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Christoph Möllers:

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European Governance – meaning and value of a concept

CHRISTOPH MÖLLERS*

1. Introduction

New phenomena require new concepts. New concepts require new words. But how do we know what is new and what is old? And how can we legitimately call anything new (or old) while everything is in flux and therefore simultaneously old and new? The concept of governance claims novelty. It is particularly this claim that gives the idea its global power and presence in the actual public law discourse.[1] Its implicit justification, though only rarely made explicit, goes as follows: Governance is a counter-concept to government that has to be embraced because Government is outdated.[2]

The following contribution will try to give the idea of governance a meaning for the context of European integration. The contribution will assert that governance should rather be understood as a new perspective on old problems than as the observation of truly new institutional phenomena. In this perspective, governance is rather a version, a modification or a complement of a classical state government than its successor. As often in the contemporary discourse of public law and political sciences, the question of the remaining significance of nation states and their governments underlies the discussion on governance.[3] But as always, references to the traditional concept of the nation state can neither be made in a completely unmodified fashion nor can they be completely avoided.[4]

* Prof. Dr. Christoph Möllers, LL.M. (Chicago)
Lehrstuhl für Öffentliches Recht, insb. Staatsrecht, Rechtsvergleichung und Verfassungstheorie,
Georg-August-Universität Göttingen
Professor of Constitutional and Comparative Law, Faculty of Law, University of Göttingen.

[1] See generally: Schuppert (Ed.), *Governance-Forschung* (Baden-Baden, 2005). Ladeur (Ed.), *Public Governance in the Age of Globalization* (Aldershot, 2004). Bermann and Pistor, *Law and Governance in an enlarged EU* (Oxford, 2004). Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Markets* (Oxford, 2002). Bernard, *Multilevel Governance in the European Union* (The Hague/New York, 2002). Scott and Trubek, "Mind the Gap: Law and New Approaches to Governance", 8 *European Law Journal* (2002), pp. 1-18. Zürn, "Democratic Governance beyond the Nation-State. The EU and other International Institutions", 6 *European Journal of International Relations* (2000), pp. 183-221. March and Olsen, *Democratic Governance* (New York, 1995).

[2] The key titles are Rosenau (Ed.), *Governance without government*, 5th ed. (Cambridge, 2000). Teubner (Ed.), *Global law without a state*, 1st ed. (Aldershot, 1997).

[3] For a convincing account: Reisman, "Designing and Managing the Future of the State", 8 *European Journal of International Law* (1997), pp. 409-420.

[4] Möllers, "Steps to a Tripartite Model of Multilevel Government", *Jean Monnet Working Paper No. 5/2003*.

In order to cope with the concept of governance, this contribution will advance in three steps. We will begin with some contextual observations not all of which are directly linked to European integration (2.) but which are necessary to understand the meaning of "governance". This will be useful to give a provisional definition of governance and to apply this definition to some relevant institutional examples of *European* governance (3.). These examples will finally lead us to the question what the concept of governance may mean for a European legal method (4.).

2. Governance perspective: concepts and contexts

2. 1. *Elements of governance from an institutional perspective*

Governance and government share the same etymological roots. They are metaphors for public command and control, for steering the state ship.[5] Though we find some ancient versions of the word that are close to "governance", these versions came out of use in favour of "government". The rise of the concept of government is closely connected to rise of the western nation-state. The words "government" and "state" may even be used, as in "Federal Government", interchangeably, designating all three branches. In spite of its old roots our contemporary use of governance is a neologism. The inventor and promoter of this neologism is the World Bank.[6] In a famous and influential definition, the Bank promoted the concept of governance in a tripartite form, distinguishing the form of political regime, the process by which authority is exercised in the management of a country's economic and social resources for development, and the capacity of governments to design, formulate and implement policies and discharge functions.[7] This definition is hardly surprising given the tasks the Bank has to perform. It is hardly new given the fact that the Bank tries to promote a rather traditional idea of the democratic nation state for developing countries[8]. But one has to wonder why the concept has gained such wide attention.

[5] Sellin, Article "Regierung", in: Brunner (Ed.), *Geschichtliche Grundbegriffe*, vol. 5, ed. (Stuttgart, 1984), p. 361, (363).
[6] Theobald, *Zur Ökonomik des Staates*, 1st ed. (Baden-Baden, 2000), pp. 87 et seq.
[7] World Bank, *Governance: The World Bank´s Experience* (Washington, 1994), p. XIV. The first important use of the concept is in World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, 1989).
[8] Theobald, supra, note 6, 214 et seq.

Reasons for this may be found by taking a closer look at the institutional role of the World Bank (and comparable institutions that make similar use of the term).[9] Governance is not a synonym for a combination of democratic statehood and civil society as stated in the definition mentioned above. It is rather a synonym for the *promotion* of these values by organizations beyond the state with a strong but informal influence on nation states' development. Governance can neither be identified nor separated from the conventional ideas of democratic self-government and rule of law within the form of the state. But the use of the concept indicates a special perspective on these ideas. In the course of this article, the World Bank will serve as an example that can be generalized. In other words: It is not enough to simply take into account the aims promoted by "governance" in order to understand the term. It is rather necessary to understand the institutional situation in which the concept was coined and promoted.[10] It is a particular institutional perspective of a public institution observing other public institutions which made it feasible to use a paradigm different but not completely deviating from "government". Some elements of this *governance perspective* seem to be especially important:

Externality: Governance takes a perspective from outside the state. The governance perspective is the perspective of an observer, not of a participant in the states' political and societal processes. This external perspective creates a distance that is necessary to effectively observe and evaluate the phenomena observed. But at the same time, this distance is an instrument to disrupt any form of institutionalized accountability between the observing organization and the observed state. In a governance structure the observing organization does not answer to the observed state.

Hybridity or public private holism: The external perspective is not limited to public institutions, as shown by the definition.[11] The observation takes public institutions in their context in a given society. The perspective is oriented towards the interferences between public institutions and their private contexts, between state and civil society. Governance describes the hybridity of legal interferences within a society, not legal forms as such.[12] These hybrid structures are often described by network metaphors which are part of many governance concepts. The network imagery stays in sharp contrast to the idea of pyramidal

[9] Very similar definitions can be found with IMF and the WTO, also needless to say that Governance has also become an integral part of the UN speak. For problems with this approach: Chesterman and Ignatieff and Thakur (Eds.), *Making states work: State failure and the crisis of governance* (Tokyo/New York, 2005).

[10] This corresponds to a generally accepted pragmatist approach to the meaning of concepts. Cf. Brandom, *Making it Explicit*, ed. (Cambridge/London, 1994), pp. 18-30. Fish, "Working on the Chain Gang: Interpretation in Law and Literature", in: Fish, Doing What Comes Naturally (Durham, 1995), p. 87-102.

