governments or markets. It will be my purpose in the remaining portion of this essay to elaborate upon this implication by specifying what these principles and norms might be.

But first a brief excursus into defining "it:"

Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and cooperating in the implementation of these decisions.

Its core rests on horizontal forms of interaction between actors who have conflicting objectives, but who are sufficiently independent of each other so that neither can impose a solution on the other and yet sufficiently interdependent so that both would lose if no solution were found.[11] As we shall see, in modern and modernizing societies the actors involved in governance are usually non-profit, semi-public and, at least, semi-voluntary organizations with leaders and members; and it is the embeddedness of these organizations into something approximating a civil society that is crucial for the success of governance. These organizations do not have to be equal in their size, wealth or capability, but they have to be able to hurt or help each other mutually. Also essential is the notion of regularity. The participating organizations interact not just once to solve a single common problem, but repeatedly and predictably over a period of time so that they learn more about each other's preferences, exchange favors, experience successive compromises, widen the range of their mutual concerns and develop a commitment to the process of governance itself. Here, the code-words tend to be trust and mutual accommodation -- specifically, trust and mutual accommodation between organizations that effectively represent more-or-less permanent social, cultural, economic or ideological divisions within the society.

Note also that governance is not just about making decisions via deliberation, bargaining and negotiation, but also about implementing policies. Indeed, the longer and more extensively it is practiced, the more the participating organizations develop an on-going interest in this implementation process since they come to derive a good deal of their legitimacy (and material rewards) from the administration of mutually rewarding programs.

The fact that governance arrangements are typically thought to be "second-best solutions" is a serious impediment to their legitimation. If states and markets worked well -- and worked well together -- there would be no need for governance. It only emerges as an attractive option when there are manifest state failures and/or market failures. It is almost never the initially preferred way of dealing with problems or resolving conflicts. States and

markets are much more visible and better justified ways of dealing with social conflicts and economic allocations. Preference for one or the other has changed over time and across issues following what Albert Hirschman has identified as a cycle of "shifting involvements" between public and private goods. Actors, however, are familiar with both and will "naturally" gravitate toward one of them when they are in trouble. Governance arrangements tend to be much less obvious and much more specific in nature. To form one successfully requires a good deal of "local knowledge" about those affected and, not infrequently, the presence of an outside agent to pay for initial costs and to provide reassurance -- even coercive backing -- in order to overcome the rational tendency not to contribute. As we shall see, this almost always involves some favorable treatment from public authorities as well as (semi-) voluntary contributions from private individuals or firms. What is novel about the present epoch is that, increasingly, support for governance arrangements has been coming from private and not just public actors and from trans- and supra-national sources – and not just from national and sub-national ones. And the European Union has been among the most active and innovative producers of such arrangements.

Whether the EU has been as successful in convincing its citizens that these arrangements are legitimate exercises of its authority is not clear, although one should note the impressive extent to which member states and mass publics have consented to the "authoritative allocations" of its myriad committees and the decisions of its Court of Justice. It is certainly premature to claim that the EU is a "producer" rather than a "consumer" of legitimacy – depending as it does so heavily on the borrowed authority of its member governments. As David Beetham and Christopher Lord have argued so persuasively, it is the interaction between the different levels of aggregation and identity that reciprocally justifies the process of European integration.[12] In such a complex and still contingent polity, it becomes rather difficult to discern who is loaning and who is borrowing legitimacy – and for what purpose.

Moreover, much of what is happening within the EU is more the result of expediency, pragmatic tinkering, the press of time, the diffusion of "best practices," *ad hoc* and even *ad hominem* solutions than of shared principles and explicit design. My (untested) presumption is that, if the EU were to elaborate and defend such principles and, then, design its arrangements of governance accordingly, it would improve their legitimacy.

Part II: BUILDING THE LEGITIMACY OF GOVERNANCE INSTITUTIONS

Inserting Some Generic Principles for their Design:

In the course of my (marginal) participation in a collaborative project with the somewhat preposterous title, "Participatory Governance for Achieving Sustainable and Innovative Policies in a Multi-Level Context, a number of themes emerged from my listening to the discussion by those who were really dong the field research. Subsequently, along with additional reading in several "literatures," I have collected, condensed and labeled a set of generic

principles that might be used to guide the design of what I will call generically: European Governance Arrangements (EGAs).

