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**Mountain or Molehill ?:  
A Critical Appraisal of the Commission White Paper on Governance**

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*Mountain or Molehill?*  
*A critical appraisal of the Commission*  
*White Paper on Governance*

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## DEMOCRATIC OR TECHNOCRATIC GOVERNANCE?

Erik Oddvar Eriksen

### Abstract:

*The White Paper on European governance is a disappointment as it reflects a rather technocratic attitude. It suggests networking and partnership models of integration. These may help in rationalising policy-making and implementation but do not contribute much to close the legitimacy gap. The governance path is problematic as it basically comes down to steering or efficient problem-solving. Without spelling out the proper standards of democracy – i.e., accountability and congruence criteria – there can be no adequate way to handle the problems. Given the lessons from the ongoing post-Nice debate, it is, indeed, surprising that this is lacking in the White Paper.*

### Introduction

The EU is facing grave challenges.<sup>1</sup> With the Internal Market and the Monetary Union more or less in place the Common Market is exhausted as a resource for further integration. The pending enlargement to the East and South, the establishment of a common foreign security policy and, not least, the question of social measures at the EU level, pose new kinds of problems for co-operation. The questions raised in these policy areas are difficult to handle within the established economic, free-trade frame of reference for the politics of the Union, as they affect the very basis for co-operation. They require a notion of the collective enterprise, *i.e.*, a conception of the entity's foundation, mission or vision beyond that of a free market. The questions not only have to do with solving the perceived problems of the Member States, but with the setting of borders and priorities, and with defining new collective tasks. Thus, they require a conception of what the EU is or should be - *i.e.*, of its constitution and identity.

Another set of challenges stem from the fact that, in the Member States, many are reluctant and sceptical of the Union's policies. This distrust is manifested not only in the low turnout in the elections to the European Parliament and in the Irish "No" to the Nice Treaty, but also in the loudly voiced opposition of anti-globalisation groups. Some are violently opposed to EU policies, as the demonstrations in Nice 2000 and against the Gothenburg European Council meeting last June (2001) testify to.

In the White Paper on *European Governance* from the EU Commission,<sup>2</sup> there is awareness of these challenges. Different proposals for improving the functioning of the EU's systems of decision-making and implementation are outlined. By better involvement of the citizens and through more efficient decision-making and enforcement policies, the authors hope to increase the information and knowledge of the system and the loyalty and responsibility of the actors. The White Paper aims at

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<sup>1</sup> I am effective policies. By governance is meant the structure of rules and processes that affect the exercise of grateful for comments made by Águstin Menéndez, John Erik Fossum, Johan P. Olsen and Helene Sjørusen.

<sup>2</sup> COM(2001) 428 final of 25.07.2001.

Erik Oddvar Eriksen

more relevant and power, particularly with regard to openness, participation, accountability, effectiveness and coherence. These are the basic principles of good governance.

*“Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local.”* (p.10)

More concrete measures include better and more active involvement of the groups and actors of *civil society*, better consultation and dialogue, on-line information, a code of conduct that sets minimum standards for what to consult on, as well as when, with whom and how, more use of framework directives (soft law), and co-regulation which combines regulatory actions with the actions of affected parties. The EU has limited power and cannot act like national governments. It has to depend on partnerships and co-arrangements with a wide set of actors, governmental and non-governmental. *Extensive partnership* arrangements with certain sectors should be developed from 2002. Greater *flexibility* and a more decentralised approach to the future regional policy are also among the instruments. Through such measures the aspiration is to connect better to the people.

But is the White Paper really taking heed of the problems causing mistrust and opposition? Does it have a correct diagnosis of the situation, and are its proposals pointing in the right direction? One may also ask whether the White Paper itself really complies with the governance standards of openness, participation and accountability. This comment is oriented towards whether the White Paper is heading the EU in the right direction; it does not address present constraints.

## 1. Legitimate governance?

The White Paper is rather modest. It is about instruments and methods. There is no clear vision or agenda of what to do with the basic problems of trust and legitimacy. What is the EU’s mission beyond that of creating a free market? Without an understanding of the entity and its peculiar characteristics, there can be no adequate diagnosis.