[11] Supra, p. 2.

[12] E.g. Vesting, "The Network Economy as a Challenge to Create New Public Law (beyond the State)", in: Ladeur , supra, note 1, pp. 247-288, (286-287).

form of hierarchical public organizations.[13] The distinction between public and private is, therefore, only of minor relevance to the governance perspective. It is no accident that the term governance is not even restricted to describing public institutions within an overarching context but may be used to describe business organizations[14] as well. The latter phenomenon has labelled a whole discussion on optimizing organizations: Corporate Governance[15]. One could call this a holistic point of view from which the distinction between public and private institutions is of lesser importance than the connections and interdependencies between these two spheres. Observing developing states from above[16], one has to present a holistic institutional concept that includes the organization of public authorities as well as the standard of living, the infrastructure for water as much as judicial independence. Governance, therefore, is not something different from government, it is just a more general concept that goes beyond governmental institutions and includes the whole of society. "The term usually describes conditions in a country as a whole".[17] This has many implications for the institutional designs and for the conceptual tools they are analysed with. It would be inappropriate to ask if this approach is "correct". Up to this point, one should rather ask which perspectives may be used or should be to describe public institutions. This question very much depends on the professional context, a lawyer's answer would differ from the answer an economist would give.

Double Informality: The fusion of public and private institutions also implies a lesser relevance of the distinction between form and informality. Two implications of this have to be distinguished: On a first level, the difference between formal and informal actions within the observed states is less relevant. As long as certain goals are achieved it is irrelevant if this happens by use of legal forms or by informal means. On a second level, the instruments of governance are informal. To refer again to the World Bank: The Bank does not have any formal or sovereign power over developing states but it does have influence by means of conditionality.[18] It analyses the institutions of these states, makes offers and gives reasons to improve the situation.[19] These actions do not transport any formal legal powers but obviously, they have an enormous informal political and economic effect. Informal instruments of

[13] E.g. Vesting, supra, note 12. Ost and van de Kerchove, *Droit: de la pyramide au réseau?*, 1st ed. (Brussels, 2002).
[14] Important example: Williamson, *The Mechanisms of Governance*, 1st pbk. ed. (New York,1999).
[15] Williamson, supra, note 14.
[16] A culturalist critique of this claim to rational observation is Scott, *Seeing like a state*, 1st ed.(New Haven, 1999).
[17] World Bank, supra, note 7, p. XIV.
[18] [18] Tsai, "Globalization and conditionality: two sides of the sovereignty coin", 31 *Law and policy in international business* (2000), pp. 1317-1329. Köberle (Ed.), *Conditionality revisited*, 1st ed. (Washington, 2005). For the IMF: Denters, *Law and Policy of IMF Conditionality*, 1st ed.(The Hague, 1996).
[19] Killinger, *The World Bank's non-political mandate*, 1st ed.(Cologne, 2003), pp. 7-40.

governance function rather as a (sometimes distorted) mirror than as a rule. They provide the observed state with alternatives that are not compulsory. But informality must not be confused with the absence of hierarchy, an element that is regularly claimed to be part of the governance concept.[20] The informal contribution of governance to politics is regularly part of an asymmetric distribution of power in which the observed states are neither formally constrained nor factually free to make a decision. Informally organized, the governance structure wields political power as part of an informal hierarchy.

Efficiency and Output: The Governance perspective brings an approach to public institutions which is oriented towards efficiency or output. Taking the World Bank as a model, we see that it understands democracy and rule of law as means to enhance economic development and output. This means that the governance perspective stands for a pragmatic stance on constitutional institutions that is more typical for a social engineer than for a lawyer or a (democratic) politician. Public Governance is an output oriented concept which pays special attention to efficiency and economic success. In the academic economic discourse, the term governance is particularly used by institutional economists.

Sectorality: The Governance perspective must not necessarily comprise all parts or all aspects of public institutions. Unlike the all-encompassing ideas of government and constitution, the discussion of governance regularly refers to a special regulatory sector. As the juridification of international relations is a matter of different sectoralized regimes[21], it is rather typical for the Governance approach that is constrains itself to a defined regulatory field like telecommunications or water supply[22]. This corresponds well to a rather technocratic de-politicized approach to solving practical problems.

2. 2. *Governance perspective and legal method*

If the distinctions between public and private institutions and between formal and informal actions are only of limited significance for the governance perspective, it is clear that legal problems are of a relative importance relevance for this approach. The governance perspective towards public authorities is a perspective of institutional choice and efficiency. The governance perspective will, beyond empirical fact-finding matters, pre-eminently make use

[20] E.g. Slaughter, "Global Government Networks, Information Agencies, and Disaggregated Democracy", in: Ladeur , supra, note 1, pp. 121-156, (151-153).
[21] For International Relations: Krasner (Ed.), *International Regimes*, 1st ed. (Ithaca, 1983).
[22] E.g. Saleth and Dinar, *The institutional economics of water: a cross-country analysis of institutions and performance*, 1st ed. (Cheltenham, 2004). Generally: Trute and Denkhaus and Kühlers, „Governance in der Verwaltungsrechtswissenschaft", 37 *Die Verwaltung* (2004), p. 451-473, (468).

of constitutional or institutional economics. As the "law and economics" movement has shown, lawyers can contribute to this discourse.[23] But this contribution is methodologically contested and it differs, at any rate, considerably from classical legal methodology and its quest for legality.[24]

Therefore, the relevance of the Governance discourse for "lawyers' law" is difficult to determine *in abstracto*. On one hand, comparative knowledge of administrative and constitutional law seems to be a necessary element of any substantive Governance approach. The design of efficient institutions is not possible without any knowledge of institutional options within a certain constitutional framework. On the other hand, however, this use of legal knowledge operates within an unusual context. Legality is not an expression of democratic self-determination and liberal respect for individual rights, it is an instrument. Therefore, legal knowledge becomes a descriptive tool rather than a normative one. The governance perspective transforms legal knowledge from questions of legality to question of the optimal institutional arrangement.