I begin with the somewhat heterodoxical notion that EGAs are political institutions and, as such, have to root their legitimacy in distinctively political principles. Just performing well will not be sufficient to ensure that their commands will be voluntarily obeyed – if only because their regulations and assignments inevitably have uneven distributive and even redistributive consequences. Their beneficiaries/victims will eventually question not just the substance of what they do, but how they have made their decisions. Admittedly, agencies such as the World Bank that have been promoting the idea of governance insist that their "recommendations for good governance" are apolitical and have nothing to do with "interfering in the domestic politics of member states." No one should be fooled by this. Setting up a governance arrangement inevitably involves making significant political choices -- with even more potentially significant political consequences if it is done wrong.

At a minimum, three features of political design are involved if the agent creating a governance mechanism expects to obtain legitimacy for its decisions and, hence, ensure the greater efficacy and efficiency of its operations:

(1) What is the purpose of delegating power to such an arrangement (chartering)?;

(2) Who should participate in it (composition)?;

(3) How should they reach decisions (rules)?.

The logically prior notion of "chartering" rests on the presumption that a particular issue or policy arena is "appropriate" for a governance arrangement, *ergo* that it is not better handled by good, old-fashioned market competition or government regulation. Some particular composition of actors, each acting autonomously, is thought to be capable of making decisions according to rules, voluntarily accepted or consensually deliberated, that will resolve the conflicts and provide the resources necessary for dealing with the issue or policy arena designated by its charter. Moreover, these decisions once implemented will be accepted as legitimate by those who did not participate and who have suffered or enjoyed their consequences. And, if this were not enough, a successful EGA would also have to demonstrate that its capacity to resolve conflicts and provide resources is superior to anything that a national or sub-national arrangement could have done. Looked at from this perspective, there may not be that many arenas that should acquire "their" EGA!

Someone who has given considerable thought to this question is Eleanor Ostrom[13]. Through her empirical research on "self-organized, common-pool resource regimes," she has come up with a list of attributes that increase the likelihood that such governance arrangements will be formed and will perform

better than either markets or states. [14] Let us look at this list and comment on the validity of its assumptions for the "pre-design" of EGAs:[15]

Attributes of the Resource (i.e. of the issue or policy arena): [16]

Feasible Improvement: Resource conditions are not at a point of deterioration such that it is useless to organize or so underutilized that little advantage results from organizing. *It would not be appropriate to create an EGA to accomplish something no one cared about or that had degenerated so much under national or sub-national management that a Europe-wide approach would be doomed from the start.*

Indicators: Reliable and valid indicators of the condition of the resource system are frequently available at relatively low cost. *Here, the issue involves "Europeanizing" the flow of quantitative and qualitative information by eliminating national peculiarities and thereby encouraging the emergence of Europe-wide standards of "best practice."*

Predictability: The flow of resource units is relatively predictable. *For EGAs the major problem with this is the likelihood that predictability may differ from one member state to another or that, even where the indicators have been Europeanized, they may be subjected to "local" interpretation.*

Spatial Event: The resource system is sufficiently small, given the transport and communication technology in use, that appropriators can develop accurate knowledge of external boundaries, and internal micro-environments. *Taken at face value, this attribute would literally preclude a European level of governance. Needless to say, until the enlargement process is terminated, no one can know what the external boundaries of any EGA will be. The integration process (and technological developments) may have considerably decreased transaction costs (and will do so even more in the future), but they will always be higher than inside each member state. What this suggests is that the implementation of EGA decisions should be administered and "articulated" in such a fashion as to encourage adaptation to national and sub-national contexts – while running the risk of systematic cheating if monitoring mechanisms are inadequate. This also suggests the wisdom of tolerating, even encouraging, "flexibility" in the establishment of EGAs such that they may be composed of different member-states.*

Attributes of the Appropriators: (i.e .of the composition of participants):

Salience: Appropriators are dependent on the resource system for a major portion of their livelihood. *Participants should be "stake-holders" and "knowledge-holders" with both a significant interest in the issue and the capacity to deliver the compliance of their followers-employees-clients to decisions made by the EGA.*

Common Understanding: Appropriators have a shared image of how the resource system operates and how their actions affect each other and the resource system. *Obviously, given differences in language and historical*

practice, "Europeans" are more likely to be deficient in this attribute than "nationals" – even though convergence across member-states in both performance and intellectual understanding has been impressive and growing. Also, one could question whether this should be taken as a "pre-requisite" for, or as a "product" of EGA activity.