The White Paper is about how to strengthen the efficiency of planning and policy-setting within the institutions and to increase knowledge about the EU under the existing Treaties in the advent of the next intergovernmental conference. It is not to propose Treaty-amending measures. “However, in preparing for further institutional change, the Union must start the process of reform now.” (p.8) But the post-Nice debate on constitutional reform is not really the concern of the White Paper. Rather, it is about enhancing the visibility and knowledge of the present system so as to meet the criticism of its being technocratic, remote and removed from the people. Even though the White Paper recognises some of the problems facing the Union, it finds, strangely enough, the EU basically legitimate. There is no need for fundamental reform because:

*“The union is built on the rule of law; it can draw on the Charter of Fundamental rights, and it has a double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States.”* (p.7, emphasis added)

The authors of the White Paper also find the *Community method* correct even though it admits only the Commission to make legislative and policy proposals. They also maintain that the “Union uses the powers given by its citizens” (p.8) although, in fact, the Union, for the most part, works on powers delegated by the governments of the Member States.

The definition of the situation is deficient and the problems recognised as requiring action are confined to the more or less pragmatic ones. This is clearly seen in the diagnosis of the causes of the mistrust and the low turnout in EP elections. The White Paper locates the problems in the Commission's inability to act where it is most needed and in not getting credit for its actions. Furthermore, there is the complaint that the Member States do not "communicate well about the Union". (p.7) Then, there is the *ignorance* of the people – "many people do not know the difference between the institutions" (ibid). By focusing on apathy and ignorance, one not only puts the blame on the people, but also reduces the problem to one of information – it is about lack of knowledge. This represents a rather superficial understanding of the causes of the distrust, and one which, nevertheless, remains at odds with the post-Nice-debate.

## 2. The democratic division of labour

In this debate, a more profound understanding of the popular mistrust of the EU has increasingly come about. The real problem is not one of ignorance or apathy but one of *democratic legitimacy*, i.e., accountability and representation. Basically the legitimisation problems stem from citizens not being involved in the making of the laws that they have to abide by. To rally popular support, more profound remedial actions are called upon, ranging from institutional reforms to more geopolitical and social concerns. In a recent Eurobarometer poll, five themes emerged when asked about involvement in the "dialogue on Europe": the fight against unemployment (53%), citizens' rights (52%); food safety (50%); health (49%), and the environment (48%).<sup>3</sup>

The White Paper also reflects a rather limited conception of democracy. The authors put their trust in extended participation and active involvement of civil society - and "with better involvement comes greater responsibility." (p.15) Another means proposed, thus, is *partnership arrangements*, which entail a commitment to additional consultations with civil society actors. The problem, here, is, on the one hand, the democratic danger of *co-optation*. When the associations have a vested interest in certain results, they are not in a free position to take a stance in the opinion formation process. They are not free to counteract policies. Further, civil society associations are restructured for political or administrative purposes, as they, themselves, must "follow the principles of good governance." (ibid.) What is more: "Participation is not about institutionalising protest. It is about more effective policy-shaping, based on early consultation and past experience" (ibid.). Hence, there is the problem of *domestication of civil society organizations*. Civil society is not seen as an arena for voluntary action and for open and free public debate. The democratic division of labour between state and civil society is endangered when voluntary associations (NGOs) are used as merely instruments to implement policies more smoothly.

On the other hand, extended participation may merely yield a means to rationalise governance in domains heavily exposed to efficiency standards and may also favour strong parties and lead to evasion of liability (Luhmann 1981). Extended participation cannot replace the legal protection and rights-based empowerment of the individual. When the subjects are not equipped with the rights and powers needed to sanction the rulers, they are not made into *citizens with equal rights*. Citizenship entails not only being ruled but also ruling in turn.

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<sup>3</sup> Cited from Tomorrow's Europe, July 2001 – No.1.



In sum, the White Paper does not seriously address the deep mistrust, its causes consequences. Instead, it represents a pragmatic way of addressing the problems – good governance is merely a question of delivering the goods and of enhancing the knowledge of the (ignorant) people of the Union. This smells of top-down, expert-driven strategies for increasing governance capability. Furthermore, there are limitations to the governance path as such.