2. 3. *Governance as a historically new phenomenon?*

So far, this contribution has taken the concept of governance to express a specific reaction to a specific institutional situation. This approach seems to be more a promising and more plausible way to define governance than any claim to historical novelty that is raised so often in the academic discussion of governance. The case for the novelty of Governance structures has been made quite easily, too easily. Neither the reference to the kind of regulatory functions that are fulfilled by the European Union, particularly its close relationship to trans-national capitalism[25], nor the comparison to the classical community method[26] make the case. Behind these and many other definitions lurks a master narrative that has become amazingly prominent in a considerable part of the academic discussion of western public law.[27] This narrative takes the emergence of trans-national or global markets and the necessity to regulate them as something uniquely new – which it is definitely not, not even in its actual quality and quantity[28] – and constructs a story in which the old hermetic hierarchical nation state is now

[23] Mercuro and Medema, *Economics and the Law*, 1st ed. (Princeton, 1997).
[24] Everson, "The Crisis of Indeterminacy", in: Joerges and Dehousse, supra, note 1, p. 3, (29).
[25] Harlow, *Accountability in the EU, 2002*, pp. 179-180 (Oxford, 2002). Bernard, supra, note 1, pp. 9-11 refers to the phenomenon of lobbying to justify the novelty of governance.
[26] Trubek and Scott, supra, note 1, p. 1, (2).
[27] For the German discussion see Möllers, „Theorie, Praxis und Interdisziplinarität in der Verwaltungsrechtswissenschaft", 93 *Verwaltungs-Archiv* (2002), p. 22-61
[28] Berger, *Notre première globalization*, 2002. Wallerstein, *The Modern World System*, 1st ed. (New York, 1974).

replaced by global networks, often operating in close co-operation with private organization – governance structures. Indeed, we can observe trans-national administrative networks at work.[29] But there is no reason either to believe that these phenomena are new or that they mean the end of the classical concept of the nation-state. Reality is obvious more complex: institutionally, it conflates national and trans-national structures. Historically, it does not provide us with a unilinear development but with a messy heap of unsynchronized developments. We just have to be reminded of the well-known fact that the European markets before World War One were no less integrated than in the late nineties of the last century.[30] We can observe a first wave of trans-national administrative co-operations in the second half of the 19th century.[31] The alleged novelty of our situation has to be put into contexts: into the context of the unusually strong role of nation-states between 1918 and 1989 and into the context of the very dominating American discussion for which the experience of internationalization is much less usual common than for the discussions in Europe.

Why is all of this important? Because historical narratives easily acquire a normative underpinning[32]: If governance is "new", governance is part of a historical development that we are not able to change. The governance narrative becomes a self-fulfilling prophecy.[33] This does not necessarily imply that there is nothing new about governance. But we have to look very carefully for similar institutional situations. Institutions that had to take care of state building may be found e.g. in the administration of colonialism.[34] But obviously, the role of trans-national institutions that are not directly democratically accountable, but simultaneously obliged to the political preferences of democratic nation states can be seen as something new. The innovative character of the governance idea remains indebted to the institutional context in which it was developed.

2. 4. *A Governance of free and equal? Democratic representation*

Is governance a democratic concept? As we saw, governance is regularly defined, if not in opposition to, at least as distinguished from government. And "government" is often

[29] Infra, 3.3. Slaughter, *A new world order*, 2004, pp. 131 et seq. Möllers, „Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung“, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), p. 351-389.
[30] Krugman, *Pop Internationalism*, 1st ed. (Cambridge, 1996), pp. 211-212.
[31] Klabbers, *An Introduction to International Institutional Law*, 1st ed. (Cambridge, 2002), pp. 18-23.
[32] Danto, *Analytical Philosophy of History*, 1st ed. (Cambridge, 1965).
[33] Blumenberg, *The Legitimacy of the Modern Age*, (Cambidge, Mass., 1983).
[34] For an attempt to learn from this experience see Ferguson, *Empire: How Britain Made the Modern World*, (London, 2004).

identified with the nation-state and with representative democratic rule[35], even if there are forms of collective representative self-determination beyond the nation state. [36]

If governance designates the institutionalized observation of nation-states, its legitimacy may be found in the output of a working self-government. But it is questionable, if it is legitimately possible to organize democracy without any democratic origin of this rule.[37] Thus, we are dealing with a well-known dilemma: To create democratic accountability would undermine the structure of governance institutions, it would also require formal rule-making powers and it could annihilate the expertocratic criteria as well as the external observing perspective. But this does not mean that governance structures do not need democratic legitimacy.

This problem cannot be solved here. But one can certainly say that governance structures always have a merely uncertain legitimacy. The governance discussion in the European Commission will help to understand this correlation, but there are other indicators for this assumption: The term "Good Governance" illustrates the point. Since the beginning of modernity, the question of what is “good” has been a contested issue and should, therefore, be the object of an open and contingent majoritarian procedure.[38] In contrast, the idea of "good" governance depends on a prepolitical consensus that could make democratic institutions superfluous but that is itself rather a symptom of a crisis than a political project of its own. Good governance can appeal to phenomena that are uncontestedly bad, like poverty, corruption or the violation of human rights[39], and try to suggest conclusions from this negative consensus. But it is obvious that this consensus will soon come to an end – and this is the point where democratic politics in the form of representative government usually begins.

On both, the European and the global level, the idea of participation of civil society in Governance procedures is another important element of the Governance discourse.[40] With the absence of a national public sphere and an egalitarian political process, compensatory means have to be developed, one of them being the inclusion of interested parties. From the perspective of democratic theory there is little doubt that these compensations are deficient:

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[35] As the alleged decline is often identified with the end of democracy. E.g. Guehenno, *The End of the Nation State*, 2000 (Minneapolis, 2000).

[36] March and Olsen, supra, note 1, pp. 49 et seq.

[37] For these problems see Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building Legitimacy*, 1st ed. (Oxford, 2005).

[38] Habermas, *Between Facts and Norms*, (Cambrigde, Mass., 1995), Ch. 7.

[39] Fischer-Lescano, *Globale Weltverfassung. Die Geltungsbegründung der Menschenrechte*, 1st ed. (Weilerswist, 2005).

[40] Nickel, “Legal Patterns of Global Governance: Participatory Transnational Governance”, in: Joerges and Petersmann (Eds.), *Transnational Trade Governance and Social Regulation: Tensions and Interdependencies*, (London, 2006, forthcom.).