Low Discount Rate: Appropriators use a sufficiently low discount rate in relation to future benefits to be achieved from the resource.

From this discussion, I arrive at some general norms that should guide the initial formation of EGAs, the composition of those who should be entitled to participate in them and the rules they should follow in making their decisions.

I. Six Generic Principles for the Chartering of EGAs:

(1) THE PRINCIPLE OF 'MANDATED AUTHORITY': No EGA should be established that does not have a clear and circumscribed mandate that is delegated to it by an appropriate EU institution. Any EU institution should be entitled to recommend the initial formation and design of an EGA, i.e. its charter, its composition and its rules, but (following the provisions of the Treaty of Rome) only those approved by the Commission should be actually established, whether or not they are subsequently staffed, funded, "housed" and/or supervised by the Commission.

(2) THE 'SUNSET' PRINCIPLE: No EGA should be chartered for an indefinite period, irrespective of its performance. While it is important that participants in all EGAs should expect to interact with each other on a regular and iterative basis (and it is important that the number and identity of participants be kept as constant as possible), each EGA should have a pre-established date at which it should expire. Of course, if the EU institution that delegated its existence explicitly agrees, its charter can be renewed and extended, but again only for a definite period.

(3) THE PRINCIPLE OF 'FUNCTIONAL SEPARABILITY': No EGA should be chartered to accomplish a task that is not sufficiently differentiated from tasks already being accomplished by other EGAs and that cannot be feasibly accomplished through its own deliberation and decision.

(4) THE PRINCIPLE OF 'SUPPLEMENTARITY': No EGA should be chartered (or allowed to shift its tasks) in such a way as to duplicate, displace or even threaten the *compétences* of existing EU institutions. European governance arrangements are not substitutes for European government, but should be designed to supplement and, hence, to improve the performance of the Commission, the Council and the Parliament

(5) THE PRINCIPLE OF 'REQUISITE VARIETY': Each EGA should be free – within the limits set by its charter – to establish the internal procedures that its participants deem appropriate for accomplishing the task assigned to it. Given the diversity inherent in these functionally differentiated tasks, it is to be expected that EGAs will adopt a wide variety of distinctive formats for

defining their work program, their criteria for participation and their rules of decision-making – while (hopefully) conforming to similar principles of general design.

(6) THE 'HIGH RIM' OR 'ANTI-SPILL-OVER' PRINCIPLE: No EGA should be allowed by its mandating institution to exceed the tasks originally delegated to it. If, as often happens in the course of deliberations, an EGA concludes that it cannot fulfill its original mandate without taking on new tasks, it should be required to obtain a specific change in its mandate in order to do so.[17]

II. Four Generic Principles concerning the Composition of EGAs:

(1) THE MINIMUM THRESHOLD PRINCIPLE: No EGA should have more active participants than is necessary for the purpose of fulfilling its mandated task. It has the autonomous right to seek information and invite consultation from any sources that it chooses; however, for the actual process of drafting prospective policies and deciding upon them, only those persons or organizations judged capable of contributing to the governance of the designated task should participate.[18]

(2) THE STAKE-HOLDING PRINCIPLE: No EGA should have, as active participants, persons or organizations who do not have a significant stake in the issues surrounding the task assigned to it. Knowledge-holders (experts) specializing in dealing with the task should be considered as having a stake, even if they profess not to represent the interests of any particular stakeholder.

(3) THE PRINCIPLE OF 'EUROPEAN PRIVILEGE': All things being equal, the participants in an EGA should represent Europe-wide constituencies.[19] Granted that, in practice, these representatives may have to rely heavily on national and even sub-national personnel and funding and may even be dominated by national and sub-national calculations of interest, and granted that the larger the constituency in numbers, territorial scale and cultural diversity, the more difficult it may be to acquire the "asset specificity" that provides the basis for stake-holding, nevertheless, the distinctive characteristic of a European governance arrangement is contingent on privileging this level of aggregation in the selection of participants.