### 3. Why governance?

The proposals outlined in the White paper for change in the EU are also an example of what, in analytical terms, political scientists call *governance*. This is not political rule through responsible institutions such as parliament and bureaucracy – which amounts to *government*, – but innovative practices of networks or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other. Governance is based on a variety of different processes with different authority bases, and highlights the role of voluntary and non-profit organisations in joint decision-making and implementation and the semi-public character of modern political enterprise. (Schmitter 2001) In legitimacy terms, it is clearly deficient as popular sovereignty is not brought to bear on the processes. It is merely steering without democracy, and governance without government. (Rosenau and Czempiel 1992)

This is much in line with recent scholarships in its efforts to conceptualise the EU. The EU is conceived as *a system of multi-level governance* which consists of multi-tiered, geographically overlapping structures of governmental and non-governmental élites<sup>4</sup>. Some analysts term this the *new governance agenda*, which means that governing is no longer exclusively statal, that the relationship between state and non state actors is non-hierarchical and that “the key governance function is ‘regulation’ of social and political risk, instead of resource ‘redistribution’” (Hix 1998:39). The White Paper underscores this view of European co-operation by accentuating the role of *agencies* in conducting public affairs. A range of regulatory agencies already exists in the Member States, some of which apply Community law. However, much in line Giandomenico Majone, who opts for the *regulatory state*, more independent agencies should be created. The regulatory state does not need popular legitimation proper, as politically independent institutions, such as specialist agencies, Central Banks, judicial review, the delegation of policy-making powers to independent regulatory commissions, *etc.*, provide the required legitimation of a unit constructed to resolve the perceived problems of the Member States. (Majone 1996).

Proponents of the regulatory state contend that the existing institutional complex of the EU does, in fact, also produce a more transparent and accountable policy process than the domestic policy processes of the Member States actually do. The argument is that the intergovernmental structure provides for a constant presence of national officials in the Council and in the Commission, the oversight of 15 national governments, the tradition of publicising Council decisions, the complex and multi-level stages of decision-making, and that the extensive publicity and interest intermediation and the role of the NGOs, *etc.*, keep the EU in close contact with the constituencies. From the limited perspective of the EU as a problem-solving regulatory state –dealing with regulation, not

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<sup>4</sup> There is a large body of literature on this; see, for example, Marks 1993; Jachtenfuchs and Kohler-Koch (eds) 1996; Marks, G., Hooghe, L. and K. Blank 1996; Kohler-Koch and Eising 1999.

redistribution – this, it is contended, will suffice. In as far as the EU merely solves the problems of the Member States with respect to their interests and preferences, and does not impinge upon national identities, the established institutional structure is adequate.

However, it is difficult to distinguish between regulation and redistribution. What we have seen is a regulatory ‘race to the top’ in some policy fields of the EU, rather than one ‘to the bottom’. In certain areas, such as consumer and environment protection, health, bio-technology, and workplace conditions, standards have been raised (Egan and Wolf 1999:253). Further, the pattern is one of *re-regulation and modernisation* rather than deregulation and the politics of the lowest common denominator (cf., Joerges and Everson 2000). Re-regulation is actually taking place at EU level with severe impact on both the citizens and the Member States. Thus, the premise of the regulatory state model does not hold.

#### 4. Indirect legitimation

So far, twelve independent agencies have been created in the EU and the White Paper opts for more. This is so because they help the Commission in economising and in focusing on core tasks. In addition: “The creation of further EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union.” (p.23) Furthermore, the inclusion of civil society organisations and the weight placed on transparency procedures are intended to increase the public awareness of the EU. It is a means to make visible who is participating and who is heard. This comes in addition to other measures to enhance coherence and openness. Keywords are the open method of co-ordination, working with key networks, and the simplification of Community law. *The open method of co-ordination* is especially interesting, as it entails a process of mutual adjustment and learning which allows for divergences to be spelled out and for the Member States to find their own way.<sup>5</sup> According to the Council the open method ensures consensus through the four following elements:

- setting short-, medium and long-term guidelines for the EU with specific timetables for their achievements;
- establishing performance indicators and benchmarks tailored to each Member State and different sectors which allow comparison of best practice;
- translating targets from the European to the national and regional levels; and
- periodic monitoring, peer review and evaluation with the emphasis placed on the process of mutual learning. (Hodson and Maher 2001:724)