Participating is less than determinating, it is the right to be heard, not the right to decide. The inclusion of interested parties cannot guarantee democratic equality but may create privileges and distortions in the representation of interests. Not coincidentally, the term civil society has its origins in the transitional crisis of eastern democracies around 1989.[41]

Finally, the governance discourse regularly promotes transparency and openness of its procedures. Art. I-50(1) of the Constitutional Treaty promised the Promotion of Good Governance and connected it with these ideals[42]. Openness and transparency are necessary to organize any democratic process, but they cannot substitute it.[43] The emphasis on both elements has a compensatory meaning. The identification of deliberation with democracy is not democratic but elitist.[44]

2. 5. *An intermediary conclusion*

It may be time to draw some tentative conclusions. In a very diverse and often imprecise discussion it is hardly possible to give one strict and consequent definition of governance that covers all the phenomena actually discussed under this heading. But with the help of some observations concerning the institutional situation of the idea of governance, we are well able to give some coherent meaning to it: The invention of governance by the World Bank is no coincidence. It is of significance to understand the whole governance discussion. The concept of governance describes a specific perspective on public institutions, particularly on states: This perspective is external and output-oriented, it observes and evaluates, but it is not entitled to a formally legal interference within the observed state. Governance structures wield informal influence not formal powers. Governance, therefore, does not constitute a formal hierarchy, yet it is hierarchical. The democratic legitimacy of governance is often fragile and only compensatory. The matrix of evaluation of public institutions regularly stems from institutional economics. Governance, this has to be emphasized once again, is at its conceptual heart not a legal concept but an institutional framework that privileges certain forms of organization. For this reason, the concept has important repercussions especially for the study of administrative law.

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[41] Von Beyme, „Zivilgesellschaft - Karriere und Leistung eines Modebegriffs“, in: Hildermaier and Kocka and Conrad (Eds.), *Europäische Zivilgesellschaft*, 2000, pp. 41-55.
[42] Lenaerts and van Nuffel, *Constitutional Law of the EU*, 2nd ed. (London, 2005), 16-006, 16-015-019.
[43] Dyrbeg, “Accountability and Legitimacy: What is the Contribution of Transparency?”, in: Arnull and Wincott (Eds.), *Accountability and Legitimacy in the EU*, 1st ed. (Oxford, 2002), p. 81-96.
[44] Weiler, Epilogue: „Comitology“ as Revolution: Infranationalism. Constitutionalism and Democracy, in: Joerges and Vos (eds.), *EU Committees*, 1999, 339 347et seq.

3. European Governance – an exemplary approach

3.1. *Governance in the European integration*

What has all of this got to do with European integration? Obviously, European integration has some similar features, but it also has many features which sharply contrast with the institutional context that has been described above. The European Union is not involved in institution-building, at least not within its own territory[45]. But in spite of these differences, governance has become a key concept for the description of European institutions[46]. One reason for this may be a lack of more adequate expressions. From its outset, European integration has been a challenge for our concepts – and new words have always been welcomed[47]. But a closer look will show that the features of governance, elaborated above are not as distant from European integration as one might think.

This is most obviously the case for the European Commission. The European Commission finds itself not entirely, but to a greater part in a governance situation. The Commission is the formal political agenda-setter of the community, Art. 250 EC. But it does not have a representative democratic political environment like governments. It is no coincidence that the legitimacy of the Commission has been the first and foremost topic of the European Governance discussion led by both, the academia and the Commission itself (3.2.).

The Commission's formal powers do not only allow for the initiative of a legislative process but also for the control of the implementation of European law by Member States, Art. 211 (1) EC. But these formal powers seem to be insufficient. The control of the vast and extremely heterogenous European administrative space[48] is nearly impossible. For this reason, the Commission had to develop informal or soft instruments to monitor implementation and it had to include the Member States' administration into these procedures. The paradox of co-operative control[49] in which the Member States become agents of control mechanism that are

[45] But see Governance promises in treaties with developing and Eastern European countries: Smith, "The use of political conditionality in the EU's relations with third countries", 3 *European foreign affairs review* (1998), pp. 253-257. Grabbe, *The EU's transformative power: Europeanization through conditionality in Central and Eastern Europe*, 1st ed. (Houndmills/Basingstoke/Hamoshire/New York, 2005). One example is the obligation to "Good Governance" in Art. 96 ACP-EC Partnership Agreement.

[46] Supra note 1.

[47] This is especially true for the German discussion, in which ad-hoc expressions like "Staatenverbund" played and play an important role.

[48] Expression Schmidt-Aßmann, „Strukturen des Europäischen Verwaltungsrechts", in: Schmidt-Aßmann and Hoffmann-Riem (Eds.), *Strukturen des Europäischen Verwaltungsrechts*, 1st ed. (Baden-Baden, 1999), pp. 9-43, (12). Olsen, "Towards a European administrative Space?", 10 *Journal of European Public Policy* (2003), p. 506-531.

[49] Chiti, "Decentralisation and Integration into the Community: A New Perspective on European Agencies", 10 *European Law Journal* (2004), pp. 402-439.

directed towards their own implementation practices may be the most amazing element of European governance. Verticality and informality are the most important elements of this structure (3.3.). Finally, the lack of formal powers that reach directly into the Member States and their societies makes it necessary to connect with privates by other means (3.4.).

But European governance is not only an administrative phenomenon that concerns the European Commission. The lack of representative government has an impact on the intergovernmental political process as well. The European Council may solve these problems by hiding its political power behind the informality of non-binding agreements or by benchmarking procedures like in the Open Method of Co-ordination (3.5.).

In these examples, one will recognize all the elements of governance mentioned above. We have a supra-national structure observing states. This structure is only equipped with limited formal powers of control, forcing it to work with informal regulatory instruments and with the inclusion and participation of interested parties. While promoting democratic values, Art. 6 (1) TEU, this superstructure itself stands merely on a fragile democratic legitimacy that is at least not built according to the classical form of representative government.

3. 2. *Governance beyond Representation? The politics of administration in the "White Book"*

The most explicit official use of governance in the European context can be found in the European Commissions's White Paper on European Governance[50], an unusually in-depth reflection of the Commission's own institutional *status quo*. Though the paper received broad academic attention (most of it being quite critical)[51], the process of its making hardly qualifies it as a truly representative account of the Commission's self-image. The working group entrusted with the draft was neither allowed to refer to any particular policy of the different Directorate Generals nor was it able to make proposals for any amendment of the Treaties, meaning that it had to redescribe the status quo in a rather abstract sense.

What does governance mean for the European Commission? The White Paper defines governance as "rules, procedures and behaviour, that affect the way in which powers are exercised at European level- particularly regarding (and here we have the key-words for the Commission, C.M.), openness, participation, accountability, effectiveness and coherence".[52] This definition operates obviously within the European legal order and aims at the way or the

[50] COM(2001), 428 final.
[51] Joerges and Mény and Weiler. (Eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, (Jean Monnet Working Paper, 6/2001).
[52] At 8, note 1.

style in which formal powers are informally exercised. The key words are explained in the White Book but the text does never leave a very high level of generality, a kind of proto - theory.