(4) THE ADVERSARIAL PRINCIPLE: Participants in an EGA should be selected to represent constituencies that are known to have diverse and, especially, opposing interests. No EGA should be composed of a preponderance of representatives who are known to have a similar position or who have already formed an alliance for common purpose.[20] In the case of 'knowledge-holders' who are presumed not to have constituencies but ideas, they should be chosen to represent whatever differing theories or paradigms may exist with regard to a particular task.

III. Eight Generic Principles concerning Decision-Rules for EGAs:

(1) THE PRINCIPLE OF 'PUTATIVE' EQUALITY: All participants in an EGA should be considered and treated as equals, even when they represent constituencies of greatly differing size, resources, public or private status, and "political clout" at the national level. No EGA should have second and third class participants, even though it is necessary (see Item II.2) to distinguish unambiguously between those who participate and those who are just consulted.

(2) THE PRINCIPLE OF HORIZONTAL INTERACTION: Because of the presumption and practice of equality among participants, the internal deliberation and decision making processes of an EGA should avoid as much as possible such internal hierarchical devices as stable delegation of tasks, distinctions between "neutral" experts and "committed" representatives, formalized leadership structures, informal arrangements of deference, etc. and should encourage flexibility in fulfilling collective tasks, rotating arrangements for leadership and rapporteurship, extensive verbal deliberation, -- and a general atmosphere of informality and mutual respect.

(3) THE CONSENSUS PRINCIPLE: Decisions in an EGA will be taken by consensus rather than by vote or by imposition.[21] This implies that no decision can be taken against the expressed opposition of any participant, although internal mechanisms usually allow for actors to abstain on a given issue or to express publicly dissenting opinions without their exercising a veto. Needless to say, the primary devices for arriving at consensus are deliberation (i.e. trying to convince one's adversaries of the *bien-fondée* of one's position), compromise (i.e. by accepting a solution in between the expressed preferences of actors) and accommodation (i.e. by weighing the intensity of actor preferences). Regular and iterative interaction among a stable set of representatives is also important, although (see Item I.2) this should be temporally bounded.

(4) THE 'OPEN DOOR' PRINCIPLE: Any participant should be able to exit from an EGA at relatively modest cost and without suffering retaliation in other domains – either by other participants or EU authorities. Moreover, the ex-participant has the right to publicize this exit before a wider public (and, the threat to do so should be considered a normal aspect of procedure), but not the assurance that, by exiting, he or she can unilaterally halt the process of governance.

(5) THE PROPORTIONALITY PRINCIPLE: Although it would be counter-productive for influences to be formally weighed (see Item III.1) or counted (see Item III.3), it is desirable that across the range of decisions taken by an EGA there be an informal sense that the outcomes reached are roughly proportional to the specific assets that each participant contributes (differentially) to the process of resolving the inevitable disputes and accomplishing the delegated tasks.[22]

(6) THE PRINCIPLE OF SHIFTING ALLIANCES: Over time within a given EGA, it should be expected that the process of consensus formation will be led by different sets of participants and that no single participant or minority of participants will be persistently required to make greater sacrifices in order to reach that consensus. Thanks to Item III.4, this situation should be avoided, if only because it will be so easy and "cheap" for marginalized actors to exit.

(7) THE PRINCIPLE OF 'CHECKS AND BALANCES:' No EGA should take a decision binding on persons or organizations not part of its deliberations **unless** that decision is explicitly approved by another EU institution that is based on different practices of representation and/or of constituency. Normally, that EU institution will be the one that "chartered" the EGA initially, but one can imagine that the European Parliament through its internal committee structure could be accorded an increased role as co-approver of EGA decisions.

(8) THE REVERSIBILITY PRINCIPLE: No EGA should be empowered to take decisions (even when co-approved as per Item III.7) that cannot be potentially annulled and reversed by "rights-holders," i.e. by European citizens acting either directly through eventual referenda or indirectly through their representatives in the European Parliament.

IV. Five Other Generic Principles of EGA Design:

(1) THE PRECAUTIONARY PRINCIPLE: An EGA should in the substance of its decisions take into account the full range of knowledge and, where that knowledge is uncertain or incomplete, it should err on the side of assuming the worst possible consequence – ergo, it should avoid risks rather than maximize benefits when calculations about the latter are inconclusive.

