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New Modes of Governance

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The Seven Habits of Highly Legitimate New Modes of Governance

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– All comments most welcome –

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0 Introduction

How might ‘New Modes of Governance’ in the European Union be made more legitimate? The following reflections suggest seven ways to enhance the legitimacy of ‘New Modes of Governance’ and hence the legitimacy of the EU. The remarks explore the contested concept of ‘legitimacy’ and its implications.

The phrase ‘New Modes of Governance’ (NMG) also merits sustained discussion as to its extension, what is new, and what ‘governance’ means. But for the purposes of this paper NMG include

- Territorial multi-level governance,
- The Open Method of Coordination,
- Delegation to independent bodies, and
- The combination of private and public actors.

Among the important issues that must be addressed with regard to NMG are 1) Whether they are meant to replace democratic arrangements, or instead be subject to democratic control and if so how. 2) How, if at all, they are regulated by human rights constraints, and how such constraints will be visible and trustworthy.

Section 1 presents an overview of the wide-ranging discussions of the legitimacy deficit of the EU, with an eye to extrapolate some insights to NMG. For our purposes it is of some importance to be able to distinguish the two questions of whether an arrangement is democratic and whether it is normatively legitimate. In that spirit, section 2 sketches a unifying account of normative legitimacy that draws on the “assurance game” literature. Long-term support for the EU requires not only present compliance and support, but also long term trust in the general compliance of others – both citizens and officials - and shared acceptance of the legality and normative legitimacy of the regime. Suggestions for enhancing legitimacy of the EU – and of NMG - may best be assessed in light of how they jointly can contribute to such trustworthiness. Section 3 points to seven areas where NMG should be modified or supplemented to further enhance trust and trustworthiness in the EU, and hence its legitimacy. Democratic arrangements are discussed for illustration.

1 Objects - Concepts – Means of Legitimacy and Legitimation

The academic and political debates about the Legitimacy Deficit of the European Union have revealed deep disagreements about alleged symptoms, diagnosis and prescriptions to alleviate such a deficit as there might be. One taxonomy - of several¹ - takes the literature to address at least six different *objects* of legitimacy at varying levels of generality. We find four different fundamental *concepts* of what legitimacy is about, and the literature considers at least four institutional *means* of legitimation for expressing or achieving such legitimacy.

¹ Follesdal 2005, which contains references to the legitimacy literature. For other typologies, cf. Jachtenfuchs, Diez, and Jung 1998, Beetham 1991; Beetham and Lord 1998, Lord and Magnette 2004; Höreth 1999; Easton 1965.

Objects

The discussions about legitimacy, legitimation and the EU turn out to address different objects or institutional levels, where the different concepts and institutional arrangements clearly apply better to some levels than others.²

Discussions may concern a particular political *decision* – a policy or piece of legislation;

- the *authorities* – the political actors: officeholders, a particular government or set of representatives;
- particular *public institutions* such as the European Central Bank or a regulatory agency;
- the *regime*, that is the combination of institutions into a political order as a whole;
- the regime *principles*. These concern the objectives and ideals of the EU, such as general welfare, social inclusion, free markets, and the rule of law; and the scope of decisions and division of powers between the institutions.
- the *political community*: the set of individuals participating in and maintaining common decision-making processes for these ends.

NMG are typically decision-making institutions or aspects of the regime.

Concepts: Legality, Compliance, Problem-solving, Justifiability

We can distinguish at least four different concepts of legitimacy.

Legitimacy as Legality. Questions regarding the legitimacy of the European Union are often answered by pointing to its legal pedigree: States have created the European Union according to all legal requirements.³

Legitimacy as Compliance. Compliance in the form of acquiescence may stem from apathy, cynicism or fear.⁴ Yet Weber and others have also insisted on compliance that expresses a sense of *social* legitimacy: “the mores sanctified through the unimaginably ancient recognition and habitual orientation to conform.”⁵

Legitimacy as Problem-Solving. The EU’s legitimacy is sometimes regarded as a matter of whether it identifies and implements solutions that actually secure certain goals otherwise unattainable.⁶

Legitimacy as Justifiability. Normative legitimacy is often seen as a question of whether citizens are under a moral obligation to comply, answered by offering a justification for this use of public power – often expressed in terms of *justifiability among political equals*, for instance by appeals to hypothetical acceptance or consent under appropriate choice conditions.

