

Colloquium on Globalisation

Professors Ben Kingsbury and Richard Stewart

Gráinne de Búrca, Presentation for March 10th, 2003

The paper which is being circulated for this seminar focuses on the emergence and implications of a relatively new form of governance in the European Union, known as the Open Method of Coordination (OMC). The paper argues that various aspects of this particular form of soft governance challenge some of the basic tenets and commitments of the traditional constitutional model underpinning the EU system.

The paper considers the possible reasons for the emergence and spread of this new mode of governance, what its virtues are said to be, and what its weaknesses seem to be. Apart from the questions of the effectiveness and impact of the OMC (which are as yet difficult to assess), its weaknesses are considered from the perspective of rights, participation and transparency, and the dominance of particular economic values. Drawing on some of the emergent features of a new constitutionalism in Europe in the last decade, the paper suggests how some of these weaknesses might begin to be addressed.

The EU tends not to be seen as a relevant comparator for many forms of international cooperation because of its uniquely densely institutionalised degree of economic and political integration amongst states [the 'sui generis' thesis]. However, it could be argued that some of the sectors and issue areas in which the OMC has emerged are those in which there has historically been little willingness (immigration policy) or incentive (employment policy, social exclusion, pensions) even for EU member states to coordinate their policies. Further, the willingness to use relatively softer governance methods where the barriers to consensus on stronger decision-making are high has also dovetailed with a belief that such methods in some contexts may in fact be more effective forms of regulation. These two factors might be said to have certain parallels in similar developments beyond the EU.

Within the OECD, for example, there has been an apparent recognition of the need to consider 'regulatory alternatives' and to improve the transparency, flexibility, accountability and responsiveness of regulatory governance (see the 1995 Recommendation on Improving the quality of government regulation; and the 2002 Review of Regulatory Reform: 'Regulatory Policy in OECD Countries: From Interventionism to Regulatory Governance'). Secondly, the use of Peer Review (an important component of the OMC method) is a central strategy of the OECD, across a range of fields such as environmental performance, development cooperation, trade, science and technology, and labour, education and social affairs (see F. Pagani, 2002, 'Peer Review: A tool for cooperation and Change; An Analysis of an OECD Working Method').

A more recent example of an international self-monitoring, peer-review process – welcomed by some and criticised by others – is the African Peer Review Mechanism established in the context of the New Partnership for African Development (NEPAD), which aims to ensure conformity by the participating states to a set of agreed political, economic and corporate governance values and standards.

A third instance that could be cited concerns recent developments in international competition cooperation, where a move can be seen from instances of bilateral cooperation to forms of horizontal cooperation between antitrust agencies, with the recent establishment of an international competition network which aims, amongst other things, to develop best practices and to issue non-binding guidelines and recommendations on issues in competition policy.

These are three randomly drawn and very diverse examples from different spheres, which appear to share some of the features of the newer forms of governance in the EU, mainly insofar as they entail softer forms of coordination rather than attempts at hard international regulation, and are based on principles of information-gathering, comparison, and in some cases, peer review and/or the development of best practices. Many other possible examples could be cited, whether in the area of environmental governance, trade policy review within the WTO context, or poverty reduction strategies in the IMF and the World Bank.

Thus, although the paper is focused on the European Union, participants in the seminar may want to consider whether similar ‘new’ approaches to governance are evident in, or could be suited to, other spheres and sites of international governance. Are the problems and dilemmas of other transnational economic and social arenas such that forms of governance of this kind could be appropriate or useful? And if so, would the same weaknesses as have been identified in the EU context be likely to manifest themselves elsewhere, perhaps in even starker form?

The Constitutional Challenge of New Governance in the European Union

Gráinne de Búrca*

1. Introduction

The premise of this paper is that the European Union's constitutional system reveals a paradoxical character. There is a fundamental tension between the powerful political attachment to a traditional and 'high' form of constitutionalism which is focused on limited EU powers, clarity in the division of competences between states and the EU, and the shaping of an effective and visible EU government on the one hand; and the reality of a highly reflexive and pragmatic form of governance (or 'low constitutionalism') entailing the expansion of EU activity into virtually all policy fields, a profound degree of mixity in terms of the sharing of competence between levels and sites of decision-making, and the existence of a dense and complex system of governance alongside the formal structures of government.

This contrast contains a number of further tensions. (a) A first is the tension between legally limited competences and expanding policy activities. (b) A second is that between the depiction of a clear division of powers amongst levels of authority in accordance with a static version of the subsidiarity principle, and the actual fluid sharing of powers and responsibilities amongst different levels in a more dynamic way. (c) A third is the tension between policy segmentation, privileging or ring-fencing (such as, for example, the 'unalterable' treaty provisions on Economic and Monetary Union during the Amsterdam and Nice summits), and the impetus towards policy integration and linkage. (d) A fourth is the tension between a conception of fundamental human rights (or a bill of rights) as representing binding, justiciable negative constraints on the powers of the EU, and a conception of human rights as the articulation of values which should positively inform and shape the conduct of all actors within the system of governance. (e) A fifth is the tension between the emphasis on representative governmental institutions as the key to legitimacy, and the inclusion of a wider array of stakeholders, civil society actors and others in response to the dual concerns of democracy and effectiveness. (f) Finally, there is the tension between the intergovernmentalism/ supranationalism dichotomy which has long characterised the political debate over federalism, and the less clearly theorised but descriptively powerful conception of multilevel governance.

The substantive focus of the paper is on a range of policy processes which have been evolving within the past decade or more and expanding considerably in recent years both to new and existing areas of EU activity, which tend to be grouped under the label of the open method of co-ordination (OMC). While this label properly speaking is probably only applicable to a number of processes initiated after the European Council summit at Lisbon in 2000, it is used more generally to refer to a range of related European policy co-ordination processes which began with the economic policy guidelines introduced by the Maastricht Treaty as a complement to economic and monetary union, and which find

their most structured form within the context of the employment policy chapter of the Treaty added by the Amsterdam Treaty in 1999, but which are either being pursued or proposed also in a wide range of other policy areas at present. The growing set of developments exemplified by the OMC – to which for shorthand I will refer as dimensions of ‘new governance’ - will be considered against the background of the more mainstream constitutional debate – to which I will refer as ‘traditional constitutionalism’ - whose elements have been briefly outlined above and which is currently exemplified by many of the processes taking place within the Convention on the Future of Europe.

The core of the argument is that features such as the spread of the OMC constitute a challenge to many of the premises on which the EU’s traditional constitutional self-understanding rests, and that the contrast between the reality of new governance and the persistence of key elements of traditional constitutionalism merits further exploration. I will suggest that despite the strengths and merits of new governance in particular in escaping some of the restrictive features of traditional constitutionalism, various problems of the new modes of governance need to be examined. I suggest that the OMC emerged for many reasons, but at least in part in response to the limitations of traditional constitutional instruments and forms for pursuing important policies; in turn, however, some of the newer forms of governance suffer from evident weaknesses. Finally, I suggest that these problems might be addressed by recourse to the values of a new and emergent model of European constitutionalism which is founded on the principles of self-government and equality.

