

CAN THE EUROPEAN UNION BE LEGITIMIZED BY GOVERNANCE?

Philippe C. Schmitter*

This article begins by attempting to define legitimacy and governance. Thereafter, it draws several implications from these specifications. The author reaches the interim conclusion that actors must reach consensus concerning the correct criteria to be applied when settling on shared expectations about how the EU's authority should be exercised. Furthermore, it is contended that incremental improvements in the legitimacy of the EU are more likely to stem from the praxis of governance rather than the conventional institutional makeup of government. The paper then suggests principles for the generation of legitimacy for the EU as a whole.

I. INTRODUCTION

'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 invoking it –especially 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 other normative expectations with regard to EU actions and benefits.

II. 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 authority 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 and acceptable norms.

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 location. 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 authority relations which 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 and recognize each other as such does not *eo ipso* provide the norms for its legitimation – indeed, well-entrenched differences in the democratic institutions of 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 passively to accept the

sovereign national state as the “natural” and “exclusive” site for legitimacy, 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 should be. 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 trusting 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 disputes over rules involve 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 –“social”, “pre-political” or “extra-judicial”– 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 a personal ethic of responsibility as the source of norms and the virtually unconscious 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 –e.g., nation-states– that legitimate political authority is possible. When one introduces, however, the unorthodox 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 as the EU, it may be very difficult to trace the origin and responsibility for legitimizing norms.

(5) The basis for voluntary conformity is presumably normative, not instrumental, consequentialist or strategic. In a legitimate polity, actors agree to obey decisions that they have not supported made by rulers whom they may not have voted for. They also agree to do so even if it is not in their (immediate and 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 the performance of individual rulers or agencies. Needless to say, in the case of the EU the compelling nature of norms is even more difficult to gauge. The intergovernmental nature of its Council of Ministers and the European Council 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 concession to hegemony. Add to all this, the propensity for national rulers who can no longer “deliver the goods” 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.

III. 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.

Moreover, in the present circumstance –at least until the EU has acquired sufficient properties of stateness and nationality– one should not presume

an isomorphism between the norms operative in the respective national member states and those that should prevail at the supra-national level. Most scholars naturally make this presumption. This leads them inevitably to the conclusion that the EU must suffer from a “democratic deficit” and that the only way of filling that deficit is to insert “conventional democratic institutions” into the way it makes binding decisions, e.g. assert parliamentary sovereignty, institute direct elections for the President of the Commission and/or, above all, draft and ratify a “federal” constitution. It is that natural tendency that I wish to contest, although I am aware of the risk that the more that the EU uses distinctive criteria in the design and evaluation of its institutions, the more difficult it will be (at least, 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 can be resolved.

I am taking two things for granted at this point:

- (1) that the apposite criteria for the legitimation of the EU will have to be “democratic”, but only in some fundamental or foundational sense – and not necessarily in terms of specific institutions or decision-rules;
- (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 obtain 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 their proponents being aware of it) and argued that “democracy can be independently invented and reinvented whenever appropriate conditions exist”.^[2] The European Union is unavoidably part and parcel of these changes. Not only must it reflect transformations in the nature of actors (e.g. from individual to collective citizens) and role of the state (e.g. from redistribution to regulation) that are well underway in the ‘domestic democracies’ of its member states, but it must also adapt to its own 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 at the present

moment.

(2) Despite the heterogeneity of its national and sub-national components and, hence, the strong likelihood that major actors will not be in agreement on either 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 John Rawls, those who participate in the EU enjoy an “overlapping consensus”.^[3] 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 subito* -completely and immediately.^[4] 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 rights 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'état, liberation from foreign occupation, defeat or victory in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the *ancien régime* 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 its ruling institutions.^[5] The fact that all of its states (with one exception) have written constitutions and that this is a presumptive *sine 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.^[6] 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.

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 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. For one thing, it would take some time for any one of them to produce its intended effects – especially, since several of them were 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 predicated upon exploiting these political externalities to press gradually and stealthily toward further democratization.

My second (“very important”) implication is that marginal improvements in the legitimacy of the European Union are much more likely to come from the admittedly “fuzzy” but innovative practices of governance than from the much more clearly delineated and conventional institutions of government.