But why can such a term be of any help to the Commission? Which of its problems does the Commission try to solve by reference to this meaning of governance? Though neither the legitimacy nor the factual importance of the agenda-setting powers of the Commission[53] has ever been undisputed with regard to the development of the European integration, it remains clear, that this task is a political one that cannot be reduced to pure administration. As long as the construction of the internal market, the so called negative integration[54], was the primary project of the European Commission, the agenda-setting could be understood as the implementation of a politically uncontested project. In the nineties, however, the internal market was officially completed and new intergovernmental structures, the EU pillars, became simultaneously part of the European integration. This had to have consequences for the role of the Commission. The intergovernmental bargaining process regained importance and the European Parliament gained self-confidence. New sectors of regulation like domestic security or foreign policy became part of political conflicts as they could not distribute uncontested economic freedoms but diminish trans-national freedom. The Commission started its search for a new role and called it governance. The central problem for the commission is easy to describe. Agenda-setting is virtually impossible without any organized contact with the society that has to be regulated. This contact has different functions. It supplies the regulator with factual information and with the articulation of different interests. In a system of representative government this is normally guaranteed by two different structures: the political process that connects lobbyism to party politics and the administrative apparatus that hands political decision down to individual decisions. Both factors are missing in the case of the Commission. The Commission needs substitutes. Corporatist arrangements serve in the White Book as the missing link between the political agenda-setter and society. But for the White Book, Civil Society is not more than the sum of all corporatist actors, like trade unions, NGOs and even "charities"[55]. The inclusion of the Civil Society in the agenda-setting process is the Commission's substitute for politics in a non-representative and non-egalitarian institutional context. But, amazingly enough, while the Commission made use of the relatively new and innovative language of governance in order to define its role, it simultaneously insisted on the old community method and its successes in the old days of the

[53] Moravcsik, *The Choice for Europe*, 1st ed. (Ithaca, 1998).
[54] Scharpf, *Governing in Europe. Effective and Democratic?*, 1st ed. (Oxford, 1999), ch. 2.
[55] The definition in 14, note 9.

"heroic commission" before Maastricht[56]. Paradoxically, the Commission simultaneously wants to become new and remain the same.

What is the relevance of this for European public law in a stricter sense? By using the concept of governance, the Commission basically repeats an old debate in the administrative law community about the status of interest representation in administrative rule making[57]. In the classical transmission belt concept of public administration, decisions are determined by statutory provisions and by the internal hierarchy of the administrative pyramidical organization. This transmission belt idea has been widely criticized[58]. The installation of an administrative interest representation especially for rule making procedures is one of the results of these discussions[59]. Rule making procedures are common in some legal orders, e. g. in the US American one, but less common in others like in the German legal order[60]. This is not the place to discuss the Pros and Cons of specified rule making procedures. But several points are remarkable in a European context: First of all, it seems odd that the Commission treats this well-known discussion under the headline of governance without mentioning the actual exchange of argument. Secondly, it is interesting to observe that the Governance perspective of the Commission defines the role of interested private parties and the Member States very much alike. Both, democratically responsible Member State administrations and private parties have the same status within the Governance scheme[61]. Neither the fundamental difference between them nor the corporatist dangers of privileged participation that have already been realized on an institutional level[62] are apparently worth mentioning, sometimes with dubious success[63] of the "participatory myth"[64]. Even comitology, a procedure that includes Member States' administrations, is rendered moot by the White Book[65], apparently

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[56] Scharpf, supra, note 54, 5-8. A diagnosis of decline of this method, in particular in regard of the Commission, can be found in Majone, *Dilemmas of European Integration*, 1st ed. (Oxford, 2005).

[57] For the U.S. Stewart, *The Reformation of American Administrative Law*, 88 *Harvard Law Review* (1975), pp. 1669-1813. Applied to the in Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, 1st ed. (Oxford, 1990). Comparative: Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe*, 1st ed. (Ashgate, 2001). Della Cananea, "Beyond the State. The Europeanization of Procedural Administrative Law", 9 European Public Law (2003), p. 563-578.

[58] Haltern and Mayer and Möllers, "Wesentlichkeitstheorie und Gerichtsbarkeit", 30 *Die Verwaltung* (1997), p. 51-74.

[59] Bignami, "Three Generations of Participation Rights in European Administrative Proceedings", *Jean Monnet Working Paper No. 11/2003*.

[60] A comparison that recommends the American way to the German system with good reasons but without mentioning American problems like ossification: Rose-Ackerman, "American Administrative Law under Siege: Is Germany a Model", 107 *Harvard Law Review* (1997), p. 1279-1302.

[61] White Book, supra , 11-17.

[62] Skeptical: Smismans, *Law, Legitimacy, and European Governance*, 2004, pp. 19-32.

[63] Case T-135/96, *UEAPME v. Council*, [1998], ECR II- 2335. Betten, "The Democratic Deficit of Participatory Democracy in European Social Policy", 23 *European Law Review* (1998), p. 20.

[64] Expression in Smismans, supra, note 63, p. 431.

[65] Supra, note 50, p 31.

because this well researched form of a rule-making procedure may be a threat to the decision making power of the Commission.[66].

The most striking omission of the White Paper concerns the Commissions' account of its own institutional development. In the last ten and more years the Commission's political situation has gained more and more similarities to that of a classical government. Especially due to its relation to the European Parliament, the Commission could not help becoming more and more politicized. Today, the President of the Commission has to belong to the party of the biggest parliamentary party faction in the European Parliament. And as we write these lines, many regulatory questions on the European level – from the relationship with the United States to the directives on free services or chemicals – can be seen as elements of a truly political conflict, following the allegedly overcome distinction between right and left[67]. This development was already well recognizable when the Commission published the Governance White Paper. And even if one concedes that the European Commission will never become a typical Westminster style majoritarian supra-national government[68], it is obvious that this development has to be included if one talks about European Governance on such an abstract level.

The institutional role of the European Commission is stuck somewhere between a certain nostalgia for its old technocratic role, so well designed by Jean Monnet, on the one hand and its institutional assimilation to governmental features like partial parliamentary responsibility on the other hand. [69] The governance perspective is the result of the Commission's quest to find a middle way between these alternatives. But this route seems to lead nowhere as the proposals in the Governance paper are only workable for an administrative entity without any political responsibility. The most recent step on this route is Plan D (for dialogue and democracy) launched in October 2005 as a new internet based project of discourse. [70]

3. 3. *Heterarchy?: Horizontal administrative couplings*

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[66] Vos and Joerges (Eds.), *EU Committees*, 1st ed. (Oxford, 1999).
[67] Mouffe, *The Democratic Paradox*, 1st ed. (London, 2000), pp. 80-107.
[68] See the analysis of Dann, "European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy", 9 *European Law Journal* (2003), pp. 549-574. Magnette, "Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context", 7 *European Law Journal* (2001), pp. 292-310. The most promising models for the Commission would be non-majoritarian, but proportionally democratic governments, like the Swiss Federal Government. Lehmbruch Exploring non-majoritarian democracy. in: Daalder (Ed.), *Comparative European politics: the story of a profession*, 2nd ed. (London, 1999), p. 192-205.
[69] Möllers, *Gewaltengliederung*, 1st ed. (Tübingen, 2005), pp. 270-279.
[70] IP05/1272

Traditionally, nation states have organized their external relation around one central authority, the foreign office and its diplomatic service. This monopoly of external representation guaranteed a uniform and unequivocal form of expressing the political will of a sovereign state with all its legal implications. It satisfied the internal needs of the national constitutional systems as well as the necessities of international law.[71] This monopoly was also an expression of the state's sovereignty because it shielded sovereign states from external legal orders and filtered all legal obligations through a central representative. Only as long as the external relations were organized around one central institution, the sovereign state itself could determine which sub-part of the state organization was addressed and obliged by international law.