It is a complement to ordinary legislation – the Community method - and “is used on a case by case basis. It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans, as in the case of employment and social exclusion” (p.21) In many fields, such a method could add

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<sup>5</sup> The term stems from the Lisbon European Council and draw on supply-sided economics. “The emphasis is on consensus-forming with three elements found in each process: common assessment of the economic situation; agreement on the appropriate economic policy responses; and acceptance of peer pressure and, when necessary, adjustment of the policies being pursued.” (Hodson and Maher (2001:723)

value by reducing the Commission to an information provider and supervisor of the process, and opening up for the Member States to compare their efforts and adjust their aspirations through benchmarking information and peer review. However, it is given a somewhat restricted role - "it should not be used when legislative action under the Community method is possible" and should not "upset the institutional balance, nor dilute the achievement of common objectives.." (p.22).

Now, well-intended and well-thought as many of the White Paper's proposals to make more effective and relevant policies may be, one may ask how much they contribute to increase the accountability of the executive branch to the elected legislatures and to open up the decision-making process of the EU. Will they enable more citizens to participate on an equal basis in the decisions that affect them at European level? Are the proposed changes really contributing to democratic governance?

The focus on governance, problem-solving, flexibility and reinforced co-operation derive, in legitimacy terms, from an *intergovernmental view* of the EU. The proposals presuppose a mode of indirect legitimation, *i.e.*, the EU derives its legitimacy from the legality and legitimacy of the governmental system of the Member States. They wrongly convey the impression that the EU is in the hands of the Member States and that it is basically the Member States which provide for democracy. Governance measures for enhancing accountability, visibility and transparency provide an extra, additional layer of democratic legitimacy. As I will discuss below, the electoral authorisation of ministers at national level, and their accountability to their national parliaments does not suffice to provide for democratic legitimacy at EU level. Neither is the incorporation of interest groups and non-profit organisations in co-operative and consultative bodies. In such settings, actors are heard and may voice criticism, but there is no chance of *equal access and popular control*. The citizens lack the instruments of power to force decision-makers to look after their interests. The inhabitants are merely the subjects (or subordinates - "Untertanen") of power, not the holders of power themselves - they are not empowered to authorise or instruct their rulers. The ultimate instruments of control do not rest with the people but with the decision-makers.

The proposed mechanisms may enhance the effectiveness and efficiency of the decision-making system and help in targeting the policies. However, they do not necessarily contribute to close the legitimacy gap of the system. The real problem of democratic *legitimacy* lingers. Legitimacy is the second crucial criterion to be met for a political system to be recognised as valid, *legitimacy and efficiency* being albeit essentially interdependent and intertwined. Even an optimal decision may be opposed to if it has not been made in a procedurally correct manner, and, similarly and simultaneously, even good procedures are worthless unless they also produce good and timely decisions. This implies that the institutional reforms of the EU should be tested both with regard to their legitimacy and their functional salience. The White Paper is mostly about the latter.

## 5. A political union

The EU is a complex and multi-faceted entity which is unprecedented, but whose identity, legitimacy and democratic quality are contested. There are disagreements among scholars about its nature and there is disagreement among lay people about its value and justification. The technocratic vision has, for a long time now, dominated both the public and scholarly debate on the EC/EU: it is an élite game in the hands of economic interests and bureaucrats. It is the executive power, the experts and the functional interests that dominate the EU. It exists mostly for handling problems which are beyond

the reach of nation states. Its legitimacy hinges on the ability to solve problems in a smooth way, hence the free market measures and the ability to manage solely negative integration. However, due to recent events, the single currency, the ECB, enlargement, a common foreign and security policy - the increasingly deeper and wider integration - this perspective has become ever more confining. There is no broad consensus on the goals – the so-called permissive consensus came to an end in 1991 - and the EU is not solely about regulation and pragmatic concerns.