(2) THE FORWARD-REGARDING PRINCIPLE: An EGA should in the substance of its decisions take into account the furthest future projection of the consequences of its decisions. This obviously poses a serious difficulty in terms of the composition of its participants, (e.g. who can legitimately represent as yet unborn generations), but some "place at the table" should be occupied by persons or organizations representing as long a time perspective as possible.

(3) THE SUBSIDIARITY PRINCIPLE: No EGA should deal with an issue or make decisions about a policy that could be handled more effectively or more legitimately at a lower level of aggregation, i.e. at the level of member states or their sub-national units. Inversely, no EGA should occupy itself with an issue that cannot be resolved and implemented at the level of Europe, but requires a higher level of aggregation, i.e. the Trans-Atlantic or Global one.

(4) THE PRINCIPLE OF (PARTIAL) TRANSPARENCY: No EGA should take up an issue or draft a projet de loi that has not been previously announced and made publicly available to potentially interested parties not

participating directly in its deliberations. Conversely, none of the participants in an EGA should make public the content of deliberations while they are occurring and the draft of a *projet* until a consensus has been reached. Once a decision has or has not been made, the participants are free to express their satisfaction/dissatisfaction with it to whomever they please.

(5) THE PRINCIPLE OF PROPORTIONAL EXTERNALITIES: No EGA should take a decision whose effects in financial cost, social status or political influence (especially for those not participating in it) is disproportionate either to the expectations inherent in their original charter or general standards of fairness in society. When claims of disproportionate effect are made, these externalities should be investigated and, where found to be justified, compensated for by other EU institutions – in particular, by the European Parliament.

Concluding with some caveats

Participatory/democratic governance is no panacea. It may contribute positively to enhancing the legitimacy of the EU, but only if it is "seconded" by reforms in the institutions of its government. Moreover, EGAs will not work to resolve all policy issues and they will not work unless firmly based on political as well as administrative design principles. And that means that difficult choices involving their charter, composition and decision-rules cannot be indefinitely avoided or finessed. Unless EGAs are "properly" designed, there is no reason to be confident that their decisions will be more sustainable or accepted as legitimate by those who have not participated in them and joined in the consensus they are intended to promote. And, as emphasized above, governance arrangements never work alone but only in conjuncture with community norms, state authority and market competition.

I can foresee two key dilemmas that still must be addressed – even if progress is made on the difficult choices involved in designing EGAs. I will only raise them without further explication:

The proliferation of EGAs tends to occur within compartmentalized policy arenas (and more so in the EU than in member states). This leaves unresolved the larger issue of how eventual conflicts between their decisions are going to be resolved. Multiple "governances" at the micro- or meso-levels no matter how participatory, sustainable and legitimate on their own, may end up generating macro-outcomes, e.g. *via* externalities, that were not anticipated and that no one wants!

The criteria for the inclusion of participants and the making of decisions in EGAs are not generally compatible with the conventional norms for democratic legitimation used within national and sub-national polities – although experimentation with governance arrangements is occurring at all levels of aggregation. Before EGAs can be reliably deployed and generate a sense of obligation among broader publics, it may be necessary to spend a

good deal of effort in changing peoples' notions of what democracy is and what it is becoming.

FINE

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* ENDNOTES *

1. Although it would be more accurate to stress that these "other" arrangements based on expertise, legality, personal reputation or just plain effectiveness are themselves embedded in a more encompassing framework of national democratic institutions that, at least potentially, have the power to amend or overrule whatever decisions are made by non-democratic means. This contextual property is sometimes overlooked by enthusiasts for central bank autonomy, independent regulatory agencies, oversight boards, judicial review, and so forth.

2. The evidence usually adduced to "prove" the existence of this deficit is far from convincing (to me). Most of the items cited (e.g. decline in voter turnout in Euro-elections, decline in favorable attitudes toward EU institutions, rising difficulty in ratifying treaties by national referendum, increase in electoral support for extreme nationalist parties) are either also true with regard to "domestic" democratic practices or only tendentially related to European integration. In short, it is quite possible that the alleged "democracy deficit" is as much or more national than supra-national!