In spite of the reasons for centralization, state administrations under the governmental level have begun, step by step, to develop their own external relations with their counterparts in other countries. One of the earliest examples is INTERPOL[72]. Trans-national informal administrative networks with a considerable influence on European and national legislation began to emerge. Informal organizations were founded, especially in regulatory fields that needed trans-national co-operation without having an institutionalized international regime in form of an international organization.[73] Today, these networks are firmly established in the regulation of telecommunications, financial and insurance markets[74]. The pluralisation of external relations is now leading to a dismemberment of the state organization[75] piercing the legal personal veil of sovereignty.

Originally, these informal networks have not been part of European integration. In most cases, they emerged out of the community of western regulatory bodies as comprised by G-9 or the OECD. The powerful Basel Banking committee is one example for the network structure[76], the influential International Organization of Securities Commissions, IOSCO[77], is another one. These and other groups are part of the international Western "club". But for at least two reasons, these structures belong to an analysis of governance as discussed in this article. First of all, these networks represent exactly the kind of observing informal trans-national administrative superstructure that has been recognised above as being typical for the idea of

[71] Klabbers, *The Concept of Treaty in International Law*, 1st ed. (The Hague, 1996), pp. 97 et seq.
[72] Stiebler, *Die Institutionalisierung der internationalen polizeilichen Zusammenarbeit*, 1981, 11 et seq.
[73] Slaughter, supra, note 29 pp. 152-161.
[74] *Picciotto*, "Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism", 17 *Northwestern Journal of International Law & Business* (1996/97), p. 1014-1056.
[75] Slaughter, supra, 266 et seq.
[76] http://www.bis.org/bcbs/. For critique: *Macey*, "The 'demand' for international regulatory cooperation: a public-choice perspectice", in: Bermann and Herdegen and Lindseth (Eds.), *Transatlantic Regulatory Cooperation*, 2001, p. 147-166, (151).
[77] Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations", 33 *Texas International Law Journal* (1998), pp. 281-330.

governance. The networks have no formal rule-making powers but wield considerable influence as expert observers. Secondly, these networks have close ties to the interest groups they regulate. This phenomenon reveals the effects of softening the distinction between public and private spheres, as is so typical for the idea of governance.

What about *European* governance? The fate of administrative networks in the European Union is remarkable. Obviously, any close administrative co-ordination of selected EU Member States with non-Member States may create a problem for the EU. Especially the European Commission must be concerned for at least two reasons: It is responsible for a homogenous administrative implementation of European law, Art. 211 EC – and it is excluded. The ongoing importance of institutions like the Basle committee or IOSCO illustrate that the Commission was not able to avert these forms of administrative co-operation beyond its jurisdiction. However, the Commission has not been altogether unsuccessful: With the support of the European legislator, the Commission began to utilise these informal structures and to partly integrate them into the European administrative order. In 2004, the European Commission legally recognized the great importance of these networks. On the basis of new regulatory framework rules in the fields of telecommunications and capital markets, the Commission created new regulatory bodies that were modelled after trans-national networks and which started to substitute them in part. This strategy of reception has two advantages for the Commission. Obviously, the Commission is now able to observe and to participate in the co-ordination of national regulators. Secondly, the Commission now addresses national regulatory bodies without interference of Member States' governments. Bypassing governments is of particular interest in regulatory areas in which the governments have peculiar economic interests, e. g. in the telecommunications markets which are still dominated by state-owned enterprises. A more or less direct communication between regulatory bodies and the Commission ensures a fair and symmetric implementation of market rules and enhances the independence of the national regulatory bodies from their governments. A closer look at these regulations shows more innovative elements:

The implementation of the so called Lamfalussy concept[78] created a whole committee-system for the regulation of capital markets, intervening in the law-making process in several steps: Committees representing the national supervising bodies for banking, insurances and securities were installed.[79] On the first level, these committees advise the Commission before

[78] Lastra, "The Governance Structure for Financial Regulation and Supervision in Europe", 10 *Columbia Journal of Transnational Law* (2003), p. 49-68, (58 et seq.).

[79] Commission Decision of 5 Nov. 2003 establishing the European Banking Committee (2004/10/EC), O.J. 2004, L 3/36; Commission Decision of 5 Nov. 2003 establishing the European Insurance and Occupational

initiating European legislation on one of these areas. On the second level, the committees act as comitology structure participating in the implementation rule making[80]. In addition to this system, the Commission has organized a second set of committees that has to secure the implementation of the European norms and to co-ordinate the daily work of different Member State bodies[81]. In this rather complicated structure – that is supplemented by a participation procedure of the European Parliament – we discover many governance elements. Two features are especially interesting: The advisory task of the Commission has exactly the function discussed above[82]. It substitutes the representative political environment that is needed on a national level to initiate a legislative project. The Commission organizes, *faute de mieux*, its own political context. Secondly, the Commission bypasses Member States' governments and comes into direct contact with the national regulatory bodies and with the regulated industries.

The regulatory structure developed for the telecommunications sector is quite similar. Again we can observe the institutionalization of committees that comprise the Commission and the national regulatory bodies. Another element is peculiar: The national regulatory bodies are obliged to actively take into account the decisions made by other national administrations. The regulation does not only collect the national authorities in one common committee. It also stipulates obligations of mutual observation and respect or, to use a term from international public law: positive comity[83], with regard to the decisions made by other national bodies. The European polity has known a duty of "federal loyalty" (comparable to the German "Bundestreue") between the EU and its Member States for a long time. This loyalty is now codified in Art. 10 EC.[84] But the obligations in the telecommunications directive differ from this type of loyalty in two regards: They do not concern the relationship between European and Member State level but the relationship between Member States under the auspices of European law. They are not part of a general quasi-constitutional concept of the European federation but an element of a very technical part of European administrative law. These differences are peculiar, because the normative content that must be implemented by one

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Pensions Committee (2004/9/EC), O.J. 2004, L 3/34; Commission Decision of 5 Nov. 2003 amending Decision 2001/528/EC establishing the European Securities Committee (2004/8/EC), O.J. 2004, L 3/33.