The paper is structured as follows. It begins by describing briefly the basic elements of what I am calling traditional EU constitutionalism, followed by a brief outline of the nature of the debates taking place within the Convention on the Future of Europe at present, and the questions being posed about the constitutional future of the Union. It then moves on to outline the ‘new governance’ and in particular to explain the origins, spread and significance of the Open Method of Coordination as a means of policy-making in the EU. The strengths and the weaknesses of the OMC are briefly outlined, and their relationship to more traditional forms and structures of constitutionalism discussed. Finally, the paper will consider whether some of the problems of new governance may begin to be addressed by the values underpinning a renewed European constitutional model.

It might of course be argued at the outset that the paradoxical character described above is little more than the basic tension within any political system between the formal constitutional structure and the practices of the administrative state.¹ But even if that

* Thanks to Oliver Gerstenberg, Chuck Sabel and Jonathan Zeitlin for their helpful comments on an earlier draft. As will be evident on reading, this paper is still very much at the stage of work in progress, and all comments and criticism are welcome.

1 For discussion of the significance of ‘infranationalism’ in the EU, understood as the practices of the network of committees and other bodies which service the Council and the Commission in their lawmaking capacity, and of the undesirability of seeking to understand these in traditional constitutional terms, see J. Weiler, chap, *The Constitution of Europe* (CUP, 1999, 98), and see

were so, the complex relationship between high and low constitutionalism, or between constitutionalism and governance is nonetheless well worth examining. However, I argue further that in the context of the European Union, it is a somewhat different and deeper tension. In the first place and most obviously, the EU's formal constitutional structure cannot easily be equated with that of a state, nor can its practices of governance readily be contrasted with the administrative structures of a state. The EU's constitutional framework does not have a settled and embedded existence of the kind enjoyed by most national systems: it is still relatively young and has been in a process of constant dynamic evolution through a series of intergovernmental conferences and otherwise.

Secondly, the distinction between EU administrative law and EU constitutional law, and between the EU constitutional framework and its administrative organisation is rather blurred, if such a distinction can be maintained at all. The powers and tasks of the EU are shared between different actors and institutions which act at different times as parts of the executive and as parts of the legislature, as administrators and decision-makers in all kinds of policy areas from the minor to the most important. There are no clear administrative actors distinct from legislative decision-makers: while agencies have begun to proliferate in recent years, their role is deliberately circumscribed and brought within the formal framework of the primary decision-making institutions of the Commission and Council; and the vast network of advisory and implementing committees (often referred to as 'comitology') which develops and administers European legislation is similarly woven in complex ways into this framework, without their own autonomous legal powers. The reflexive relationship between EU norm creation and application can thus be seen not only in the judicial and national implementation of EC legal acts, but also in the EU's own process of constant revision of primary legislation (often Directives and Regulations) in the light of the evolving body of implementing legislation made through the comitology process.

Thus, and this is important to the argument of the paper, as a consequence of these characteristics of dynamic evolution and blurred lines of governance, significant developments in the 'administration' of the EU are themselves always of potential constitutional significance, and contribute to shaping the EU's constitutional form and nature.

2. The traditional model of EC constitutionalism

The European Union has its origins in the common market established by the Coal and Steel Treaty in 1952 and the European Economic Community (EEC) Treaty in 1957, which was modelled partly on German economic *ordo-liberalism* with strong protection for economic liberties and freedom of trade, supported by competition and non-discrimination rules. The interpretative role of the European Court of Justice, which

his Epilogue in C. Joerges & E. Vos (eds) *EU Committees: Social Regulation, Law and Politics* (Hart, 1999).

attributed direct effectiveness to the ‘negative integration’ rules of the Treaty – free movement of goods, persons and services, in particular - and posited their primacy over any conflicting national rules and policies, helped to transform these provisions from elements of an intergovernmental agreement into the core of an economic constitution.² Thus the twin concepts of direct effect and supremacy, being the legal instruments by which the Court of Justice is said to have constitutionalised the EC Treaty,³ as applied to the fundamental economic norms establishing the internal market, formed the centrepiece of the EC’s constitution. These are, to use Weiler’s terms, respectively the “structural” and the “material” dimensions of European constitutionalism classically understood,⁴ which are supported by the original institutional framework of a Commission, a Council of Ministers, a European Parliament and a Court of Justice with specifically assigned roles under the Treaties. These differing institutional roles are conventionally perceived as representing a balance between the concerns of the Member States (primarily through the Council), the overall ‘Community’ interest (via the Commission) and the people (weakly, via the Parliament), under the scrutiny of a Court of Justice whose role it is to enforce the rule of law.

This depiction is, of course, a deliberately simplified one. Both the description of the European constitutional system as predominantly economic, and the identification of the key actors in the decision-making process as the Council, Commission, and to a lesser extent the Parliament and the Court, can be challenged as unduly reductionist. Two such challenges will briefly be outlined and to some extent rebutted.

Firstly, as far as the economic focus is concerned, it can be argued that while the common market was certainly the core of the EEC’s mission and the strongest field of policy activity, supported by the Court of Justice’s bold interpretative strategy, there was also, from the very outset, a notion of a more holistic European project which went beyond the creation of a single market and which envisaged the gradual political and social integration of the Member States. However, to this it must also be said that the methods and instruments initially created to facilitate this deeper project – and which obviously reflected the degree of control which the member states were willing to cede – did not match in nature or in scope the EEC’s market-liberalisation powers and policies. The EU – and the EC and EEC before it – is a political entity supposedly based on the principle of attributed competence, which means that one of its articles of faith is that its powers are limited to those conferred by the member states in the founding treaties. And it is clear that, even as the early EEC’s so-called ‘flanking policies’ developed beyond the original fields of agriculture and transport into areas such as social, environmental and consumer

2 D. Chalmers, *From Single Market to Journeyman*

3 E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) *AJIL* 1, G. F. Mancini ‘The Making of a Constitution for Europe’, (1989) 26 *CMLRev* 595. See for a more recent interpretation of the ECJ’s audacity in its constitutionalisation of the Treaties, H. Lindahl ‘Sovereignty and Representation in the European Union’ in N. Walker (ed) *Sovereignty in Transition* (Hart, 2003).

