

The Constitutional Challenge of New Governance in the European Union

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Summary:

This article focuses on the contrast between what is referred to as ‘traditional EU constitutionalism’ and ‘new governance’. It begins by outlining this contrast, and describing the basic elements of traditional EU constitutionalism in the context of the recent workings of the Convention on the Future of Europe. The notion of new governance and in particular the origins, spread and significance of the Open Method of Coordination (OMC) as a means of policy-making in the EU are then explained, and the strengths and weaknesses of the OMC briefly outlined. The final section considers how the problems of new governance might be addressed in the context of a renewal of the European constitutional model, and the disappointing results of the Convention in this respect are appraised.

1. Introduction

The EU’s constitutional system reveals a certain paradoxical character. As a system which has evolved from a functionally restricted common market order, established by treaty in the 1950s as the European Economic Community, into the vastly more complex and thicker political organization known as the European Union, its nature and scope remains constantly contested. The paradoxical character of the system is revealed in 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 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: *first*, between legally limited competences and ever-expanding policy activities; *second*, 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; *third*, between policy segmentation, privileging or ring-fencing, and the impetus towards policy integration and linkage; *fourth*, between a conception of fundamental human rights as representing binding, justiciable, negative constraints on the powers of the federal government (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; *fifth*, 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; and *sixth*, between the intergovernmentalism/supranationalism dichotomy which has long characterized the political debate over federalism, and the less clearly theorized but descriptively powerful conception of multilevel governance.

The substantive focus of this article is on a range of policy processes which have evolved over the past decade or more and expanded in recent years both to new and existing areas of EU activity, and which tend to be grouped under the label of the open method of coordination (OMC). These coordination processes arguably find their most structured form within the context of the employment policy chapter of the Treaty added by the Amsterdam Treaty in 1999, but they are either being pursued or proposed also in a significant 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 was reflected in many aspects of the Convention on the Future of Europe which took place in 2002-3.

The core argument is that features such as the spread of the OMC constitute a challenge to several of the premises on which the EU’s traditional constitutional self-understanding rests, and that the apparent contrast between the reality of new governance and the persistence of key elements of traditional constitutionalism merits further exploration. Developments over the last decade also suggest that elements of a new model of European constitutionalism may be emerging which is less top-down in nature than before, and which is premised on a more participatory and contestatory conception of democracy. In the context of this changing constitutional background, the strengths and merits of the newer forms of governance, including their attempt to forge effective solutions to common, intractable-seeming social and economic problems and their avoidance of some of the restrictive features of traditional constitutional instruments and methods, are apparent. However, they also raise a number of democratic concerns, and three in particular will be considered here. The first concerns the place of rights within the new governance, the second the degree of commitment to participation and transparency, and the third the risk of dominance of particular economic values. Finally, the article considers what ways there might be of addressing some of these concerns within the context of a renewed model of European constitutionalism.

It should be said at the outset that very notion of a ‘new’ form of governance generates a degree of scepticism, particularly among EU lawyers, the focus of whose work and

interest tends to be on binding legislative and administrative measures and on judicial rulings. For many, soft law in general, and recent manifestations such as the OMC in particular, are of subsidiary importance and cannot rival in significance, authority or impact the role of hard law. Further, the OMC is perceived by some as a passing phenomenon and a fudge, with opportunistic political sloganeering masking the lack of more substantive progress in particular policy fields, or concealing a particular neo-liberal economic agenda in palatable and novel language. Whether the OMC proves itself as a lasting and important instrument of EU policy-making remains to be seen, but it is the contention of this article that it constitutes a genuine attempt, and contains the potential, to address some of the central dilemmas of European integration. Firstly, in terms of process, it offers a methodology which can neither be dismissed as 'primarily national' or 'primarily EU-level' but which is genuinely multilevel in nature, which in principle (although not yet in practice) offers a mode of decision-making open to a wider range of actors and interests than traditional forms, and which aims to avoid some of the rigidities of the latter. Secondly, in more substantive terms, the deployment of the OMC thus far suggests that it could constitute a means to develop and promote social and other forms of solidarity in Europe in a context where individual states' capacity to provide for public welfare has been weakened and where the EU lacks the authority, legitimacy and ability to pursue centralised policies of this kind.