Normative theorists often take various forms of *normative legitimacy* to be fundamental. Theorists will disagree whether to accept all four concepts of legitimacy, or e.g. whether social legitimacy is mainly an indicator of normative legitimacy. Still, the three other concepts of legitimacy seem normatively relevant. They are interrelated, often compatible, and they can

² I draw in part on the helpful tripartite distinction of Easton (Easton 1965), expanded by Norris 1999 and Dalton 1999 who use it for the concept of political support.

³ Weiler 1991, Weiler 1995, Wallace 1993, Lenaerts and Desomer 2002.

⁴ Abromeit 1998.

⁵ Weber [48] 1972, 78-79.

⁶ Michelman 2000, Waldron 1987, Rawls 1993, possibly Habermas 1979, cf. Follesdal 1998, Lehning 1997, Banchoff and Smith 1999.

be mutually re-enforcing. *Legal legitimacy* in the form of constitutionalism and the rule of law is often regarded as a necessary condition of the justifiability of a political order. On its own, *general compliance* is insufficient for normative legitimacy, since people may comply with unjust rule solely from fear of sanctions, lack of alternatives or unreflective habit. Yet compliance often requires that the population believe that the institutions are *normatively* legitimate.

Institutional means of Legitimation

These four concepts of legitimacy tend to focus on different institutional arrangements that grant *legitimation* to authorities.⁷

Legitimation through Participation. The legitimacy of the EU is said to increase by including citizens, interest groups or experts in the decision process.⁸

Legitimation through Democratic rule. By democratic rule is here meant that citizens hold rulers accountable for their use of public power by selecting among competing candidate parties on the basis of informed discussion of their relative merits and the objectives to be pursued.⁹ The democratic character of domestic political rule is regarded as central to legitimation and legitimacy across Europe – and, some hold, globally.¹⁰ Indeed, so central is democratic rule that Koen Lenaerts and Marlies Desomer hold that “the notions legitimacy and democratic legitimacy must be considered as interchangeable” for the purpose of an analysis of EU constitution making.¹¹

Legitimation through Actual Consent. Some authors place great importance on institutional arrangements whereby subordinates and other authorities expressly grant consent or affirm the authorities as legitimate, and where other legitimate authorities expressly recognize them.¹² Similarly, some normative theories in the discourse ethics tradition seem to hold that the actual acceptance of a normative justification by all affected parties is required for normative legitimacy, and that this ideal should guide institutional design.¹³

Legitimation through Output. The EU’s institutions should be set up so as to solve the problems that member states identify.¹⁴

This account may reduce the conceptual obfuscation, but it does not suffice to alleviate the legitimacy deficits. The different levels, concepts and means of legitimacy and legitimation may provide alternative, possibly complementary ‘frames’ to understand and respond to the legitimacy challenges facing the EU. These different ‘frames’ lead to different, mutually incompatible recommendations for institutional changes and the extent of integration.¹⁵ Reforms will often strengthen some forms of legitimacy at the expense of others. Efficiency, democracy and constitutionalism may obviously conflict, even in principle.¹⁶ Mechanisms of veto and other arrangements that require actual consent may hinder efficient problem-

⁷ cf. Beetham 1991.

⁸ Andersen and Burns 1996, 245; cf. Banchoff and Smith 1999, 11.

⁹ Cf. below. Weiler and Mayer 1995 offer a thorough exposition of the democratic deficits of the EU.

¹⁰ Norris 1999.

¹¹ Lenaerts and Desomer 2002.

¹² Beetham 1991.

¹³ Habermas 1979, 200; McCarthy 1994, 46.

¹⁴ Jachtenfuchs 1995, Karlsson 2001, 273.

¹⁵ Kohler-Koch 2000.

¹⁶ Elster and Slagstad 1988.

solving.¹⁷ Accountability may stifle creative searches for solutions.¹⁸ For instance, some argue that increased democratisation and politicization of the EU Commission is likely to threaten its problem solving capacity and its credibility as neutral guardian of the treaties.¹⁹ The authority to tax and redistribute may increase the problem-solving ability of the EU, at the expense of participation and democratic accountability.²⁰

2 Aspects of a Unified Account: Trustworthiness among Contingent Compliers

A detailed account that unites all relevant concepts, means and objects of legitimacy and legitimation and resolves all tensions is beyond the scope of these reflections, beyond the scope of political philosophy, and beyond what is needed to assess and enhance the normative legitimacy of ‘New Modes of Governance’. The following sketch provides a unified perspective that identifies some of the central arguments and concerns, so as to guide discussions concerning trade-offs, scope and institutional design.