4 J. Weiler “The Constitution of the Common Marketplace: Text and Context in the Evolution of the Free Movement of Goods” in P. Craig and G. de Búrca, eds, *The Evolution of EU Law* (OUP 1999).

protection, the constitutional hierarchy between the internal market and competition provisions of the Treaty on the one hand, and its flanking or ‘spillover’ policies, remained. The Single European Act in the 1980s and the Maastricht Treaty in the 1990s incorporated a range of new ‘positive’ policy competences into the Treaties, although the reality was that these European policies had long been in existence and had previously been implemented through soft action programmes without explicit legal powers, or else under the guise of internal market legislation.⁵ But many of these powers – especially in fields such as education, public health, consumer protection and culture – were deliberately diluted and restricted so as to preserve primary national control over those issues. Thus, despite the growth of positive competence in these so-called flanking areas, an essential distinction between the EU as an overarching market-liberalising organization and the States as the legitimate locus for the provision of social and political welfare remained. There was a clear internal constitutional hierarchy, in terms of the available instruments and legal status, between the EC’s set of policies concerning economic market freedoms and those of its social, environmental and other policies.⁶ This hierarchy has been evident not only in the actual terms of the treaty and the powers conferred on the institutions to act, but often also in the way in which the Court of Justice (ECJ) has interpreted and enforced those provisions. Thus while social, environmental, cultural and other policy concerns have certainly not been absent from the EC’s or the ECJ’s remit, they have been conceived of and dealt with either as justification-requiring exceptions to market-integration norms,⁷ or as politically necessary supplements to market liberalisation goals, but rarely as autonomous policy priorities in their own right, and only in recent years as objectives to be ‘mainstreamed’ into other policies. Further, while the Court in earlier years had appeared to exempt certain publicly provided services such as education,⁸ air navigation⁹ and social security¹⁰ from the strictures of EC Treaty internal market rules, its position more recently has shifted so that very few activities or policy areas now remain outside the scope of those rules.¹¹

5 For accounts of the emergence of EC environmental, consumer and social law respectively, see J. Scott, *EC Environmental Law*, (Longmans,) S. Weatherill *EC Consumer Law and Policy* (Longmans,) and T. Hervey, *EC Social Law and Policy*

6 For a stark declaration of the hierarchical superiority of free competition as a constitutional norm protected by the EC Treaty and by the ECJ, see C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para 36 and C-453/99, *Courage v Crehan* [2001] ECR I-6297 paras 20-24. However, more recently the ECJ has begun, while not necessarily weakening the status or position of those norms under the Treaty, to permit exemptions to the scope of the competition rules where certain social policy objectives might be undermined: see e.g. the question of applying competition rules to collective agreements made between management and labour : C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, although the ruling in this case is quite narrowly confined.

7 D.R. Phelan, 1993 S. O’Leary and Fernandez Martin 1995

8 263/86, *Belgium v Humbel* [1988] ECR 5365

9 C-364/92, *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43

10 C-159-160/91, *Poucet and Pistre* [1993] ECR I-637.

11 On health and social security institutions, see C-120/95 *Decker* [1998] ECR I-1831, C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, C-157/99 *Geraets-Smits v Stichting Ziekenfonds* [2001] ECR I-5473 and C-368/98 *Vanbraekel v ANMC* [2001] ECR I-5363.

The second way in which the depiction of the traditional European constitutional system as a limited, economically-oriented one under the control of a limited set of new treaty-based decision-making institutions could be challenged is by pointing to the wider and more complex array of institutional actors who have actually been involved in the EU policy-making process. Thus it can be argued that the dense web of committees which over the decades has increasingly come to work within and alongside the formal institutional framework,¹² and the growing set of agencies which supplies those institutions with information, expertise and regulatory advice¹³ requires a more nuanced characterisation of the constitutional framework and of the role of the key institutional actors. As against this, however, it can be argued that the growth of committees, agencies and other advisory bodies has not disturbed the *formal* hierarchies of the traditional constitutional framework. In the first place, the spread of agencies has largely occurred within the last ten years and only a few of the newer agencies actually have decision-making powers, most of them being advisory and ultimately situated within the umbrella of the Commission's authority.¹⁴ Further, in the case of the advisory and implementing committees (the so-called comitology system), these committees are similarly situated formally within the institutional framework of the Council and Commission, so that although they provide highly influential input and clearly limit the discretion of the Commission in particular, all final decisions must be taken either by the Commission or the Council and the committees themselves have no decision-making power.

Nonetheless, the various challenges which can be made to my depiction of the EU's traditional model of constitutionalism demonstrate that this depiction merely represents what I perceive to have been the dominant, explicit constitutional model underpinning the European Union's development, rather than a comprehensive reality. A more complex and nuanced system of multilevel governance than is revealed by the clear outlines of this traditional constitutional model has certainly existed for many years, and other models could undoubtedly be described and defended. More importantly still, there has been a revival in the past ten years – stimulated by the legitimacy crisis which originated in the negotiation and adoption of the Maastricht Treaty on European Union in 1992 – of normative theories of European constitutionalism which draw on developments in EU

12 *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (R. Pedler and G. Schaefer, eds., European Institute of Public Administration, 1996), and *EU Committees: Social Regulation, Law and Politics* (C. Joerges and E. Vos, eds, n.1 above). K. Middlemas, *Orchestrating Europe* (1995), K. Armstrong, *Regulation, Deregulation, Re-regulation* (European Dossier Series, 2000),

13 A. Kreher, 'Agencies in the European Community: A Step Towards Administrative Integration in Europe' (1997) 4 *JEPP* 225, R. Dehousse, 'Regulation by Networks in the European Community: The Role of Agencies' (1997) 4 *JEPP* 246, 255, E. Chiti 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37 *CMLRev* 309, E. Vos 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) 37 *CMLRev* 1113.

14 This position has been partly the legacy of the early judgment in case 9/56 *Meroni v High Authority* [1957-58] ECR 133 where the Court of Justice ruled that the delegation of powers to an agency within the Community framework could only take place on the basis that the powers delegated were not discretionary but were clearly defined and limited. Further, the delegating institution would remain subject to the review jurisdiction of the Court even if the agency to which power was delegated could not be. See Lenaerts "Regulating the Regulatory Process; 'Delegation of Powers' in the European Community" (1993) 18 *ELRev* 23.

citizenship and to posit a deliberative, inclusive and bottom-up form of constitutionalism based on the equal dignity and human rights of citizens.¹⁵

Nonetheless, I argue that it is still the case that the legacy of certain elements of the EEC's original mission, following the retreat from more ambitious federal goals for a European political union in the 1950s, remains a significant influence on the greatly expanded European Union of today. For all its evolution, and the undoubted significance of the new 'pillars', new policy spheres and new powers gradually accorded to the Union, a number of fundamental features of its original formation remain present and powerful. In the first place, the EU still stands somewhere between a functionally limited supranational organisation and a political community of open-ended and undetermined goals,¹⁶ and any claims made on its behalf to the latter status remain sharply politically contested.¹⁷ And in the second place, still imprinted in the existing Treaties which form the normative basis of the EU is a hierarchy between economic and social policies and goals. These features go some way to explaining why not only the traditional conception of EC constitutionalism, but also the "constitutional theory constructed for the EU" has until recently largely been a thin form of liberal constitutionalism linked to the notion of limited government.¹⁸