The EU is more than a mere appendix to the Member States. Through measures aimed at redistribution, through regulation of social, environmental and health policies, and through police and judicial co-operation, the EU affects the daily lives of Englishmen, Germans, Belgians and Danes and, increasingly, central and Eastern Europeans as well. The EU is a political union. It is not merely a confederation of states secured by agreement, a fact which is not merely a self-conscious assertion listed in the Treaties. The European Court of Justice (ECJ) claims *kompetenz-kompetenz* and the 'direct effect' principle of EC law, premised on the notion of EC law as 'higher' European law (namely, measures within the First Pillar) profoundly affects the Member States. National law must give way to Community law. National courts of last instance have a duty to refer cases to the European Court of Justice, and all national courts are bound by its judgments (*cf.*, Weiler 1999). The unity and sovereignty of the Member States are not left intact in the EU. Nor are their identities. The principles, organisational and institutional structures, and action programmes, associated with present-day EU, an entity that established the EMU and is currently involved in preparing for enlargement to the East, require *direct legitimation*.<sup>6</sup> Hence, the governance mode of legitimation is insufficient. It does not suffice to account for the present-day EU in democratic terms.

## 6. Law based integration

There is a marked difference between policy-networks consisting of private actors, interest groups, NGOs and governmental actors constituting a kind of *trans-national civil society* and the contribution of the EU to global governance. Even though institutions of civil society and public deliberation are important to bring about civility - trust and solidarity - *modern law* based on individual rights entitlements is equally important. Law is a medium for stabilising behavioural expectations and constraining defection and free-riding, because it connects non-compliance with sanctions. It is a way to solve the problem of collective action. There may be reasons to oppose even a rational agreement, and nobody is obligated to comply with collective norms unless all others also comply. Law is a medium for collective action because it combines wills with sanctions unilaterally. It makes agreements into rights or contracts, which make them binding on all the members in the same way.

The EU highlights the role of law, accountability and supranational political commitments - a structure not only capable of deliberation but also of collective action within an obligatory frame of reference. This is underscored by extended use of qualified-majority vote – *i.e.*, after the Treaty of Amsterdam entered into force - which in most cases, however, goes hand in hand with co-decision with the European Parliament.

Compared to other international organisations, the EU is not completely void of democratic quality (*cf.*, Moravcsik 2001). In no other international organisation do we find so much openness,

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<sup>6</sup> On this, see Beetham and Lord 1998; Eriksen and Fossum 2000a.

participation and electoral control. The EU is also an *entity in the making* and the integration process itself is lending legitimacy to the project as such. The way Treaty changes are conducted through referendums is an example of the power of the citizen in the integration process. The system of representation and accountability in the EU gives the citizens at least a minimal input in the process of framing and concretising the rights to be enacted. What is required, then, are rights which are specified with regard to the explicit duties of the power-wielding bodies, *i.e.*, legislative, adjudicative and executive power bodies. The EU is in need of a more fundamental democratic reform.

## 7. Direct legitimation?

For some, it is quite a paradox that governance measures are proposed when the EU is in the midst of a *constitutionalisation process*. The EU is in the process of being turned into a governmental structure. The European debate gathered momentum after Joschka Fischer delivered his by now famous speech at the Humboldt University, Berlin, last year, pleading for federalisation of the Union. It received a lot of attention and many critical comments.<sup>7</sup> Now, the German Chancellor, Gerhard Schröder, the British Prime Minister, Tony Blair, the French Prime Minister, Lionel Jospin, and the Greek Prime Minister Costas Simitis, among others, have voiced their views. Certainly, there is disagreement. Whilst some speak of a *federal state* much in line with the German model, others would like a more intergovernmental model, and while Schröder would like to turn the Council of Ministers into an “Upper House”, Jospin speaks about the *Federation of Nation-States* that should be understood “as a progressive and controlled manner of sharing or transferring powers at European level”. In a Memorandum adopted in June 2001, the Governments of Belgium, the Netherlands and Luxembourg subscribe to the need for “constitutionalisation” of the EU. There is now a rising interest in spelling out the vision and the normative foundation of the EU among its component parties. The basic values and commitments of the Union as well as the rights and duties of its citizens need to be specified.