On this view, long-term general support for the EU requires that citizens can trust in the general compliance of others – both by citizens and officials – based on a shared acceptance of the legality and normative legitimacy of the regime. I venture that the different suggestions for enhancing legitimacy of the EU may best be assessed and combined in light of how they can contribute to such trustworthiness.

The fundamental issue of normative legitimacy is: When do citizens have a political obligation to abide by the rules and commands of a political order? I suggest that we should distinguish between the normative legitimacy of a political order or regime *simpliciter*, and the conditions for when citizens have a political obligation to abide by such rules and commands. The general answer to the question of when one has political obligations then becomes: When the rules that apply are normatively legitimate AND when they are actually generally complied with. For citizens generally to have a normative duty to obey political rules and authorities two conditions must hold: firstly, the commands, rulers and regime must be normatively legitimate, and secondly, citizens must have reason to trust in the future compliance of other citizens and authorities with such commands and regimes.

I submit that all four concepts of legitimacy and the institutional arrangements of legitimation can enhance political trust and trustworthiness in a normatively legitimate EU among people who are ‘contingent compliers’. Contingent compliers are prepared to comply with common, fair rules as long as they believe that others do so as well, for instance out of a sense of justice. They may be motivated by what John Rawls called a *Duty of Justice*²¹

that they will comply with fair practices that exist and apply to them when they believe that the relevant others likewise do their part; and to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.

The EU institutions may provide important forms of assurance among contingent compliers that they will all comply.

¹⁷ Tsebelis 1990, Scharpf 1999.

¹⁸ Scharpf 1999, Naurin 2004.

¹⁹ Lindberg and Scheingold 1970, 269 as cited in Banchoff and Smith 1999, 5; Majone 2001, 261-62; Craig 2003, 3.

²⁰ Börzel and Hosli 2002.

²¹ Rawls 1971, 336 and cf. Scanlon 1998, 339.

3 The Seven Contributions of Institutions

The assurance problems among contingent compliers were addressed already by Rousseau.²² Recent work on the theory of games and research on social capital shed further light on how institutions can bolster expectations concerning others' actions to affect the complex assurance problems that face contingent compliers.²³

Social institutions can promote trust and trustworthiness in various ways. They can reduce the likelihood that others default by shifts in the trusted's incentives. They can reduce the costs of failed trust, for instance by restrictions on the scope of legal political decisions by human rights that protect minorities.²⁴

A contingent complier decides to comply with rules and institutions, and otherwise cooperate with officials' decisions because she

- A) perceives the government as trustworthy in making and enforcing normatively legitimate policies; and
- B) has confidence that other actors, both officials and citizens, will do their part.

Institutions can provide assurance of at least seven relevant kinds. With regards to the first condition, perception of the government pursuing normatively legitimate policies,

1. *Civil society* can foster the development and dissemination of a plausible public political theory that provides normative legitimacy by laying out and defending the objectives and normative standards of the political order: democracy, subsidiarity, solidarity, and human rights.
2. Institutions must be sufficiently *simple and transparent* to allow assessment.
3. The institutions must be seen to be generally sufficiently *effective and efficient* according to the normative objectives and standards.

Institutions may also help provide public assurance of general compliance.

4. Institutions can be seen to *socialize* individuals to be conditional compliers, for instance in the educational system, or in political parties that foster somewhat consistent and responsive policy platforms.
5. Institutions can include mechanisms that can be trusted to monitor whether the policy or authority actually *solve the problems* aimed for.
6. Institutions can provide *sanctions* that modify or reinforce citizens' incentives, to increase the likelihood that others will also comply.
7. Institutions can include mechanisms that can be trusted to *monitor the compliance* of citizens and authorities with the legal rules.

²² Rousseau [1762] 1978, 2.4.5, Madison 1787.

²³ Sen 1967, Taylor 1987, Elster 1989, 187; Ostrom 1991, Scharpf 1997, Rothstein 1998; Levi 1998a. Recent normative contributions addressing the standards of normative legitimacy on the explicit assumption of such contingent compliance include Rawls 1971, Goodin 1992, Thompson and Gutmann 1996, 72-73; Miller 2000. For Social Capital, cf. Loury 1977; Coleman 1990 ch 8; Putnam 1993; Putnam 1995; Levi 1998b; Newton 1999.