3. Traditional constitutionalism and the Convention on the Future of Europe

The current moment is one of great political activity and a widening intellectual and popular debate on the subject of European constitutionalism. In that sense, questions concerning the EU's institutional structure and constitutional future no longer remain confined as they have for many decades purely to academic debate or within the remit of elite bargaining, but have emerged to some extent into the wider social and political arena as a result of recent developments. Key amongst these developments was the decision of the heads of state to establish the Convention on the Future of Europe, modelled on the earlier Convention which drew up the EU Charter of Fundamental Rights, to present a range of proposals to the next Intergovernmental Conference concerning the famous 50-or-more questions of the European Council's Laeken declaration. These questions cover a vast range of institutional and substantive issues including, for the first time ever in an official EU document and in particular in a European Council document, the desirability of a constitution - in fact rather more coyly, a 'constitutional text' - for the EU.

15 Shaw, Bellamy, Gerstenberg, Habermas. Michelman.

16 In Maduro's view, insofar as the EU asserts or claims to the kind of independent authority associated with such an unlimited political community, the legitimacy of this claim has not adequately been articulated: M. Maduro 'Where to Look for legitimacy', Arena Conference on Democracy and European Governance, March 2002,

17 F. Scharpf, in "Legitimate Diversity: the new challenge of European integration", Cahiers Européens de Sciences Po 1/2002, argues that the reason that virtually all debates on reform of the EC and EU - including the current constitutional debate, despite its breadth - have proceeded along the form-follows-function path, beginning by articulating particular substantive policy goals which are sought, is because there is still no shared willingness to create an all-purpose European polity.

18 C. Closa "The implicit model of constitution in the EU constitutional project", Arena Research Paper 2002

The Convention began its work early in 2002, and there have so far been eleven working groups.¹⁹ The eleventh and final working group was belatedly established and mandated to consider the EU's social policy, and the circumstances in which it was established will be returned to below. However, it is notable that the majority of the working groups dealt with institutional, structural and 'decision-making' questions, rather than with substantive policy issues or orientations. Only four of the eleven groups could be said to have examined substantive policy and those were the working groups on Defence, on 'Freedom Security and Justice' (which encompasses policing, immigration and judicial cooperation), Economic Governance, and Social Policy. Even within these groups, it is evident that the focus of discussion was less on substantive policy than on instruments and decision-making methods, with the possible exception of the Defence group. Therefore the focus of the constitutional convention for the first six months was very much on the questions of institutions, instruments, structures, classification of powers and competences, and legal personality, rather than on the sometimes knottier issues of substance. The reasons for this emphasis may simply have been a lack of desire to open these questions for debate within the context of drafting a 'constitutional text', so that the status quo should as far as possible be maintained on objectives and policies; or it may reflect the difficulty of debating these issues in the context of a forum such as the Convention. It touches, however, on the question whether the aim of the debate over a constitution was less one of change and reform, than of encapsulating the existing EU within what was hoped to be a more popularly understood and legitimated constitutional framework than the ad-hoc development of the EC treaty system over the decades had delivered.

For the purposes of this paper, however, what is most interesting is how many of the key elements of traditional EC constitutionalism have been present and often dominant within the Convention debate. These include an emphasis on functional limitation, normative (neo-liberal) bias, a concentration on the formal institutional power-structure and an avoidance of the complexities of the multi-level system and the diffusion of power, a deep ambivalence about new governance, and an emphasis on the Charter of Rights as power-limiting rather than transformative or power-conferring. Thus, while the legal and academic debate on European constitutionalism in recent years has become more sophisticated and nuanced, in particular in its engagement with social and political theory,²⁰ the political currency and persistent hold of the traditional frame of reference is

19 For most of the documents, reports, debates and submissions to the Convention, see the official website at <http://european-convention.eu.int>, and the accompanying website supposedly representing the input of 'civil society' into the debate: (check <http://europa.eu.int/futurum>)

20 For a selection, see N. Walker "European Constitutionalism and European Integration" [1996] Public Law 266, D.Grimm "Does Europe need a Constitution?" (1995) 1 ELJ 282, R. Bellamy -piece on republicanism & constitutionalism check - J. Shaw, "Postnational Constitutionalism in the European Union" (1999) 6 JEPP, 579, "Process and Constitutional Discourse in the European Union", (2000) 27 JLS 1 and "Process, Responsibility and Inclusion in EU Constitutionalism" P. Craig, "Constitutions, Constitutionalism and the European Union", (2001) 7 ELJ 125, J. Habermas 'Why Europe Needs a Constitution' New Left Review 2001, various of the essays contained in J. Weiler, *The Constitution of Europe* (CUP, 1999). For an interesting analysis of the shortcomings of the 'personificationist' and 'no-demos' theses underlying different conceptions of political community and constitutionalism, see O.

evident not only in popular debate and in the discourse of the key political actors, but also in the context of the Convention.

The debates and the work of the Convention so far have certainly provided very interesting insights into the way in which the constitutional issues of the EU are being constructed and addressed. What is evident so far is that the issues of simplification, clarity, comprehensibility, and ‘delimitation of functions’ are very much to the fore. Within at least three of the working groups: those on complementary competences, on subsidiarity, and on integration of the Charter of Rights, the primary concern has been about establishing clearly articulated limits to the tasks and powers of the EU, together with a reassertion of the proper role of the Member States. In others, the concern has been to simplify the range of available legal and policy instruments, to abolish the three-pillar structure, and to create a single legal personality for the Union. More recently, a debate in the plenary Convention has focused on how to shape a new system of *government* for the EU, with virtually all of the attention focusing on the division of power, both symbolically and in practice, between the Commission and the Council, thus reflecting the perennial debate on supranationalism versus intergovernmentalism.

Finally, within the economic governance working group, a deep division emerged between those who felt that the focus should be only on monetary policy and economic policy, while others felt strongly that issues of social policy were also to be considered. Because the group split in a fundamental way on this basic question, and indeed on the appropriate balance between economic and social objectives to be reflected in the new constitutional treaty,²¹ the plenary session of the Convention agreed to set up a separate working group on social policy questions.

