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NEWGOV **New Modes of Governance**

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The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness

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Summary

The literature remains divided about whether, and if so how and to what extent, New Modes of Governance enjoy normative legitimacy and even confer it to the EU. This paper lays out some of the central normative concerns and indicates some of the relevant findings. The aim is neither to provide a comprehensive overview of the normative and empirical literatures, nor to criticize them. Instead, these reflections only sketch one framework for how such work may later move forward.

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I. Introduction: Do NMGs have a legitimacy deficit?

The literature remains divided about whether, and if so how and to what extent, New Modes of Governance enjoy normative legitimacy and even confer it to the EU. *New modes of governance* are defined as modes of public policy making by private actors and policy making by public actors which occur outside of legislative arenas. Of particular concern are a) the delegation of regulatory activities to *independent regulatory authorities* at the national and the European level; and b) *regulatory networks* outside the legislative arenas that involve both private and public actors for specific sectors (Héritier and Lehmkuhl 2008).

While these NMG are not directly accountable in the sense that the participants can be voted out of office, they *may* still allow the general public to affect policy substance so as to be responsive to the best interests of citizens (Héritier 1999) – and thus provide at least a second-best source of legitimization for the EU (Lord and Magnette 2004). Moreover, there are further arguments in favor of NMG over democratic arrangements, for instance a) *Effectiveness*: the networks, and private actors, have more expertise, and may respond more speedily than public actors alone; b) *Credible commitments*: they can make more credible long term commitments since they are insulated from shifting governments who are subject to electoral recall; c) *Learning*: they can better facilitate policy transfers within the EU whilst respecting national sovereignty.

Whether the NMGs indeed do secure the relevant normative objectives requires thus both attention to the normative question of what standards are appropriate for a legitimate multi-level political order such as the EU; and empirical findings about the extent to which these standards are satisfied.

The present paper lays out some of the central normative concerns and indicates some of the relevant findings. The aim is neither to provide a comprehensive overview of the normative and empirical literatures, nor to criticize them. Instead, these reflections only sketch one framework for how such work may later move forward. Section 1 seeks to give a flavor of the debate. Section 2 includes some remarks on the notion of normative legitimacy and the multifarious roles of institutions that help give assurance and render authorities trustworthy in this regard. Section 3 then discusses how NMGs may provide these various forms of assurance, as compared to procedures where democratically accountable public authorities dominate. It also notes some of the enabling conditions that must be in place for democratic procedures to serve these functions. The conclusion is cautiously optimistic with regard to NMGs. While claims of their benefits seem ill founded or overdrawn, the prospects for ‘standard issue’ democratic measures are also poor in multi-level settings. Some but not all normative weaknesses of NMGs may be reduced if they remain under the control of democratically accountable bodies – and they in turn may also gain from the NMGs if properly restrained. Thus, I submit that the normative challenges that emerge on this picture is not that democratic arrangements have weaknesses in handling the complex, multi-level European Union, weaknesses to which NMG offer solutions. Rather, the multi-level EU creates problems both for standard issue democratic theory and for NMGs – problems that NMGs alone are also ill equipped to address. NMGs on this view are not obviously the solution: rather, they are part of the problem. But they may, when carefully joined with democratic accountable procedures, be part, but only part, of the solution.

II. Divergent opinions

In a thorough and wide ranging paper, Cini and Rhodes indicate how normative theorists have responded very differently to the NMGs, and to the Open Method of Coordination (OMC) in particular (Citi and Rhodes 2007).

Some have high hopes about the OMC considered as an alternative to hierarchical political accountability, it would better promote deliberation and problem solving (Sabel and Cohen 2003), and promote participation by all groups.

However, critics question the ‘deliberative quality’ of the processes (De La Porte and Nanz 2004), and note that not even the social partners are satisfied with their access to the processes (Smismans 2006). A judicious observation is that "If the structure of the network in terms of interest representation is well balanced , the network will tend to open up policy-shaping opportunities for a variety of diverse actors without interests being realized at the cost of third parties" (Héritier 1999) 273).

These divergences of views bring out several of the central concerns: who is to decide what counts as a ‘well balanced’ network, and that certain externalities are worth the cost? Domestically, one standard response to such questions has been ‘the people’. Thus, more fundamentally, many critics worry that NMGs lack accountability, political in the form of democratic elections, or legal in the form of judicial scrutiny - and that NMGs even lack the prerequisites of such accountability such as transparency.

These discussions highlight that several issues must be clarified: what standards of legitimacy are appropriate for a multi-level, highly complex political order such as the EU? And what empirical findings are relevant to determine the extent to which these standards are satisfied?