IV. ANOTHER DEFINITION AND (MORE THAN) SEVEN IMPLICATIONS

The concept of “governance” has spread with such astonishing rapidity over the past three decades and has been applied by both academics and practitioners in so many different settings that it must connote something significant. I have become convinced that behind all this capaciousness lurks a distinctive method or, better, mechanism for resolving conflicts and solving problems that reflects some profound changes in the exercise of authority that have been emerging in almost all contemporary societies and economies - and, not just in those that are trying to catch up with the more developed ones. Capturing what is distinctive about this method has not been helped by the fact that the concept is almost always preceded by a qualifier such as “corporate”, “participatory”, “democratic”, “stakeholder”,

and of course, “good”, Here, however, is my attempt to grasp that core meaning:

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 co-operating in the implementation of these decisions.

Hidden in this complex and dense definition are a number of implications.

(1) Governance 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.^[7]

(2) In contemporary developed societies the actors involved in governance mechanisms 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.

(3) These organizations do not have to be equal in their size, wealth or capability, but they have to be able to hurt or to help each other.

(4) The participating organizations interact not just once to solve a single common problem, but repeatedly and predictably over a period of time to deal with a range of functionally related issues.

(5) This implies that they can 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 their respective societies.

(6) Although it is not explicitly stated, the rule for arriving at “mutually satisfactory and binding” decisions in governance arrangements is usually consensus – definitely not voting among equals (or weighted participants, and even more definitely not imposition by the most powerful or the most concerned. In principle, negotiation and deliberation should be sufficient to produce an outcome that may not be unanimously favored, but accepted by all. Its bindingness rests on a shared preference for avoiding either

no decision at all or the un-coordinated actions of member governments.

Also implicit is the assumption that participation in such arrangements is voluntary. Actors can opt-in and opt-out of them, provided they are willing to forego their estimated benefits or refuse to accept their additional costs. Needless to say, a dynamic notion of governance arrangements would stress their tendency to become “path dependent”, i.e. to lock in exclusive advantages, as well as to generate increased defection costs.

Note also that, in its ideal-typical configuration, governance is not just about making consensual decisions via consultation, deliberation, 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 policies.

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 or equally satisfactory. It can produce “bad” as well as “good” outcomes. 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 utilisation of public authority by some subset of elected or (self-) selected 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.

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 actions and private interests.^[8] 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 such an arrangement successfully requires both a good deal of “local knowledge” about those affected and, not infrequently, the presence of an outside agent to pay for the 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.

V. COMBINING GOVERNANCE AND LEGITIMACY IN THE EUROPEAN UNION

With its “White Paper” on European governance,^[9] the EU literally announced its intention to stake its future legitimacy on the successful application of governance arrangements in order to solve interest conflicts among its member states and satisfy normative political expectations across its national publics. In so doing, it also implicitly recognized that it could not compete on legitimacy grounds with well-established national democracies. Whatever modifications might be introduced in its rules and practices -including those in the draft Constitutional Treaty- they would not suffice to convince most of its citizens that the EU could function as a “real-existing” liberal-representative-parliamentary-electoral-constitutional-democratic regime. Something else had to justify why the decisions of this unavoidably complex and remote trans-national regional polity were legitimate and worthy of being obeyed. And ‘governance’ was chosen to fill this bill of particulars.

It should be noted that the evidence for a serious “legitimacy deficit” is

still sporadic and thin: a steady decline in turnout for European Parliamentary elections, lower proportions of citizens in mass Eurobaromètresurveys declaring that “the EU has been a good thing for their country”, an increase in complaints before the European Court of Justice. None of these was or is especially threatening. Matched against this was the impressive extent to which member states and mass publics have quietly consented to the “authoritative allocations” of its myriad committees, the directives of its Council of Ministers 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.^[10] In such a complex and still contingent polity, it becomes rather difficult to discern who is loaning and who is borrowing legitimacy – not to mention, for what purpose and according to what principles.

Much of what is happening within the EU on a regular basis is more the result of issue-specific expediency, pragmatic tinkering, time pressures, 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 to design its arrangements of governance accordingly, this would improve their legitimacy in the long run and, just maybe, convert the EU from a consumer of national legitimacy into the producer of a new type of supra-national legitimacy.