Returning, then to the six dimensions of contrast drawn earlier in the paper between traditional constitutionalism and new governance, it is evident that virtually all of the features of traditional constitutionalism are reflected in the Convention process. First, the focus on limiting competences, which preoccupied several of the working groups; secondly, the attempt to draw clearer demarcation lines between the proper sphere of Member State activity and that of EU activity, as seen in the working groups on simplification and on complementary competences; thirdly, the emphasis on policy segmentation, which was evident in the economic governance working group, in the need to establish a distinct working group on social policy, and in the divisions within the latter group also; fourthly, the emphasis on the Charter of Rights as a constraint on the

Gerstenberg and C. Sabel ‘Directly Deliberative Polyarchy: An Institutional Ideal for Europe?’ in C. Joerges and R. Dehousse, *Good Governance in Europe’s Integrated Market* (OUP, 2001), and M. Wilkinson ‘Civil Society and the reimagining of European constitutionalism’ (2003) 6 *European Law Journal*, forthcoming.

21 An interesting example of the diversity of views about the possible transition which may be taking place at present from an economic constitution to a fuller document embodying the political and social constitution of the European polity, can be seen in the comments of German think-tank director, Hans Werner Sinn, on the first draft articles of the new EU constitutional treaty: “the document ignores the free market economy. There is not a word about the protection of property and no commitment to free enterprise and the division of labour. Instead, it contains dubious secondary objectives such as ‘sustainability’ and ‘balanced economic growth’”. *Financial Times*, 13 February 2003, p. 11.

EU (rather than a source of positive values for both the EU and the member states) and the concern to ensure that the Charter would lead to no increase in powers; fifthly, the emphasis on representative governmental institutions, rather than a wider category of 'stakeholders', as the key to legitimacy, and finally the depiction of political options in terms of a choice between a model of intergovernmentalism or one of supranationalism.

4. New Forms of Governance: the Open Method of Coordination

While the notion of 'new governance' has at least over the last decade become a familiar one both within domestic systems and internationally (with variants such as 'reflexive, 'network' or 'post-regulatory' governance being debated and theorised)²², its emergence and its implications for law in the specific context of the EU have in very recent years been subject to intensive analysis.²³ Scott and Trubek have identified some of the characteristic features of newer forms of governance as: participation and powersharing, multi-level integration, diversity and decentralisation, deliberation, flexibility and revisability, experimentation and knowledge-creation.²⁴ However, they have also emphasised the continuities between older regulatory forms and new modes of governance. Thus the central role of comitology committees and of national and regional bodies in the elaboration and implementation of EU policies, the emergence of information-based agencies, and the reliance on softer legal instruments and action programs to pursue European policy objectives over the years, undoubtedly exhibit some of the characteristics of what is referred to as new governance.

However, the policy approach which has come to be known as the open method of coordination (OMC) is undoubtedly the best exemplar of the emergence, spread, and increasing generalisation and institutionalisation of a new form of governance characterised precisely by the features identified above. The OMC is still relatively new but is an increasingly prevalent form of policy-making which was given its title by the Lisbon European Council meeting in 2000. It is a policy approach which was first adopted in the Maastricht Treaty in 1993 for the purpose of coordinating national macro-economic policies, and which was applied in a somewhat different manner to employment policy by the Treaty of Amsterdam. Since the Lisbon summit promoted this soft policy approach under the title of OMC, it has been applied to a growing number of policy areas, including social exclusion, education and pensions, and has been proposed in a number of others where the possibility of adopting harder and stronger legal measures already exists, such as immigration and asylum policy, disability policy, and liberalisation of the market in certain formerly public services such as telecommunications. It has also been proposed in a number of areas where at present the EC has few or no legal powers, such as youth policy.

22 For a recent overview in the field of US and 'international' administrative law, see R. Stewart, *Administrative law in the 21st Century*, 2003 NYU Law Review, forthcoming.

23 N Lebossis and J. Paterson, *Developing new modes of governance in the European Union*, Commission Forward Studies Unit, 1999.

24 J. Scott and D. Trubek 'Law and new approaches to Governance in the EU' *European Law Journal*, 2002, together with the other essays in this journal special issue on law and new governance in Europe.

The emphasis within the policy areas to which the OMC is applied is not so much on prescribing the use of a particular kind of soft legal *instrument*, as it is on the detailed formulation of a soft and quite elaborate decision-making and implementation *process*. It is a strategy which leaves a considerable amount of policy autonomy to the member states, and which in most cases blends the setting of guidelines or objectives at EU level with the elaboration of Member State action plans or strategy reports at national level in an iterative process which is intended to bring about greater coordination and mutual learning in these policy fields. As yet, there is no one ‘open method’, but rather a range of different kinds, all broadly sharing a number of characteristics but with variations and distinctive features according to the particular policy area.²⁵ The most structured is probably the employment policy coordination process which is contained in the EC Treaty, while e.g. the pensions process, in relation to which it was far less easy to reach initial agreement on an OMC, is considerably lighter. Thus in the context of the pensions OMC, Member States report to each other only every three or four years on how they are including commonly agreed objectives in their national policy.

There are four key elements to the process as it was enshrined in the proto-OMC on employment policy included in the Amsterdam Treaty, three years before the Lisbon summit. The first is (1) the setting of EU level guidelines for achieving certain goals/objectives, (2) establishing benchmarks and specific indicators as a way of comparing best practices (3) translating the European guidelines into national (and regional) policies suited to the needs of different states and regions and (4) monitoring, evaluation and peer review on a periodic basis. The Lisbon Council which first formally coined the term OMC also emphasised the importance of a decentralised approach involving local and regional levels, and involving the social partners, civil society actors and corporate and other individuals.

Thus, in the context of employment policy, there is first an agreement by the European Council (i.e. the gathering of EU heads of state) on annual guidelines; secondly, each Member State elaborates its own National Action Plan in the light of these Guidelines, and subsequently reports back to the Commission on how the guidelines have been implemented. On the basis of these, the Council of Ministers, after consulting a range of other actors, including an employment committee newly established for that purpose, evaluates what the different states have done, and can decide to make recommendations to particular states about their implementation of the guidelines. A joint annual report is then drawn up by the Commission and the Council together, and this forms the basis for the European Council’s drawing up of the annual guidelines for the following year. As mentioned above, the ‘recipe’ elaborated in the Treaty for employment policy is not the same as those being used in the field of social inclusion, or pensions, nor is it likely to be the same as those proposed for issue areas such as immigration policy, industrial policy, education, research or health, but key elements are present in every OMC. A useful

25 See the metaphor introduced by Frank Vandenbroucke of the cookbook with a range of different recipes: ‘The EU and Social Protection: What should the European Convention Propose?’ Max Planck Institute for the Study of Societies, Köln, 2002.

indicator of these key elements in fact can be found in one of the proposals which has recently been made to include a general clause on the OMC in the new draft constitutional treaty currently being elaborated by the Convention, which refers to: “a new form of coordination of national policies consisting of the Member States, at their own initiative or at the initiative of the Commission, defining collectively, with respect for national and regional diversities, objectives and indicators in a specific area, and allowing those Member States, on the basis of national reports, to improve their knowledge, to develop exchanges of information, views, expertise and practices, and to promote, further to agreed objectives, innovative approaches which could possibly lead to guidelines or recommendations”.²⁶