Increasingly, this debate turns on the conditions for democracy. Several requirements must be fulfilled for a system of governance to be considered democratic. First, all people must be able to participate in the legislative process, which follows from the principle of *popular sovereignty*. Second, their rights to autonomy or freedom must be respected, which follows from the principle of *human rights*. In a democracy, the citizens are both the authors and the subjects of the laws. It is rule by the people not merely for the people. Basically, a law is only legitimate when accepted in a free debate by all affected parties. In order for a governmental structure to be legitimate, the principles of liberty, equality, security and participation need to be complied with. In more specific terms, the requirement is that it meets the criteria of *congruence* and accountability. By congruence is meant the basic democratic principle that those affected by decisions should also be responsible for them. This is an approximation: little congruence will lead to lack of legitimacy, while “too much” is held to reduce efficiency in large polities. In real world democracies, there has to be “a trade off” between legitimacy and efficiency. *Accountability* means the decision-makers can be held responsible by the citizenry and that it is possible to dismiss incompetent rulers.

What, then, is required is that basic liberties are guaranteed and that people also have participatory rights to initiate, influence and object to proposals in formal as well as informal

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<sup>7</sup> See, for example, Joerges, Mény and Weiler (eds.) 2000; see, further, Habermas 2001.

assemblies. A rather multifarious set of institutional arrangements may be needed to secure citizens' rights in complex and pluralist societies with added layers of governance. Democracy entails the principle of collective self-rule. However, under modern conditions of pluralism and complexity this cannot mean the actual participation in the policy-making process but, rather, participation in the *public debates* presiding and surrounding law-making and policy-making processes. Then, one cannot solely focus on the distribution of decision-making power, on parliamentary representation or on the separation of powers, but also on the possibility of wielding influence via institutions in civil society – the press, the media, non-governmental organizations - and the possibility of participation in opinion formation and in the shaping of decisions in the institutional complex of the EU (Eriksen 2000, Nentwich 1998). Thus, several checkpoints are relevant for assessing the legitimacy of a system of governance, but for the EU to comply with standards of democracy, it first of all has to institutionalise the political rights of the citizens.

### 8. A constitutionalizing process?

The EU is a polity that should meet the criteria of congruence and accountability. Governance is not the answer to the legitimacy problem of the EU, because the EU cannot be seen as an intergovernmental organization. It is a political entity with far reaching effects on interests and identities, and in one sense the EU, in fact, already has got a constitution. The Treaties are the constituting elements of the Union, extended for handling deeper and wider integration whenever necessary. The Treaties of Rome of 1957, the Single European Act of 1986, the Treaty on the European Union (the Treaty of Maastricht) of 1991, the Treaty of Amsterdam of 1997, the Treaty of Nice of 2000 and the Charter of Fundamental Rights of the EU solemnly proclaimed at the Nice IGC meeting, may be seen as the constituting parts of the EU.

The EU contains a legal structure for collective decision-making - entrenched rules for the exercise of executive, legislative and judicial powers. For a long time, an *acquis communautaire* has been in operation in the Community, *i.e.*, shared rules, norms and procedures (Wiener 1998: 65ff, Weiler 1999). Community law has a constitutional fundament, but the presupposition of a supreme authority – or of a people - does not exist in Europe (Weiler 2000:3). The European Communities *already* have a Constitution in a legal sense; however, this is not recognised by the Member States and the Treaties are not formulated as such. The EU may, therefore, need a proper constitution. Because of its actual power and the actual effects it has on the European people – the goals and competences of the Union, the rights and duties of the citizens need to be spelled out through *a basic binding text* which specifies the responsibilities between the vertical and horizontal institutions and levels, between the decision-making bodies of the EU on the one hand, and between the nation states, and regional units on the other.

From this perspective, the future task includes abolishing the pillar structure (because the Second and Third Pillars are intergovernmental and essentially outside the realm of Community law), redistributing and delimiting the competences of the decision-making bodies, empowering the EP, making the Council into a second chamber, the Commission into a government headed by an (EP) elected president, *etc.* Hence, the agenda for the next intergovernmental conference 2004 includes:

the inclusion of the Charter of Fundamental Rights into the EU Treaties;

- the simplification of the EU Treaties;

- the ordering of competencies between vertical and horizontal layers of governance;
- the weighting of power relations between Member States and the EU institutions, and
- between the Council, the Commission, and the EP;
- the future role of national parliaments in the governmental system of Europe.