III. Normative Legitimacy

The concern of this report is the issues concerning *Normative Legitimacy*: when and why, if at all, do citizens have a moral duty to obey the regulations that arise from ‘New Modes of Governance’? The sense of legitimacy of primary concern here is the normative assessment of regimes, particular institutions, officials’ actions, or policies. At issue is whether these regulations, institutions, actions etc are justifiable to those affected by them, and particularly toward those required to uphold them. If the regulations are so justifiable, those subject to them – for instance citizens – may have a moral obligation to obey these institutions or officials. They are said to have a ‘political obligation’, at least when others comply.

Other familiar forms of legitimacy are often relevant for this question of political obligation: *Legality*, or legal legitimacy, in the form of constitutionalism and the rule of law is often regarded as necessary for the justifiability of a political order – though insufficient.

General compliance, as a form of *social legitimacy*, may also be relevant. Such compliance is insufficient on its own, since people may be mistaken, or acquiesce solely from fear of sanctions. On the other hand, general compliance may indicate that the subjects find the system to be just. And the following remarks assume that general if not universal compliance – and public assurance thereof – is a condition for political obligation. Crucial to this account is the situation of ‘contingent compliers.’ Such person decide to comply with rules and institutions, and otherwise cooperate with officials’ decisions, because she

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

A normative duty to obey political commands thus requires:

- that the commands, rulers and regime are normatively legitimate, and
- that citizens also have reason to trust in the *future general compliance* of other citizens and authorities with such commands and regimes.

Institutions can provide relevant assurance about these two conditions of at least seven relevant kinds (Follesdal 2005). Only when citizens are assured of both, do they have a moral obligation to comply.

With regards to the first condition, perception of the government pursuing normatively legitimate policies,

- *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..
- Institutions must be sufficiently *simple and transparent* to allow assessment.
- 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.

- 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.
- Institutions can include mechanisms that can be trusted to monitor whether the policy or authority actually *solve the problems* aimed for.
- Institutions can provide *sanctions* that modify or reinforce citizens' incentives, to increase the likelihood that others will also comply.
- Institutions can include mechanisms that can be trusted to *monitor the compliance* of citizens and authorities with the legal rules.

We must ask whether 'New Modes of Governance' provide such assurance, at least as well as 'Old Modes of Governance', understood as (democratically) accountable hierarchies of public power? Note that such comparative assessments must avoid two mistakes:

- Democracy may not be effective or appropriate in these settings (Héritier 1999); and
- We must avoid comparing the democratic ideals with on-the-ground practice of NMG (Moravcsik 2002) . Instead we must take care to compare ideals of hierarchical democratic problem solving with the ideals of NMG; or compare the two different kinds of practices.

The following remarks draws on this framework to assess the normative legitimacy of NMG, and asks whether these decision processes have institutional elements in place to enhance the trustworthiness of institutions and authorities, that the European political order as a whole remains responsive to the best interests of citizens.

IV. New Modes of Governance: Legitimate without democratic and hierarchical accountability?

This section first considers how democratic accountability and NMGs fares with regard to the 7 forms of assurance, with particular attention to how to assess the alleged benefits. The table below summarises benefits and conditions for effectiveness (in '[') for several institutional

arrangements: democracy, human rights protections and federal/multi-level systems. We then ask whether hierarchical, democratic accountability might alleviate some of the weaknesses.

Table 1: Institutional arrangements and their benefits and conditions for effectiveness

Contributions of Institutions	Democratic Accountability	Human Rights	(Quasi) federal / Multilevel Hierarchy	Networks, Open Method of Coordination?
Determine Normative Legitimacy				
1. Simple, transparent	<i>In quasi-federal order?</i>	In quasi-federal order?	[If clear competence allocation]	Opaque, <i>How adjudicate conflicts among sectorial networks about competence, jurisdiction..?</i>
2. Fosters Civil society and Public Sphere to identify and apply Standards of legitimacy	Identifies Parties & policy platforms sufficiently responsive to subjects' best Interests [real party competition]	Secures Freedom of speech and association	If public or judicial scrutiny?	Broad participation <i>Who are included?</i> <i>How show that they secure equal standing and inclusion?</i> Transparency of determination of objectives?
3. Effective and efficient problem solving	[Media, civil society, political parties]	Constraints on majority rule [Functioning Legal order]	More effective than centralized or fragmented, if regulated eg by subsidiarity <i>By whose objectives?</i>	Sometimes more creative and effective - by whose standards? <i>How dispel suspicion of collusion?</i> <i>How control power differentials in framing of issues and options?</i> <i>How protect HR?</i>
Assure of Compliance				
4. Socialize	[Multi-level parties]	(Domestic – and international – legal order?)	Cross-cutting political parties may promote multiple political obligation	'Deliberative' intra-group effects – or just group think?
5. Monitor problem solving	[Opposition, Media]	(Real access to courts, defense)	How confirm?	<i>How determine whether objectives merely reflect power differentials?</i>
6. Monitor compliance	[Opposition, Critical Media]	Requires independent Courts. <i>Is judicial human rights review legitimate?</i>	Opacity? Multilevel diplomacy blurs accountability	<i>Opacity?</i> <i>How identify noncompliance given many hands..</i>
7. Sanction non-compliance	Political contestation & accountability [Legal system]	National, international?	Not always needed.	Sanctions not always needed... <i>Who sanctions ex post?</i>