If we return again to the six points of tension between the traditional model of constitutionalism – a model which has so far been influential within the Convention - and the features of new governance which were outlined at the outset, it is evident that the OMC presents a clear contrast – even a contradiction - in virtually all of these respects. (a) In the first place, the emphasis on limited competences is entirely absent. The particular policy fields in which the OMC has already been used or has been proposed are policy fields in which at present, the EC Treaty either does not provide for power (eg youth policy) or provides only a weak policy competence (eg social inclusion, employment, pensions, research and development, industrial policy), or in which the EU’s powers are specifically circumscribed by the Treaty so as to exclude ‘harmonising’ measures (eg education, training, health). (b) In the second place, an attempt to define distinct and separate roles for the Member States and the EU respectively is clearly not a major concern within the OMC: the process is a very mixed one with intersecting roles for national and EU actors at various stages. (c) Thirdly, as far as policy segmentation is concerned, what we see in the OMC context, by way of contrast, is a constant emphasis on policy-linkage, on the importance of integrating different policy considerations – so that the connections between economic policy, employment, social inclusion, pensions, immigration, environment etc., are explicitly taken into account. Thus, the results of the different OMC policy processes are together supposed to feed into the process leading to the annual Spring summit of the European Council, at which the Broad Economic Policy Guidelines for the Union are drawn up. (d) Fourthly, there is as yet little indication of a perception of the Charter of Rights (or other legal sources of fundamental rights) as negative constraints on the elaboration of policy by means of an OMC, and certainly not as justiciable constraints. Indeed, the very notion of justiciability seems ill-suited to the rather soft and fluid policy process of the OMC.²⁷ (e) In the fifth place, the OMC involves not only representative governmental actors (although these are certainly present), but it is also intended to involve local and regional actors, civil society organisations and others, even while this is left for the Member States to ensure in accordance with their national laws and practices. (f) And finally, although the OMC has

26 See in particular the proposal made in paragraph 37 of the final report of the Social Policy working group, CONV 516/1/03.

27 See K. Armstrong ‘Tackling Social Exclusion through OMC: Reshaping the Boundaries of EU Governance’, in T. Boerzel and R. Cicowski (eds), *The State of the Union*, Volume III, OUP 2003 and N. Bernard ‘Economic, social and cultural rights in a multi-level legal order’, in T. Hervey (ed) forthcoming, 2003.

encountered criticism – in particular from the European Parliament - for being little more than a new form of intergovernmentalism which reinforces the role of the individual Member States at the expense of European institutions and interests²⁸ (even while the opposite complaint has been made that it permits the Europeanisation of areas which have often previously been almost exclusively or largely within national control, such as welfare²⁹) the process in fact is impossible to characterise either as a form of intergovernmentalism or supranationalization. It is par excellence an example of complex multilevel governance which defies ready classification along the traditional polar lines.

5. The emergence of OMC as a response to problems of the traditional model

This section suggests that some of the newer forms of governance in the EU, and in particular the OMC, might be understood in part as a reaction to certain of the rigidities or constraints imposed by the traditional constitutional model. While it is obvious that the trend towards new forms of governance is a widespread and international phenomenon, and that there are many reasons for its emergence,³⁰ at least some of the specific reasons for its emergence and spread in the particular context of the EU context are attributable to certain features of the EU's economic constitutional framework.

As indicated above, an explicit concern with imposing legal and treaty-based limitations on the EC's competence to act has been a central feature of EU constitutional debate. There are many policy fields or issue areas in which member states were either not willing to concede powers to the EC under the Treaty, or where they were willing only to grant express power in very circumscribed form. At the same time, various economic pressures and also the impact (some would say the spillover effect) of internal market policies resulted in the states frequently pursuing some kind of coordinated action in their supposedly reserved policy domains. Fritz Scharpf, for example, has highlighted the combination of the constraints imposed on domestic policy options by Economic and Monetary Union together with the stability pact,³¹ and the simultaneous restrictions imposed by internal market law on states' capacity to provide various kinds of support measure (such as industrial aid, or reserving public employment) which would traditionally have been available to states to counter shocks caused to the economy by EMU. While the states were therefore hampered from adopting such action alone in the context of such strictures, any suggestion of shifting power to the EU supranational institutions to adopt a centralised industrial policy, social policy or employment policy, to counter the powerful effects of its Economic and Monetary Union policy was never a

28 See the European Parliament's rejection of its own committee's report on introducing an OMC in asylum policy, for precisely this reason.

29 See P. Syrpis 'Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination', (2003) *European Public Law*, forthcoming

30 See Review of Regulatory Policy in OECD Countries: From Interventionism to Regulatory Governance (OECD, 2002). Cite Literature on environmental governance. See Dorf and Sabel, *Constitution of Democratic Experimentalism*, Sabel and Cohen, *Sovereignty and Solidarity in the EU and the US*, Sabel and Gerstenberg, *Directly deliberative Polyarchy*.

31 F. Scharpf, (2003) *Journal of Common Market Studies*, Legitimate Diversity. See also D. Trubek and J. Mosher

serious prospect. Quite apart from any objection in principle and on grounds of effectiveness to centralising such policies within a large political entity, the strong cultural diversity of EU Member States and the distinctive national sensibilities underlying diverse social protection systems, labour law institutions, educational and health systems etc., made consensus on moving towards a single EU policy in these areas politically inconceivable.

Yet, while on the one hand the Member States – in particular in their constitution-drafting or treaty-revising mode at the time of Intergovernmental Conferences - are unwilling, to the point of inserting specific exclusions into the Treaty, to cede power (or in some cases to cede particular types of power) to the EU in certain fields, they have at the same time been willing to contemplate and to pursue coordination strategies in these areas. This is because, firstly, coordination strategies such as the OMC are voluntaristic in their reliance on willing participation by all States; secondly, the states retain a good deal of discretion; thirdly, there are no legally binding rules and rarely any binding sanctions; fourthly there is no majority voting in most cases³² and finally there seems to be no room for a judicial role to interpret, expand or control the process and its results. The objections to ‘EU intervention’ in sensitive domestic spheres evidently do not apply in the same way to these softer and voluntaristic forms of policy making.

There are, however, also other policy fields where the states under the EC Treaty did in fact provide stronger legal powers, such as in immigration, asylum or the liberalisation of certain services sectors, but where the OMC method has been proposed or chosen for a different reason.³³ These tend to be highly sensitive national policy fields where despite the existence of reasonably extensive powers, the barriers to political consensus are high, and progress on policy making in these sectors has been impeded or blocked. In such cases, the proposals for OMC are not prompted by the fact that it is the only available option under the Treaty, but as a possible way to resolve political deadlock and to overcome the lack of consensus on policy issues which have a high domestic political salience and where national perspectives differ considerably on the appropriate way forward.