3. In other words, I agree with William Nelson's observation that institutions that "look" most democratic in one context, i.e. the national, may not be appropriate at all in a different setting, i.e. the supra-national. Nelson, p. 198. Introducing direct elections for the Euro-Parliament is one good illustration of this. Those whose principal formula for democratizing the EU is to increase the powers of that body should reflect on the consequences of this proposal when there are no corresponding parties, constituencies or even consistent platforms at the European level.

4. On Democracy (New Haven: Yale University Press, 1998), p. 9.

5. The Treaty of Amsterdam has formalized these common principles (even if they remain rather abstract): liberty, democracy, respect for human rights and rule of law. Member states found (unanimously) in violation of these vague criteria can be suspended from membership. More recently, a detailed "bill of rights" has been drafted and accepted at the Nice Summit, although it was not made legally binding.

6. What I mean by "interim" is that, in the long run, the EU might well acquire the properties of a state and even of a nation – in which case, the deployment of conventional institutions of representation and decision-making and standard notions of citizenship might become much more desirable. However, for the foreseeable future. e.g. 20-25 years, the problem will be to protect and enhance the legitimacy of political institutions that do not have these properties – and that means relying upon novel arrangements and novel norms to justify them.

7. I can only think of one clear case: Switzerland in the early 1870s. It would be interesting to explore this exception, although the fact that this country had a "one-party-dominant-system" (*Freisinnige/Radical*) at the time must have been an important factor -- and, not one that can be repeated at the EU-level.

8. How to Democratize the European Union … and Why Bother? (Lanham: Rowman & Littlefield, 2000).

9. At this point, I have to enter (briefly) the "essentially contested" field of defining what I believe should be the apposite criteria for democracy in the case of the EU. Elsewhere, with Terry Karl, I have defined democracy in its most generic terms as "a political system in which rulers are held accountable for the their actions in the public domain by citizens, acting indirectly through the competition and cooperation of their representatives." NB that is definition is not based on any specific

institutions or practices in "real-existing" or "self-proclaimed" democracies, and not restricted to any particular level of aggregation. It is not "procedural" but "processual." Nor is it "substantive" in presuming either what the issues are that citizens will hold their rulers accountable for or what results the rulers will have to produce in order to satisfy citizen expectations. It avoids any presumption about the level or type of participation on the part of citizens – just that whatever it is it should be equally available to these citizens *qua* citizens. It does not even stipulate that everyone has the right to participate in all decisions that affect him or her. It focuses on the classical question: *quis custodiet ipsos custodes* and answers: "the citizens through some form of collective action by their representatives."

^{10.}   In their otherwise very instructive book, David Beetham and Christopher Lord do presume that the grounds for legitimizing the EU will be "conventional," i.e. similar to if not identical with the norms that justify authority in national polities, despite the fact that they are sensitive to the different nature of the emerging Euro-polity. Legitimacy and the European Union (London: Longman, 1998). See also, the edited volume by Thomas Banchoff and Mitchell P. Smith with the same title, Legitimacy and the European Union (London: Routledge, 1999) where the treatment is even more "conventional."

^{11.}   One frequently encounters in the literature that focuses on national or sub-national "governance" the concept of **network** being used to refer to these stable patterns of horizontal interaction between mutually respecting actors. As long as one keeps in mind that with modern means of communication the participants in a network may not even know each other -- and certainly never have met face-to-face -- then it seems appropriate to extend it to cover transnational and even global arrangements.

^{12.}   *Op. Cit*. fn. x.

^{13.}   Governing the Commons. The Evolution of Institutions for Collective Action (Cambridge: Cambridge University Press, 1990). An abbreviated version is "Reformulating the Commons," Swiss Political Science Review, Vol. 6, No. 1 (2000), pp. 29-52. It is from this latter source that I have derived my comments.

^{14.}   Not all EGAs, existing or eventual, fit her generic specifications. Only some of them deal with resources that are "subtractable," i.e. whose consumption precludes its use/enjoyment by others. Many, but not all, involve goods from which it is difficult to exclude non-contributors. And virtually none of them are, strictly speaking, "self-organizing" since all of them involve some mandate from EU institutions that defines the scope of their activity and imposes political and legal limits on their decisions.