IV.1 Democracy in the EU

We now turn to consider why we have reason to value mechanisms of democratic accountability in general – and why the case seems weaker in the EU. Central features are

- *Electoral party based, representative democratically accountable control over governing functions; and*
- *Public debates in the public sphere, with civil society, that require policy makers to account for their decisions and the outcomes.*

Under certain conditions, in certain combinations, these contribute to several of the seven forms of assurance needed.

Representation by those who are affected is a fundamental premise for why democratic rule is more legitimate than other arrangements. To reduce the risk of domination and to promote informed policy choices, all those who are subject to the use of public power should partake in its control.

Party contestation is important for opinion formation and informed policy choice. Such contestation is important for credible monitoring, and to ascertain whether the chosen policies are reasonably effective and efficient in problem solving (no. 5 above), in light of alternatives and externalities.

Some further comments show why the conditions in the EU are sub-optimal. One important aspect of competitive politics is the existence of *opposition parties*. A critical opposition and media scrutiny in a public sphere 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. Yet such scrutiny of government against plausible alternatives is central to the seven contributions of institutions mentioned above.

To provide such assurance, the decision structures must be sufficiently *transparent* (2 above) and it must be possible to place responsibility for policy decisions with sufficient clarity. Within the European Union, the plethora of multi-level modes of governance and multiple modes of decision making makes for opacity.

Party contestation is also crucial for Socialization (4) and preference formation. Many scholars point to the importance of federation-wide parties that compete at several levels of the multi-level political order. 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 'overarching loyalty.' Another benefit of opposition parties is that they seem crucial to mobilize voters, because only when there are alternatives can people discern the impact of their votes. We saw this when the European Parliament rejected Commission President Barroso's first slate of commissioners. The grounds for this rejection is surely contestable, but the main point here is simply that party political contestation is important to promote electoral participation.

Some also argue that a necessary condition for allegiance to the political system is that there is real competition with a plausible chance for losers to one day win (7). Responsiveness to the real interests of citizens by means of democratic accountability also requires that the information flow should not be controlled by the present powers that be. To reduce the opportunities for deception about underperformance, opposition parties, critical media and independent research help alleviate the information asymmetry between the government and voters. For instance, electoral contests foster rival policy ideas and candidates for political office.

These help voters realize which choices may be made, and give them some alternatives (5, 6). In comparison, without electoral competition at the European – or domestic - level there are few incentives for the Commission or the governments to change these policies in response to changes in citizens' preferences.

Finally, opposition parties and free media can provide important monitoring functions to add credibility to governments' claims to be responsive to citizens (5, 6). Thus these accountability mechanisms help provide assurance that the promised outputs are indeed delivered.

Compared to many – but not all – national democracies, there are few if any vehicles for encouraging a European-wide debate about the public political theory of the EU. The relative dearth of public arenas for political discussion makes it difficult to mobilize 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. Thus 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 EUs policy agenda, and critical scrutiny of performance.

IV.2 New Modes of Governance assessed

Turning now to NMG, the reasons to value them are by now familiar. In particular, they are thought to promote deliberation and participation by all affected stakeholders, and secure desired results more effectively and credibly than arrangements that are more directly democratically accountable.