Therefore it might be said that in each of these categories, the OMC seems to respond to the rigidities of some of the features of traditional constitutionalism. Such features include the direct effect and supremacy of EC level internal market norms, their harmonising or pre-emptive quality which does not readily accommodate national diversity, the constraints of EMU, and the fact that legal powers to address some of these

32 Except in the context of some of the Treaty-based coordination processes when it comes to the issuing of recommendations

33 In the field of EC environmental policy, although a formal OMC method has not been applied, this is nonetheless a European policy field which perhaps best exemplifies the shift from older regulatory methods to new modes of governance. The EC was over time given a range of strong regulatory powers in the environmental arena, and the resort to softer, more flexible and informational approaches is therefore not explained by any lack of legal powers or absence of political consensus, but rather more by the earlier recognition in this sphere of the inadequacy of tradition command-and-control and other regulatory methods.

effects have been omitted altogether or have been limited in specific ways. Further, in the case of issues such as the information society and aspects of electronic commerce, where an OMC was proposed, the rigidity and pace of the traditional lawmaking process under the Treaties, and their lack of adaptability has been suggested as a reason for trying the more fluid, iterative and responsive OMC method instead.

Indeed, whether or not particular OMCs have emerged or been proposed partly in response to specific constraints within the EU's legal and constitutional framework, many powerful arguments have been made in favour of new modes of governance as inherently more suitable and effective than traditional forms of law. New governance in general and the OMC in particular have been praised as new forms of deliberative governance in their own right, as potentially the best form of decision-making and problem-solving for complex, uncertain and domestically sensitive fields of socio-economic policy and risk-regulation, and not simply as a second-best to legislation when consensus cannot be reached. Thus Scott and Trubek outlined the strengths and merits of new forms of governance such as the OMC, emphasising its "greater flexibility, its involvement of a broader range of actors in less clearly delineated roles shaping policies which are not necessarily binding and which are less substantively prescriptive and more accommodating of diversity".³⁴ Sabel and Cohen argue that it can be seen as a form of directly deliberative polyarchy, promoting more experimental and open problem-solving, and more suitable to conditions of radical uncertainty than are traditional legislative practices.³⁵ The positive tone of such analyses and the critique of many features of existing constitutional and legislative practice might seem to suggest that much of the latter is outdated and inappropriate, and that such newer forms of governance offer a better way forward.

6. The problems of new governance (and the return of constitutionalism?)

[NB: this part of the paper is sketchy and unfinished]

In this final section I want to outline some of the problems of new governance, and to suggest that the beginnings of some answers might be found in a return to constitutionalism. This may appear contradictory, given the juxtaposition of the virtues of new governance and the limits of traditional constitutionalism above, but what I want to suggest is the following. The traditional model of EU constitutionalism depicted above with its emphasis on entrenched economic rights, limited powers, and the formal organs of government is gradually being challenged by the emergence of (and the demands for) a form of postnational constitutionalism which is founded on and which takes seriously the notions of self-government, participation and equality. This can be seen in a variety of developments in particular over the past decade. The introduction of the notion of EU citizenship into the Treaty in 1993, the mobilization and (slow) recognition of civil society as a voice in the European policy debate, the expansion both

34 J. Scott and D. Trubek 'Law and New Approaches to Governance in the EU' (2002) ELJ.

35 C. Sabel and J. Cohen 'Sovereignty and Solidarity in the EU' in J. Zeitlin and D. Trubek, eds, *Work and Welfare in Europe and the US* (OUP, 2003). Also Dorf and Sabel.

politically and judicially of the principle of transparency, the gradual process of *de facto* accession of the EU to the European Convention on Human Rights, the drafting (via a new and reasonably open, deliberative process) of an EU Charter of Fundamental Rights based on the notion of equal human dignity, and the challenge posed to the traditional intergovernmental conference (IGC) method of European treaty revision by the so-called Convention method. Thus the Convention itself, even while reflecting certain strong elements of the traditional model of constitutionalism in its debates, nonetheless represents by its very establishment, composition, powers and functioning, a challenge to the state-dominated, diplomatic bargaining style of polity-making exemplified by the IGC,³⁶ and the beginnings of a different constitutional approach.

Here, I want to sketch out briefly four problems of the emerging forms of new governance, as exemplified in particular by the OMC, and to consider how a renewed notion of constitutionalism might offer some ways forward in addressing these. The problems are those of (a) values (b) participation and (c) economic bias.

(a) The problem of the role and nature of values within new forms of governance can be articulated in terms of the danger of ‘empty proceduralism’. One of the virtues of OMC which has been identified is its openness, its flexibility and non-rigidity: that rather than imposing outcomes or defining results and setting them in law, it is essentially a procedure, and through the process of information exchange, identification of best practices, reporting, monitoring and iteration, it is expected that satisfactory outcomes will emerge. However, a fear often expressed – one which gave rise to strong opposition in the European Parliament last year leading it to reject one of its committees’ reports supporting an OMC process in asylum policy³⁷ – is that there is no safeguard against the dangers of a race to the bottom, of a slippage of standards below an acceptable threshold. Is there a more integral role for constitutional values as something other than policy standards which may be revised in any direction by an OMC-type process? Here I would suggest that the OMC method could be combined with what may initially look like a traditional constitutional instrument – the Charter of Fundamental Rights. While the traditional model of EU constitutionalism depicted above has generally presented fundamental rights essentially as judicially enforceable negative constraints on EU action, the Charter of Rights (certainly in its currently non-binding form, but even if subsequently incorporated into the new constitutional treaty) could instead be regarded more broadly as an expression of the fundamental values – beginning with equal human dignity - which underpin the polity, and which ought to be integrated into all of its policies whether enshrined in law or otherwise. While there is some evidence in practice of the Charter and other human rights instruments being cited as reference-points (e.g. in the setting of objectives within the Education OMC, and in the context of the immigration and asylum proposals), this has so far been ad hoc and uneven. However, it

36 L. Hoffman “The Convention on the Future of Europe: Thoughts on the Convention Model”, Jean Monnet Paper 7/2002, www.jeanmonnetprogram.org/papers/02, P. Maignette

37 Contrast the view of the Committee on citizens’ rights, justice & home affairs of the EP, with the view of the plenary session of Parliament on the possible interaction between the Geneva Convention and an OMC in asylum.

³⁸ In this sense, the very process of benchmarking and revisable standard-setting could be seen as a way of giving concrete contextual context to the abstract rights, which would operate as norms against which the outcome of the process could be measured, and which in turn could be used to stimulate reform or revision of the standards which emerge. The institutional mechanisms for operationalising this proposal obviously require some thought, but some combination of political monitoring and a ‘framework’ or residual judicial role can readily be imagined.