VI. INSERTING SOME GENERIC DESIGN PRINCIPLES

First, one should start with the notion of chartering, i.e. of how a governance arrangement gets established at the EU level (hereafter an EGA) to deal with a particular task. This question of “why are these actors making decisions on this issue?” should be resolved through an explicit delegation of authority from a legitimate pre-existing institution, i.e. by means of a charter.

This notion of a charter rests on the presumption that a particular issue or policy arena is “appropriate” for such an arrangement, ergo, it is not better handled by good old-fashioned market competition or government regulation.^[11] What has to be demonstrated and defended is the notion that some particular set of actors is thought to be capable of making decisions that will resolve the conflicts involved and provide the resources necessary for dealing with the issue pre-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 strictly from this perspective, there may not be that many policy arenas that should acquire “their” respective EGAs!

Six Principles for Chartering 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 actually be 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.[\[12\]](#)

Second, now that the EGA has been chartered, it must be composed, i.e. those who are to participate in it must be selected (and not elected). Whether specified *ex ante* in the charter or chosen *ex post* by some authoritative body, these persons (or, better said, representatives of organizations) should have some justifiable reason for being included in the negotiations and deliberations and for entering into the (anticipated) consensus. This code-word in the present discussion surrounding the concept of governance is *stakeholders*. Unlike democratic government where all citizens are presumed to have an equal right to participate, in governance arrangements only some subset of these citizens, i.e. those who have expressed a greater concern or are deemed to be more likely to be affected, should participate. The calculation seems to be that if stakeholders can reach a consensus on what is to be done and, even more, if they can continue to agree on how to implement what has been chosen, their fellow citizens will conform as if they themselves had had the opportunity to participate.

Four Principles for Composing 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.[\[13\]](#)

(2) THE STAKE-HOLDING PRINCIPLE: No EGA should have, as active participants, persons or organizations that 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.[\[14\]](#)

(3) THE PRINCIPLE OF ‘EUROPEAN PRIVILEGE’: All things being equal, the participants in an EGA should represent Europe-wide constituencies.[\[15\]](#) 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 stakeholding, 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.[\[16\]](#) 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.

Third, now that the EGA is chartered and composed, it must take and implement decisions. As we have seen above, the usual rules dominating inter-governmental organizations (unanimity) or democratic federations (simple or qualified majorities) should not apply. Rather, a deliberately vague “meta- rule” should prevail, namely, consensus. But what are the operative principles that could frame this process of consensus formation?

Eight Principles for Decision-Making in 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 to distinguish unambiguously between those who can 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, deference arrangements, etc. and should encourage flexibility in fulfilling collective tasks, rotating arrangements for leadership and rapporteurship, extensive verbal deliberation, -- along with a general atmosphere of informality and mutual respect.

(3) THE PRINCIPLE OF CONSENSUS: Decisions in an EGA will be taken by consensus rather than by vote or by imposition.^[17] 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 the preferences of other actors). Regular and iterative interaction among a stable set of representatives is also important, although 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 former 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 or equally counted, 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.^[18]

(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 #14, this situation should be avoided, if only because it will be so easy and costly 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 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.

Finally, there are a set of principles that, while not being either legal or democratic, are “prudential” with regard to decisions taken by the governance arrangements of such a complex, remote, multi-layered and poly-centric polity as the European Union. They relate less to procedure than to substance, more to those eventually affected than those that have participated in their formulation.

Meta-Principles of Prudence for EGAs:

(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.^[19]

(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, until a consensus has been reached. Once a decision has or has not been made and participants are no longer capable of exercising a veto, they should nevertheless be 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.

VII. CONCLUDING WITH SOME DOUBTS

Governance at the level of the EU is no panacea. It will not work to resolve all policy issues and it will not work unless it is firmly based on political as well as administrative design principles. And that means that difficult choices involving the charter, composition and decision-rules of such arrangements cannot be avoided or finessed. And, as emphasized above, governance arrangements never work alone but only in conjuncture with community norms, state authority and market competition.