^{15.}   Another literature I thought seriously about exploiting in my search for operative norms-*cum*-design principles was that on "deliberative democracy." Although there is much there that could eventually be useful from the perspective of ideological justification, I found it virtually impossible to extract relatively concrete suggestions from these treatises. Not only are the arguments usually advanced at a high level of abstraction with no attention to the specifics of how one might actually design an arrangement to be more "deliberative," but many of their root suppositions seem to render it irrelevant. For example, it would be a serious distortion to presume that most of the interactions within the various forums of the EU are aimed at establishing truth or persuading one's opponents. Bargaining and negotiation are the rule, and the "successful" result is usually a compromise, not a new norm, a shared truth or a conversion in position. Interlocutors in EU committees, no doubt, learn from each other and change their perceptions of interest – but it would be hazardous to presume that this creates a novel "communicative rationality" -- least of all, one that "rationalizes domination." As is often the case with "philosophy-based arguments" in political life, they are based on a counterfactual ideal that cannot be approximated in the real world of imperfect information, limited rationality and continuous exchange of promises and threats. By establishing such a high level of validity, they tend to exclude the search for "second-best" solutions ("*le mieux est l'ennemi du bien*," the French would say) – and that is what governance is all about. From an even more practical perspective, EGAs are never composed of "all the affected parties" – just a very selective subset of their representatives. Indeed, they would not work if everyone (or every organization) got to deliberate. The trick is to compose them and, then, to conduct them in such a way that negotiations among a small group of self-interested actors can nonetheless produce a decision that will prove (until future contestation) to be acceptable to

those who have not participated.   For a heroic, but in my view ultimately frustrating effort to apply the "deliberative" label to the EU, see Erik Oddvar Eriksen and John Erik Fossum (eds.), Democracy in the European Union. Integration Through Deliberation? (London: Routledge, 2000). In their favor, it should be noted that the editors did insert a question mark after the title.

[16.]   My comments are in italics.

[17.]   NB that this does not mean that "log-rolling" and "package-dealing" should not be an integral part of the integration process, just that EGAs are not the appropriate sites for such activity. Decisions involving the negotiation of tradeoffs across circumscribed issue areas should be the purview of other EU institutions, i.e. the Commission, the Council of Ministers, the European Council and, hopefully in the future, the European Parliament.

[18.]   Another way of stating this point is to stress that all participants must possess some type or degree of "asset specificity" -- i.e. they must demonstrably have material, intellectual or political resources that are apposite to the tasks to be accomplished. Needless to say, defining "the stakes" and those who hold them is bound to be politically contested, since the number of representatives and experts who can make that claim ("interest-holders" in my terminology) is potentially unlimited – thanks to the growing interdependence of policy domains. As an approximation, I propose that a relevant stake-holder be defined as a person or organization whose participation is necessary for the making of a (potentially) binding decision by consensus, and/or whose collaboration is necessary for the successful implementation of that decision. In practice, this is likely to be determined only by an iterative process in which those initially excluded make sufficiently known their claims to stake- and knowledge-holding so that they are subsequently included. Presumably, those initially invited to participate who turn out not to be indispensable for policy-making and implementation will leave of their own accord – although a persistent problem in EGAs is likely to be the absence of an effective mechanism for removing non-essential participants.

[19.]   This should not be interpreted to mean "EU-wide constituencies" since there may be significant stake-holders and knowledge-holders in prospective member-states and even in those that have explicitly chosen not to join the EU.

[20.]   To fulfill this principle, it may be necessary for the designers of EGAs to play a pro-active role in helping less well-endowed or more dispersed interests to get organized and sufficiently motivated to participate against their adversaries. Needless to say, this element of "sponsorship" intended to encourage a greater balance in adversarial relations can conflict with the subsequent principle of equality of treatment and status. It can also generate serious questions concerning the autonomy of such 'sponsored' organizations from EU authorities.

[21.]   NB this principle serves to distinguish EGAs from other institutions operating at the European level. For example, parliaments, courts, central banks and independent regulatory agencies ultimately take their decisions by vote, even if they engage in extensive deliberation and seek to form a consensus beforehand. Some expert commissions and many executive bodies may decide by imposition when the actor designated as "superior" exercises his or her 'sovereign' authority.

[22.]   A more orthodox way of grasping this principle would be to refer to "reciprocity" – although this seems to convey the meaning of equal shares or benefits across some set of iterations. "Proportionality" is similar, but allows for the likelihood that stable inequalities in benefit will emerge and be accepted on the grounds of differential contribution/assets.