The so-called “constitutionalisation process” is no doubt driven forward by the particular developments within the EU pertaining to closer integration, and given impetus by the particularly vexing challenge of enlargement. But it is also spurred on by the emerging global system of rights entrenched in the UN Convention and the European Convention of Human Rights. This development interacts with and reinforces the European Court of Justice’s own embrace of constitutional principles and practices from the constitutional arrangements of the Member States. The net effect is a mutually reinforcing process of norm development – from above and ‘below’ - which reinforces the conception of the EU as subject to basic democratic standards and requirements (Eriksen and Fossum 2000b). This process is taken one step further with the proclamation of the Charter of Fundamental Rights.

The Charter of Human Rights proclaimed at the Nice Conference may be seen as a vehicle for constitution making. After its proclamation, the EP, the Commission and some Advocate Generals have made it clear that they will act as if the Charter were a binding document. This document clearly shifted the focus on the EU from merely a free market project to a *union of citizens* built upon shared values and binding universal norms. Furthermore, the proposed Charter can be read as one, if not “the”, most explicit statement on the EU’s commitment to direct legitimacy that has ever been produced in the EU. The institutions and the rights provided to the citizens by the EU shall, in themselves, provide the necessary basis for legitimate governance. It documents to the fact that the EU is a full-blown polity (*cf.*, Menéndez 2001). However, the Charter is not without ambiguities and constraints. It only applies to the actions of the EU institutions and the Member States’ authorities when implementing EU law, it is not designed to replace other forms of fundamental rights protection. While it is not binding, it is still written *as if* “it were a binding legal text.” (Eeckhout 2000:98).

## 9. A union of citizens

Reading the White Paper does not, however, remind us that the EU is in the midst of a constitutionalizing process. The definition of the situation and the proposals made in the White Paper are not well connected to the ongoing process of making law equally binding for every part of the Community.<sup>8</sup> What is more, there is something to learn for proponents of good governance from the way the Charter process was conducted.

The Charter process was a new one in the EU, as it was open and inclusive. The drafting of the Charter took place in a deliberative manner, in contrast to the IGC-2000 process, and all others Treaty changes that are conducted in an intergovernmental mode: the executive branches of governments strike *bargains behind closed doors*. A 62-member self-proclaimed Convention conducted the

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<sup>8</sup> In light of the quest for direct sources of legitimacy, the question of variable geometry must also be considered, as it will necessarily constrain the applicability of the Community method. Accountability may be difficult to obtain with the increased flexibility which the White Paper advocates.

drafting process, which, at least partly, was of a deliberative kind (Schönlau 2001). A majority of the members were parliamentarians, from the EP (16) and from the Member State Parliaments (two from each) participated and lent legitimacy to the process. The Convention consulted with other organisations and conducted open hearings to representatives from civil society. Since then, hundreds of NGOs have submitted briefs to the Convention on different aspects of the Charter. These briefs can be accessed on the Internet. It received more than 1000 documents from more than 200 different sources.<sup>9</sup>

In this process, more voices were heard and the problems were attended to in an open and argumentative manner, *i.e.*, with more attention to the force of the better argument than to differentials in the power basis of the participants. Issues were highly contested but deadlock was omitted and the integrity of the parties respected. The process itself is instructive for the constitutional settlement that has to come and it constitutes the benchmark for any future major reform process in the EU (de Búrca 2001).

The Charter of Fundamental Rights, then, is a step in the right direction also with regard to a constitution making process. An inclusive deliberation process, which is open for inputs, viewpoints, recommendations from all, should precede the phase of hard core decision-making, *i.e.*, conflict resolution which may require bargaining power – voting – to be settled. Conducting IGC meetings and the constitution-making process along such lines might produce less disappointing results than the Nice IGC did, which was conducted by the intergovernmental mode of governance as is the usual way of changing the Treaties in the EU. The procedures of deliberative democracy pertain to *public debate*, inclusion of *affected parties* or their representatives, and *institutionalised deliberations*, which adhere to the logic of arguing. Due to the thesis that parties may learn and successively change preferences when they have to justify their positions towards involved and affected parties, contenders may reach mutual understanding and agreement by way of sincere communication. There are not many traces such an approach in the White Paper's proposals although *the open method of co-ordination* may be read as reflective of this. It propounds, as mentioned, a consensus forming process through the setting of guidelines, benchmarks, monitoring and assessing practice.