Going through the 7 forms of contributions, we may note in particular that with regard to

- 1) Simplicity/transparency, all multi-level arrangements are complex. However, the NMG are characterised as being issue or sector specific, and this creates several additional problems about a) determining the membership: who should count as affected parties? And b) how to adjudicate between the various regulations that emanate from them (Hooge and Marks 2001).
- 2) Constructive debate seems quite likely among the participants, and this may help identify objectives and standards. However, it remains less clear who has the authority to decide on membership, and how to guard against skewed bargaining power and cooptation, so that the agreements actually reflect and balance the affected interests responsibly. Moreover, it is unclear whether citizens can have reason to trust that NMG do in fact secure outcomes that are sufficiently responsive to the best interests of citizens. Empirical findings give reason to doubt whether the set of deliberators is sufficiently representative, and the quality of the debate sufficiently 'deliberative' (Smismans 2004), (De La Porte and Nanz 2004), (Citi and Rhodes 2007). It is not clear what it would take to improve on these flaws, without resorting to some hierarchical element.
- 3) NMG may indeed secure efficacious solutions in a more speedy and cost saving manner: Networks and private actors often have more expertise, and may respond more speedily than when public actors seek to act alone. Again, one weakness is that citizens may have little reason to trust that this is in fact the case.
- 4) NMG may no doubt foster solidarity and mutual concern among the participants – this may be one desired effect of the deliberations. This may be less attractive insofar as the members do not represent all affected parties, and insofar as the deliberations are not open to public scrutiny. These factors increase the risk that externalities will be ignored.

- 5) Monitoring problem solving. It is not clear how NMG can determine whether their results are indeed effective, and how they can convince the public that such is the case.
- 6) Similarly, it is unclear that NMG can be trustworthy monitors of compliance with the agreed solutions: the risk of cooptation and misplaced solidarity with other members may hinder the requisite detachment.
- 7) Finally, the NMG may be able to provide some sanctions in the form of shaming, and even threatening with exclusion from the networks. These may well suffice as sanctions in several cases.

IV.3 Can hierarchy and NMG combine to alleviate the weaknesses of each?

These brief comments suggest that careful designs might secure combinations of NMGs and democratically accountable hierarchies that can reap many of the benefits of each while alleviating each others' weaknesses. In particular, in the EU there would seem to be good reasons to explore ways of using NMG *within* democratically accountable procedures. Thus modified, the role of NMGs becomes far less problematic, and several of the problems that arise are well known from similar modes of political decision making – consider, for instance, the benefits and risks of corporatist arrangements.

Careful nesting of NMG within democratic procedures might for instance allow more creative and informed problem solving by non-accountable bodies, the membership decided by democratic authorities – in charge of creating a ‘balanced’ set of participants (Héritier 1999).

The proposals that emerged would then have to be ultimately decided by accountable authorities, who would also have to address conflicts and spillovers among the different NMG proposals. These processes would have to be subject to much more public scrutiny than at present – and more than corporatist arrangements traditionally have received - both by the media and by competing political parties who might seek out alternative proposals and paths not taken. The deliberations within these ‘nested’ NMG would then not replace and silence broader public debates, democratic deliberation and contestation, but rather enhance them.

V. Conclusions

These comments have sought to lay out some of the central normative concerns surrounding New Modes of Governance, and to indicate some of the relevant findings. The aim was not to give a comprehensive overview of the normative and empirical literatures, but rather to sketch one framework and apply it to the debate: a notion of normative legitimacy that is closely tied to the need for trustworthiness, and that values the multifarious roles of institutions in this regard. Section 3 offered a brief discussion of how hierarchical democratic accountability arrangements and NMG each provide some of these forms of assurance, noting how the present multi-level EU lacks some of the enabling conditions for democratic procedures to bolster trustworthiness. The result was cautiously optimistic with regard to the value of NMGs. While claims of their benefits may well be ill founded or overdrawn, the prospects for ‘standard issue’ democratic measures are also poor in multi-level settings. It does seem that some, though not all normative weaknesses of NMGs may be reduced if they remain under the control of democratically accountable bodies – and they in turn may also gain from the NMGs if properly restrained.

I submit that the normative challenges that emerge on this picture is not that democratic arrangements have weaknesses in handling the complex, multi-level European Union, weaknesses to which NMG offer solutions. Rather, the multi-level EU creates problems both for

standard issue democratic theory and for NMGs – problems that NMGs alone are also ill equipped to address. NMGs in this view is not obviously the solution: rather, they are part of the problem. But they may, when carefully joined with democratic accountable procedures, be part, but only part, of the solution.

Note in closing that the combination of NMG and democratically accountable hierarchies does not offer a universal cure for the governance challenges of the EU. In particular, the multi-level nature of that political order creates some added normative concerns. They include at least three: a) the added complexity and even opacity of decision making by several different bodies at different geographical levels and with different competences; b) the mechanisms and principles for addressing disagreements about which decisions should be made by whom – witness the competing conceptions of subsidiarity, and about the objectives of the Union; c) how to create, and maintain, a sufficient sense of justice and solidarity among citizens and authorities of different sub-units, respecting both local autonomy and obligations of justice.(Citi and Rhodes 2007)

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