[80] Proposal of the Commission for a Directive in order to establish a new financial services committee organisational structure from 5 Nov. 2003 (COM/2003/0659 final).

[81] Commission Decision of 5 Nov. 2003 establishing the Committee of European Banking Supervisors (2004/5/EC), O.J. 2004, L 3/28; Commission Decision of 5 Nov. 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors (2004/6/EC), O.J. 2004, L 3/30; Commission Decision of 5 Nov. 2003 amending Decision 2001/527/EC establishing the Committee of European Securities Regulators (2004/7/EC), O.J. 2004, L 3/32.

[82] Supra, 3.2.

[83] Slaughter, supra, note **Fehler! Textmarke nicht definiert.**, pp. 250-253.

[84] Blanquet, *L´article 5 du traité C.E.E.*, 1st ed. (Paris, 1994).

national authority also depends on the implementation practice of another national authority. This is remarkable as a problem of legal methodology because the determinateness of written rules is weakened. It is also remarkable as a problem of legitimacy: the implementing national authority is responsible to a national constituency and to European authorities but it is certainly not responsible to other national constituencies.

A typical feature of a governance structure is its horizontal form of organization. But it is once more important to emphasize that, different from common wisdom, this horizontal organization must not be confused with the absence of hierarchy. Even the informal consensus-oriented international standard-setting organizations like Basle and IOSCO have strong informal hierarchies: they are dominated by single states or groups of states , e. g. the United States[85] which even tend to understand these bodies as a medium to export their own regulatory approach.[86] In the European context, we can find two forms of hierarchy. At first, it is obvious that the European Commission uses these structures to improve its control over Member State implementation. Mutual observation of Member States has always been a tool for control on the European level. In the case of the telecommunications directive the Commission even has a formal right of intervention[87] which it has already used against the Finnish authority[88]. Secondly, there are asymmetries of influence between the national authorities despite their formal equality.

Trans-national administrative networks have emerged outside or beyond the European Union. They share common features of governance structure: informality, horizontality, and latent hierarchy. The EU and especially the Commission has a vivid interest to regain control over these structures. It has partly succeeded by re-formalizing and including these committees into a now European form of governance. The network structure has changed, and certain jurisdictional conflicts have appeared.[89] But all in all, the idea of horizontal co-ordination - especially of independent regulatory bodies - is a new and influential instrument of the emerging European administration.

3. 4. *Private and Public: Standardization*

[85] Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 *Virginia Journal of International Law* (2002), p. 1-92.
[86] Raustiala, supra, note 85, pp. 32 et seq.
[87] Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2003) 2647), 2003, 561, O.J. L 190, 13.
[88] Decision of the Commission on Finland from 5/10/2004 (FI/2004/82).
[89] E.g. between the new committee structure and the European Regulators Group.

The harmonization of technical standards has never fit any classical modern account of law and state. Its particularities have irritated observers as early as in late 19th century[90] and there is still a (rather fruitless) discussion if we can talk at all about "law" when we refer to standardization[91]. In any case, the phenomenon of private self-regulatory entities that create standards which are received and operationalized by public institutions is one of the most popular examples for new European governance structures[92]. For two reasons, this is a surprising fact: At first, because private standardization bodies are nothing new, they are older than the European integration and must be understood as the result of an "earlier" stage of globalization.[93] It is, secondly, surprising because the Europeanization of the standardization does not really change its institutional structure. The hybrid public-private structure is rather replicated than modified on the European level. Europe did not add anything substantially new to the standardization problems, but *vice versa*: standardization law heightened the complexity of the European integration.

The standardization of products is traditionally done by technical bodies that represent primarily the manufacturing industries. The function of standardization is not always easy to understand. Three motives may be relevant: At first, standardization is an instrument to guarantee certain generally desired features of a product, like safety or regard for the environment. At second, standardization helps to secure the operability of a product with other products. This is relevant for technical reasons and it may also be a factor for the possibility to export this product.[94] Finally, standardization may be used as an instrument to define the identity of a product. And this means that all objects that do not show certain standardized features do not belong to this class of a product. Of course, this last function is highly problematic as standard bodies may work as a cartel that excludes competitors.[95]

Thus, we find classical private law and classical public law problems united in the question of standardization. Private problems concern questions of competition law and the use of standards as rules of negligence. Public law problems concern the question if standards are

[90] Vec and Seckelmann and Röder, "Standards, Norms and the Law: The Impact of the Industrial Revolution", in: Becker (Ed.), "Normalising Diversity", *EUI Working Paper HEC 2003/5*, pp. 23.
[91] Schepel, *The Constitution of Private Governance*, 1st ed. (Oxford, 2005). Special Issue: "Governance and International Standard Setting", 8 *Journal of European Public Policy* (2001), p. 3.
[92] E.g. Schepel, supra, note 91, pp. 406-414.
[93] See, supra, n. VVV.
[94] Therefore, standardization is a also topic of European and international trade law: Sykes, *Product Standards for Internationally Integrated Goods Markets*, ed. (Washington, 1995).
[95] Schepel, supra, pp. 285 et seq.

"governmental" trade barriers, and above all, the question how value assessments, e.g. between the price and the safety of a product can legitimately be made by these bodies.[96]

The legal form of standard bodies differs within different national legal orders[97]. But these differences do not really change the substantial problems. One may respect the standardization structure as a helpful institutional solution to a regulatory problem and one should not try to reduce the structure to its public or its private aspects: neither a purely governmental nor a purely civil arrangement seems to work better. But this does not imply that it is impossible to develop mechanisms that address legitimacy problems of standardization more adequately, especially procedures concerning the inclusion of interests and the transparency of the rule-making process.[98] This benevolent approach accepts standardization bodies as a genuine form of governance that does not fit classical models. But this acceptance does neither mean that standardization might be a general model for public institutions nor that the law of standardization is expression of a new general regulatory paradigm.[99] The case of standardization is (and has been for at least a century) too special to be a role model for public institutions. Once again, we have to understand that governance structures will complement not substitute government structures.

3. 5. *Informality: Governance in European politics*

So far, all phenomena of European governance worked on an administrative level.[100] But this is not the whole story. We also find governance structures that are closer to the inter-governmental political process. As we will see, these structures modify classical intergovernmental politics in particular ways.