²⁴ I here modify Margaret Levi's model of contingent consent (Levi 1998a, ch. 2; Levi 1998a; Braithwaite and Levi 1998.). See also Goodin 1992.

Democracy

Consider as an example the role of democratic decision making. In this context democratic institutions are not justified because they express actual consent, but rather because they – within important scope conditions and with certain enabling conditions in place – promote or satisfy these seven functions.

For our purposes the following sketch of democratic institutions may suffice²⁵: they are

1. Institutionally established procedures that regulate
2. competition for control over political authority,
3. on the basis of deliberation,
4. where nearly all adult citizens are permitted to participate in
5. an electoral mechanism where their expressed preferences over alternative candidates determine the outcome,
6. in such ways that the government is responsive to the majority or to as many as possible.

The argument for democratic decision making with regards to some issues is that, compared to the alternatives, they are over time more reliably responsive to the best interests of the members of the political order.²⁶ Crucially, democratic arrangements provide public assurance that authorities reliably govern fairly and effectively. Party contestation in competitive elections, human rights constraints, and scrutiny by media and by the opposition are central mechanisms. These are central to opinion formation, informed policy choice and scrutiny of government that are central to the seven contributions of institutions mentioned above. A full discussion is beyond the scope of these notes, but the comments below illustrate some of the features. This account helps explain why the ‘democratic deficit’ of the EU arises and what may be done to reduce it.²⁷

- In contrast to many domestic democracies, there are few if any vehicles for encouraging a European-wide debate about the public political theory of the EU. The relative lack of public arenas for political discussion makes it difficult to mobilise political opposition. But their absence may be temporary, since the requisite public debates and forums are likely to develop as political contestation among parties increases. Pessimism about European level democracy should not be overstated: there are signs of more party organization and competition in European Parliament, and more policy contestation within the Council of Ministers. There are therefore openings for contestation about the EU's policy agenda, and critical scrutiny of performance.
- Competitive elections are crucial to make elected officials responsive to the preferences of citizens.²⁸ Electoral contests foster rival policy ideas and candidates for political office. These help voters realise which choices may be made, and give them some alternatives.²⁹ Without electoral competition at the European level there are few incentives for the Commission or the governments to change these policies in response to changes in citizens’ preferences.

²⁵ Cf. Follesdal and Hix 2005-.

²⁶ Cf Shapiro 1996, Levi 1998a.

²⁷ Follesdal and Hix 2005.

²⁸ Powell 2000.

²⁹ Manin 1987: 338-68.

- One important aspect of competitive politics is the existence of opposition parties. A critical opposition and media scrutiny are crucial to citizens' judgment of the authorities' agenda and performance. As the EU is currently designed there is little room for a rival set of leadership candidates and a rival policy agenda, though the recent rejection by the European Parliament of the proposed slate of Commissioners illustrate that there is some room for contestation.
- Party contestation is also crucial for socialization and preference formation. Many scholars point to the importance of federation-wide parties that compete at several levels of the multi-level political order.³⁰ Such competition fosters political debate and formation of public opinion about the best means and objectives of policies that heed and accommodate the interests of both the sub-unit population and that of other Union citizens. These debates allow voters to form their preferences on complex policy issues on the bases of alternatives that all claim to be committed to the interests of others in the union in 'over-arching loyalty'.³¹

We finally turn to consider how well NMG secure the seven forms of assurance.

New Modes of Governance

Recall that for our purposes, NMG include Multi level governance, Open Method of Coordination, Delegation to independent bodies, and the combination of private and public actors.

A preliminary observation is in order. To assess and increase the normative legitimacy of NMG requires extensive analysis on at least two points: 1) Whether they are meant to replace democratic arrangements, or instead be subject to democratic control and if so how. 2) How, if at all, they are regulated by human rights constraints, and how such constraints will be visible and trustworthy.

The position taken here is not that all decisions should be taken democratically, because non-democratic arrangements are ipso facto normatively illegitimate. Rather, the general concern is to ensure that important decisions are normatively legitimate and seen to be so. For several NMGs the challenge is that decisions are taken by non-accountable authorities and/or without public contestation. Such non-democratic modes of decision making may paper over controversies and hide the room for political choice. In the absence of monitoring mechanisms there is also serious risk that they over time yield even worse, and even less 'effective' solutions than democratic mechanisms. Moreover, even if they as a matter of fact do secure fair and effective outcomes, the absence of oversight renders them less trustworthy in this regard.