(b) A second problem is the question of participation. Although one of the attractive features of this new form of governance is its alleged openness to greater range of non-traditional actors (in the sense of actors other than governmental representatives or the EC institutions), this seems in practice to vary a great deal from one policy sector to another. The strongest of the coordination processes – the economic policy process, is the most prescriptive, and while new committees have been created within this process which bring in other actors, there is a danger that these become rather like the much-cited committee and comitology system - technocratic, relatively elite, a network of faceless civil servants and national experts making policy, without any greater input legitimacy than traditional forms of EU lawmaking. On the other hand the weaker processes, such as social inclusion in particular, seem to have been more successful in creating opportunities for the NGO community to mobilise and be heard within those contexts, and to influence the development of the objectives, the indicators, and to argue for the setting of targets.³⁹ In the employment policy OMC, the social partners are involved, but again the extent of this varies from state to state. Further, the involvement of local and regional actors seems to be rather patchy, something which has been recognised in particular by the Commission, which has sought to encourage this.⁴⁰

In the context of regional and local organisation of the OMC process, there has been great reluctance to be prescriptive, both because of the danger of ‘rigidifying’ the procedure and undermining the value of its flexibility, but also because of sensitivity to the different constitutional systems and practices of regionalism within different member states. However, I would argue that the overriding constitutional importance of participation

38 D. Trubek, check; N. Bernard ‘Economic, Social and Cultural Rights in a Multi-level legal Order’, in T. Hervey (ed) 2003, forthcoming: “An OMC process for the purpose of implementing the Charter, offering the perspective of a public debate on National Action Plans for Fundamental Rights followed by exchange of views in the Council would seem a more promising way..”; For a similar proposal for a form of ‘benchmarking’ in the international human rights domain, see P. Alston ‘Towards a Human Rights Accountability Index’ (2002). See also K. Armstrong, in ‘Tackling Social Exclusion through OMC: Reshaping the Boundaries of EU Governance’, in T. Boerzel and R. Cicowski (eds), *The State of the Union*, Volume III, OUP 2003 on the interplay between the right to social inclusion in the Charter of Fundamental Rights, the EC Treaty provisions on social inclusion, and the OMC in this field.

39 See however for a cautious assessment, K. Armstrong, *ibid*.

40 See the various communications on involvement of local and regional actors in the employment strategy: COM(2000)196 ‘Acting Locally for Employment - a Local Dimension for the European Employment Strategy’ OJ [2001] C 22/13 and.

should be reflected in the design of the OMC processes, and that there should be an explicit requirement in the constitutional treaty (assuming such a document emerges from the Convention) to ensure the broadest possible degree of inclusiveness, even while leaving it to the member states to expand on the precise meaning and content of this in each particular policy sector and process. The limited judicial role suggested above in relation to triggering consideration of the Charter of Rights would also apply to ensuring that the constitutional requirements of participation and transparency have been observed.

The recommendation made by the Economic Governance Working Group, which was one of four working groups to recommend that the OMC should be in some way anchored in the Treaty, explicitly recognises the importance of full participation in the OMC process but falls short of recommending that this should be a constitutional requirement, and none of the other Working groups go so far either. And while at first glance the inclusion of the OMC as an instrument within a constitutional treaty, with express requirements of inclusiveness and transparency may appear to be transforming new governance into classic constitutionalism thus rigidifying it and reducing it to binding legal rules, in fact the ways in which its constitutional inclusion has so far been proposed are simply to sketch the outlines of the OMC process in the Treaty without including any details or making it specific to any particular policy area.

There has also been a more classic criticism of the OMC by the European Parliament on ‘participation’ grounds, which of all three traditional EU actors in the process is the least involved. The gist of this criticism is that the OMCs lack democratic legitimacy and that binding legislative procedures are preferable because the latter at least ensure accountability and a degree of democratic input through the involvement of the European Parliament. However, this returns to a traditional notion of ‘democracy’ within the EU, locating it in the Parliament as the representative European organisation, rather than seeing the OMC as a potentially more radically open process. There is room for considering whether the Parliament ought to have a greater involvement in the OMC, even while recognising that any consultation of Parliament can provide only a limited form of representation, whereas a range of other stakeholders and interested parties in specific policy sector ought to be involved in each relevant OMC process.

(c) The third problem, which I deal with most briefly, is that of what I have crudely called economic bias. This is somewhat different from the other two problems identified, because this is arguably a problem caused or rather contributed to by elements of the economic constitutional framework within which the OMC operates. In other words, the hierarchical relationship between the Treaty’s entrenched internal market norms and the softer powers in the social field forms a background to the operation of the OMC processes, and is to some extent mirrored within the latter. This implicit hierarchy arguably weakens the commitment of the OMC process to policy-integration and linkage, which was one of its defining features identified above. The economic policy OMC is the most powerful of the existing processes, it is anchored in the Treaty and includes something close to sanctions. Further, other OMC processes must be ‘consistent with’ the Broad Economic Policy Guidelines (BEPG) which are drawn up by the Council of

And while the European Council has specifically said that the BEPG must take into account the results of the other policy processes, the failure adequately to do so has been a persistent source of complaint by one of the important actors (the Social Protection Committee) within two of the other OMCs on social inclusion and pensions respectively.

While the root of this problem lies in the original bias within the EC's economic constitution, it might possibly be addressed by introducing an integration clause into the constitutional treaty so as symbolically to weave the requirement of consideration of the value of social protection throughout its other policies and powers. A proposal of this kind was put forward by the Belgian minister for social security,⁴² who suggested giving constitutional status to a kind of mainstreaming principle for social protection, which would impose an obligation on all EC institutions, OMC actors, everyone involved, to integrate consideration for social protection requirements into the formulation of policy. As yet this has not been taken up in the Working Group recommendations nor in the draft articles of the constitutional treaty so far presented, which suggests that the political divisions over whether any particular economic and social model should be expressed in Europe's new constitution remain very deep. While a particular economic model was undoubtedly enshrined in the early EC treaties, and has continued to cast its shadow even as the social and political complexion of the EU has considerably changed, it is less certain what the new constitutional document – which will form the context against which any OMC will operate - may reflect.

Conclusion:

41 This issue was debated within both the Economic Governance Working Group and the Social Policy working Group, without consensus being found in either group on whether this was something which should be changed.

42 F. Vandenbroucke, n.25 above. His proposed clause was “In all the activities referred to in this Article, the Community shall aim to eliminate inequalities and to promote equality between men and women, and shall take into account social protection requirements, in particular with a view to promoting accessible and financially sustainable social protection of high quality, organised on the basis of solidarity”