The first and fundamental question of governance in institutional economics was to look for criteria for the choice between markets and organizations.[101] On the level of international law we recognize a similar problem in the choice between intergovernmental treaties and international organizations. One of the most interesting developments of current public international law is the emergence of hybrid structures that blur the border between treaties and organization. In such entities the contracting parties are permanently assembled in a body

[96] For German constitutional law see the analysis in: Röhl, *Akkreditierung und Zertifizierung im Produktsicherheitsrecht*, 1st ed. (Berlin, 2000).
[97] Schepel, supra, note 91, pp. 112 et seq.
[98] Black, "Constitutionalising Self-Regulation", 59 *Modern Law Review* (1996), p. 24-55.
[99] But see Schepel, supra, note 91, pp.19 et seq.
[100] Joerges, "Governance of the European Market", in: Joerges and Dehousse, supra, note 1, pp. 3, 9 et seq.
[101] The classical account is Coase, The Nature of the Firm (1937), in: *The Firm, the Market and the Law*, 1988, 33.

that is empowered to annex or amend the basic treaty. These types of organization are particularly important in international environmental law.[102] This structure reminds the observer of long term contract relations that have been researched by institutional economics under the headline of governance.[103] We have to look for hybrid entities between contract/treaty and organization to find political governance structures.

How does this relate to European governance? Behind the institutions of the European Union lurks the constituent power of the Member States. As Member States they are bound to European law and, therefore, members and subjects of a formal legal organization.[104] But as contracting parties they are free to consensually change the rules they are bound to or to bypass the formalities and limits of European legal procedures.[105] The informality of governance structure is an instrument to blur the distinction between the treaty making powers of the Member States and the formalized organization of the European Union, between political powers outside and inside the European legal order. Two connected examples for this hybrid governance structure are the European Council and the procedure of the Open Method of Coordination.

Having started as a customary fireside chat, the meeting of the heads of state and prime ministers with the President of the European Commission became official through the Single European Act. They became an organ of the European Union through the Treaty of Maastricht. The European Council has no formal law-making powers.[106] Its task is the definition of overall political goals for the whole of the EU. But its decisions are not purely political. They define an agenda that is implemented with legal effect either by European legislation or by Member State legislation that formally bears no European traces. As representatives of the European treaty-making power the European Council has the political influence to initiate Member State and (via Council and Commission, Art. 208 EC) European legislation. The decision-making procedure is extremely arcane. Lack of transparency, one of the official European governance ideals, is not compensated by judicial control: There is no judicial remedy against decisions of the European Council, Art. 46 EU.[107] If democratic self-

[102] Churchill and Ulfstein, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, 94 *American J. o. International L.* (2000), 623.
[103] Williamson, *Markets and Hierarchies*, ed. (New York, 1975).
[104] Lenaerts and van Nuffel, supra 42, 7-003 et seq.
[105] To this problem of international organizations: Klabbers, supra, note **Fehler! Textmarke nicht definiert.**, pp. 39 et seq.
[106] But see Art. 13 TEU, 99 (2), 128 (1) TEC.
[107] Case C-253/94, Roujansky, [1995], I-7.

government and rule of law constitute interdependent structures[108], both are missing in the acts of the European Council.

This coexistence of formal treaty-making and informal bypass is nothing new to European law. It has been observed (and criticized) since the treaty of Maastricht with its complex system of para-legal or para-constitutional annexes and declarations.[109] But it is remarkable to see how the concept of governance has transformed such vices into virtues: While the academic discourse in the 1990 treats these para-treaties as a form of careless political behaviour of the Member States[110], it may happen that the idea of governance induces a re-evaluation of this and similar phenomena.

One example for such a development is the Open Method of Coordination. OMC was developed by the European council at the Lisbon Summit in March 2000[111]. It is an informal law-making procedure without binding force, a soft-law mechanism in which certain policy areas like employment or social policy for which the EU has no legislative powers are co-ordinated on a Member State level. Like in the OECD mechanisms, the main instrument for the co-ordination of the member-states is the development of soft standards[112] and their mutual comparison by benchmarking. At the moment, the success of OMC cannot be conclusively evaluated. But it is probable that this regulatory structure is a model for future tasks of the EU.[113] OMC is obviously a governance structure in the sense developed here. It bypasses the enumerated powers of the EU by an informal consensus of the member-state governments, it applies soft regulatory instruments and it shifts the political accountability to institutions that are not involved in the substantial decision-making procedure.

4. Conclusion: From Government to Governance and back again

[108] Habermas, supra, note **Fehler! Textmarke nicht definiert.**, Ch. 3.

[109] Curtin, "The Constitutional Structure of the Union: a Europe of Bits and Pieces", 30 *CML Rev.* (1993), pp. 17 (22 ff., 44 ff.). de Búrca, "The Institutional Development of the EU: A Constitutional Analysis", in: Craig and de Burca (Eds.), *Evolution of EU Law*, 1st ed. (Oxford, 1999), pp. 55, (66).

[110] *Möllers*, in: Bogdandy and Bast (Eds.), Principles of European Constitutional Law 1st. ed. (London, 2006, forthcom.), pp. 183-226, (209-212).

[111] For an optimistic assessment: Trubek and Trubek, "Hard and Soft Law in the Construction of Social Europe", 11 *European Law Journal* (2005), pp. 343-364. Furthermore: de la Porte, "Is the Open Method of Coordination Appropriate for Organising Activities at the European Level in Sensitive Policy Areas?", 8 *European Law Journal* (2002), p. 38-58; Regent, "The Open Method of Coordination: A New Supranational Method of Governance?", 9 *European Law Journal* (2003), pp. 190-214. Special Issue: "The Open Method of Co-ordination in the EU", 11 *Journal of European Public Policy* (2004), p. 2.

[112] Falkner, *Complying with Europe*, 1st ed. (Cambridge, 2005).

[113] E.g. Radaelli, "The code of conduct against harmful tax competition: open method of coordination in disguise", *EUI Working Paper* 2002.

Governance is a much used word still in search of a precise conceptual designation. This contribution attempted to give an institutional definition of governance and to apply this definition to the European polity: to problems of the Commission, to certain features of trans-national administrative process, and to developments of the political process in the Council. Governance structures emerge in a particular institutional situation: The term governance designates institutions that observe, reflect and evaluate the performance of states. These structures do not have formal legal powers and are, therefore, not democratically accountable. They work with soft tools. They provoke regulatory experimentalism. They serve as a mirror built by and for the nation states. And mirrors are not responsible for the picture they present even if it is distorted. With the instrument of governance the European Member-States put themselves in the situation of developing countries.

Governance does not substitute but complement government. There is no governance without government, as there is no soft law without hard law and, in the EU, no OMC without EMU.

The road from government to governance is a much discussed topic in European law and in the global discourse. But the development of the European Union, the making of a political process in the EP and between Parliament and Commission, also presents the opposite direction: from governance to government.