The following comments point to some areas where the various NMG may fall short.

1. With regards to the need to discuss and maintain a public political theory. Are there arenas of the requisite kind open to contributions from all affected parties? A risk of NMG such as private-public networks is that only some veto players are included, while other affected parties are left without a voice.
2. With regards to the simplicity and transparency of institutions, this is a challenge to (quasi) federal arrangements in general, as well as to NMG such as networks of private and public actors.
3. To determine whether the institutions are sufficiently *effective and efficient*, citizens must be assured that the institutions can reliably be expected to perform better than alternative

³⁰ Cf. Linz 1999.

³¹ Linz 1999.

arrangements. As an example consider the benefits of independent agencies. Some proposed accounts seem plausible for some cases. For instance, Majone provides good reasons why certain EU policies, such as competition policy or food safety regulation, should be delegated to independent, non-majoritarian, institutions to enhance the credibility of governments' commitments.³² But his arguments do not apply to policies which have distributive or redistributive effects, or when several alternative decisions may be made which divide the gains differently among parties. It is not clear why these can be expected to yield fair results when isolated from contestation, democratic or otherwise, by responsive and accountable decision-makers.

4. Concerning socialisation, both the open method of coordination and networks may socialize participants through processes of learning and deliberative preference formation. Likewise, multi-level parties may help socialise citizens toward 'overarching loyalty' in multi-level forms of governance. However, it remains to be argued – there as well as in 'deliberative democratic arrangements' - that such socialisation yields normatively desirable results, rather than group think or 'in-group' solidarity at the expense of those not included yet affected.
5. Assurance of effective and efficient decisions. One central challenge to New Modes of Governance is to provide assurance that the decisions are indeed effective and reasonably efficient as compared to what other officials would have done. In democratic arrangements media and opposition parties monitor and challenge such claims. Other institutional bodies must fill this role for networks, public-private partnerships etc.
6. Sanctions against violations of trust. A democratically accountable government may lose office if citizens find that it has abused their trust and fails to be sufficiently responsive. Public knowledge of this helps assure citizens that policy makers to some extent seek to promote the best interests of citizens. Similar assurance is harder to come by for some of the NMG, since neither independent agencies nor private-public partnerships are as accountable.
7. Monitoring of compliance. In democratic arrangements media, police and opposition parties monitor whether other citizens and the government comply with the rules. NMG need equivalent institutional bodies to remain trustworthy.

³² Majone 1994, Majone 1998.

Contributions of institutions	Democracy [Conditions]	New Modes of Governance – especially if they replace/agent of democratic government for certain issues, with no human rights constraints.
1) Civil society that debates normative standards of legitimacy	Identifies policies that are sufficiently responsive to the best interests of those subject to it	- Who are included in networks and pacts: Representatives of all affected, or only veto players?
2) Simple transparent institutions	In quasi-federal order?	- Opaque - Power differentials
3) Effective and efficient problem-solving institutions	[media, civil society and political parties]	Sometimes more effective, credible, efficient - which objectives? - When - Unique Pareto solution?
4) Socialize individuals	[Multi-level parties]	- ‘deliberative’ effects – for better or worse?
5) Monitor Problem-Solving Legitimacy	[Opposition, media]	- how confirm that OMC or network identifies best solution, effectively and efficiently?
6) Sanction non-compliance	Political contestation	?
7) Monitor compliance	[Opposition, critical media]	- Opacity? - MLG and PP blurs responsibility?

4 Conclusion

The present reflections have explored how New Modes of Governance may be made more normatively legitimate. It brings an account of legitimacy to bear which holds that citizens have a normative duty to obey political commands under two conditions. Firstly, the commands, rulers and regime must be normatively legitimate, and secondly, citizens must have reason to trust in the future compliance of other citizens and authorities with such commands and regimes. To merit obedience, institutions must address at least seven assurance problems faced by such ‘conditional compliers’ under complex structures of interdependence. Democratic arrangements provide several mechanisms that provide such trust and trustworthiness to some degree. I suggest that this perspective helps identify some of the areas where New Modes of Governance must be developed or supplemented to become more normatively legitimate and hence merit general obedience.

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