Consensus-seeking may be cumbersome and costly, but it is *the way* of lending legitimacy to political policy-making in fragmented systems of decision-making lacking a collective identity. It is a way of accommodating difference – overcoming the problem of collective action - and of ensuring willingness to comply with (eventually) decided common actions. Hence, it may not be wise to use only the open method when legislative action under the Community method is impossible.<sup>10</sup> The White Paper would like to speed up decision-making and implementation, which it now finds extremely slow: “Council should vote as soon as qualified-majority seems possible rather than pursuing discussions in the search for unanimity” (p.22). It should be remembered that veto power or unanimity represents a constraint that induces deliberation: when parties can block outcomes, actors have an incentive to find reasons which are convincing to all, not just to the majority. Many of the processes within different policy fields of the Union are actually conducted along such lines and this may provide some of the glue of the integration process – a process which, of course, is not in line

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<sup>9</sup> <http://db.consilium.eu.int/df/default.asp?lang=en>

<sup>10</sup> This indicates that the open method of co-ordination is just seen as a transitional mechanism, cf., “‘Benchmarking’ can be a factor in reframing domestic discourse and shifting the distribution of power over ideas and agenda setting”. (Dyson 2000:5)



with the terms of efficient problem-solving but a process which, nevertheless, has some ability in inducing legitimacy due to its slowness and inclusiveness. However, the open method of co-ordination and soft policy approaches in general – peer pressure, benchmarking, best practice information, *etc.* – do not by themselves solve the legitimacy problem as such, as the citizens still are not recognized as the ultimate authors of the law.<sup>11</sup>

## Conclusion

The EU has emerged beyond that of international regime or international organisation and is contributing to the reorganisation of political power in Europe and to the transformation of governance structures. The nature of the process of integration combined with the breadth and scope of competencies of the European Union make it clear that any strategy for increasing the legitimacy of its institutions must consider direct sources of legitimacy. The EU can no longer be based on *indirect legitimation* through the national political processes. This makes it necessary to review the Community method as well as the Pillar structure.

We can identify a legitimacy gap in the EU, *i.e.*, a gap between the standards of legitimate governance espoused by EU institutions and their actual performance. The governance approach, which is based on a rather thin concept of democratic legitimacy, does not close this gap. It espouses networking and partnership models of integration which may help in rationalising policy-making and implementation, but not in providing for the legitimacy which is lacking. In its Treaties, and in its institutional make up, proclamations and rhetoric, the EU has committed itself to the principles of the modern liberal state – the democratic *Rechtstaat*. The core point is to secure the entitlements for everyone to exercise their freedom. There is a need for clarifying such standards and also of identifying supportive institutional structures. The White Paper, unfortunately, does not contribute very much to establish the required procedure through supportive institutional structures and to ease the constitutionalisation process through accentuating the need for democratic reform. On the contrary, it can be read as supporting the claim that governance is enough.

In essence, the White Paper pays lip-service to the legitimacy problems of the Union. It is a disappointment. It was given a high profile by the Prodi Commission and was seen as a vehicle for regaining authority and credibility in light of criticism and the fact that the former commission was dissolved after being accused of fraud and mismanagement. It is disappointment because it didn't live up to the high expectations set by leading officials and by the many observers and participants in the process. It reflects a rather technocratic attitude on how to solve the problems. The governance path is problematic because it basically comes down to *steering*. It is concerned with efficient problem-solving and there is no onus on equal access and popular control. Without spelling out the proper standards of democracy – *i.e.*, accountability and congruence criteria – there can be no adequate way to handle the problems. That this is lacking is all the more surprising given the lessons from the Charter process and from the ongoing post-Nice debate about the future of Europe.

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<sup>11</sup> Hodson and Maher (2001:724) hold that such methods probably increase opaqueness and élitism.