The guiding hypothesis of this article has been that ‘political engineers’ and ‘policy wonks’ should take into account the principles outlined above if the arrangements they devise are to generate legitimacy for the EU as whole. In my view, these guidelines are neither autocratic, technocratic, nor democratic. They at least try to identify and provide a justification for a distinctive mechanism of solving common problems and resolving conflicts by governance. Admittedly, these principles –as stated– are vague and underspecified. They will require much more discussion and

elaboration before they can be “transposed” into operational norms and convincing justifications that could guide the chartering of EGAs, determine the composition of those who participate in them and regulate how they subsequently make and implement their decisions. My suspicion is that few of them will be easy to capture in strictly formal-legal terms. Just image how difficult it would be to define a priori and in unambiguous terms who is a “stakeholder” in a given policy area – and, by inference, who is not entitled to participate in it.

Those who have taken on the challenge of exploiting governance at the EU level will have to be careful not to use it as an excuse to expand the powers of the Commission – as was, unfortunately, the case with the now widely-ignored White Paper on Governance. According to my interpretation, if taken seriously and not opportunistically, Euro-governance could well lead to a proliferation of relatively independent regulatory agencies and functionally specific taskforces with varying memberships and degrees of supra-nationality – an outcome I have elsewhere labeled as a “condominio”. Far from promoting a “federatio” with the Commission as its core of stateness, it could even drive the EU’s *finalité politique* in quite the opposite direction and, in the process, create a radically novel form of regional polity.[\[20\]](#)

But long before this may happen, I can foresee two key dilemmas that must be addressed. I will only raise them without further explication:

(1) The proliferation of EGAs tends to occur within compartmentalized policy arenas (and more so in the EU than in its member states) – vide the extremely autonomous powers conferred on the European Central Bank by its charter. This leaves unresolved the large issue of how eventual conflicts between decisions taken by different EGAs are going to be resolved. Multiple “governances” at the micro- or meso-levels no matter how participatory, innovative, sustainable and legitimacy conferring on their own, may end up generating macro-outcomes that were not anticipated and that no one wants!

(2) The criteria for the inclusion of participants and the making of decisions in EGAs are not generally compatible with the prevailing democratic standards for 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, as well as how it has become necessary to supplement it at the supra-national level.

 REFERENCES

- * Professorial Fellow, European University Institute, April 2007.
- [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] On Democracy, New Haven, Yale University Press, 1998, p. 9.
- [3] J. RAWLS, Political Liberalism , New York, Columbia University Press, 1993, pp. 133-172.
- [4] 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.
- [5] 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.
- [6] How to Democratize the European Union ... and Why Bother?, Lanham, Rowman & Littlefield, 2000.
- [7] 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- it seems appropriate to extend it to cover transnational and even global arrangements.
- [8] A.O. HIRSCHMAN, Shifting Involvements. Private Interest and Public Action, Princeton Princeton University Press, 1982.
- [9] European Commission, European Governance: A White Paper, COM(2001) 428 final, Brussels, 2001, <http://europa.eu.int/eurolex/pdf/egp-connex-C-05-02.pdf>
- [10] D. BEETHAM and C. LORD, Legitimacy and the European Union, Harlow, Longman, 1998.
- [11] One scholar who has given concerted attention to this problem is Eleanor Ostrom. See, Governing the Commons: The Evolution of Institutions for Collective Action , Cambridge, Cambridge University Press, 1990.
- [12] N.B. 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.
- [13] 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.

[14] 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 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.

[15] This should not be interpreted narrowly 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.

[16] To fulfil 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.

[17] N.B. this principle serves to distinguish EGAs from other institutions operating at the European level. For example, parliaments, courts, central banks and independent regulatory agencies may 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 recognized by the others as “superior in knowledge or stake” exercises his or her ‘sovereign’ authority.

[18] 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 contributions or assets.

[19] This may be the only of the principles listed that has already been formally included (if not operationally defined) in the quasi-constitution of the EU, i.e. in the Treaty of Amsterdam.

[20] “Imagining the Future of the Euro-Polity with the Help of New Concepts”, in G. MARKS, F. SCHARPF, P.C. SCHMITTER AND W. STREECK, *Governance in the European Union*, London, Sage Publications, 1996, pp. 121-150.