It might be argued, to begin with, that the paradoxical character of the EU system outlined at the outset is little more than the basic tension within any political system between the formal constitutional structure and the practices of the administrative state.¹ Yet even if true, the complex relationship between high constitutionalism and pragmatic governance is nonetheless worth examining. But it is argued here that in the context of the EU, this is a somewhat different and deeper tension. In the first place, the EU's formal constitutional structure cannot easily be equated with that of a state,² 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 for several decades.

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

2 On the difficulties of using the constitutional 'toolkit' of the state to analyse the European Union and other post-national sites of authority, see N. Walker 'Flexibility within a metaconstitutional Frame' in G. de Búrca and J. Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart, 1999) and 'Postnational Constitutionalism and the Problem of Translation' in M. Wind and J. Weiler, eds., *European Constitutionalism Beyond the State* (CUP, 2003 forthcoming).

Secondly, the distinction between EU administrative law and EU constitutional law, and between the EU constitutional framework and its administrative organisation is blurred. 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 administrative actors clearly distinct from legislative decision-makers: while agencies have begun to proliferate in recent years, their role is deliberately circumscribed and within the formal framework of the primary decision-making institutions of the Commission and Council; and the vast network of advisory and implementing committees sometimes referred to as ‘comitology’ is similarly woven in complex ways into this framework, without possessing 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 iterative revision and updating of primary legislation (often Directives and Regulations) in the light of the evolving body of implementing legislation made through the comitology process.

Thus, as a consequence of these twin 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 emergent constitutional form and nature.

2. The traditional model of EC constitutionalism

The EU has its origins in the common market established by the Coal and Steel Treaty in 1952 and the 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.³ The interpretative role of the European Court of Justice, which attributed direct effectiveness to the ‘negative integration’ rules of the Treaty – free movement of goods, persons and services, in particular⁴ - 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. Thus the twin concepts of direct effectiveness and supremacy, being the legal instruments by which the Court of Justice is said to have constitutionalised the EC Treaty,⁵ as applied to the fundamental economic norms

3 For discussions of the influence of ordo-liberalism on EC competition law which forms one of the axes of the internal market, see D. Gerber, Law and Competition in Twentieth-Century Europe: Prometheus Unbound (Oxford, OUP, 1998), W. Sauter, Competition Law and Industrial Policy in the EU (Oxford, Clarendon Press, 1995).

4 D. Chalmers, ‘The Single Market: From Prima Donna to Journeyman’ in J. Shaw and G. More (eds) New Legal Dynamics of European Union (Oxford: OUP, 1995).

5 For the classic conventional accounts, see 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. For a more recent interpretation of the

establishing the internal market, formed the centrepiece of the EC's constitution. These, to use Weiler's terms, are respectively the "structural" and the "material" dimensions of classic European constitutionalism,⁶ supported by the original institutional framework of a Commission, a Council of Ministers, a European Parliament and a Court of Justice with their specifically assigned roles under the Treaties. These differing institutional roles are conventionally perceived as representing a balance between the concerns of the Member States (via the Council), the overall 'Community' interest (via the Commission) and the people (via the Parliament), under the scrutiny of a Court whose role it is to enforce the rule of law.

But this depiction is a deliberately simplified one, and 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, Parliament and the Court, can be challenged as unduly reductionist. Two such challenges will briefly be outlined and answered.

Firstly, as far as the economic focus is concerned, it can be argued that while the common market was the core of the EEC's mission and its strongest field of policy activity, supported by the ECJ's bold interpretative strategy, there was also, from the outset, 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, in response to this it must be admitted that the methods and instruments initially created to facilitate the broader project – and which reflected the degree of control which 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 based on the principle of attributed competence, which means that one of its articles of faith, expressed since the Maastricht Treaty in Article 5 EC, specifies that its powers are limited to those conferred by the member states in the treaties. 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 protection, the constitutional hierarchy between the internal market and competition provisions of the Treaty on the one hand, and its flanking or 'spillover' policies on the other, remained. The Single European Act in the 1980s and the Maastricht Treaty in the 1990s incorporated a range of new 'positive' policy competences – in fields such as education, public health, consumer protection and culture – into the Treaties, although the reality was that European policies in this areas had already been developed and implemented through soft action programmes without explicit legal

ECJ's audacity in constitutionalizing the Treaties, see H. Lindahl 'Sovereignty and Representation in the European Union' in N. Walker (ed) Sovereignty in Transition (Oxford: Hart, 2003).

6 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).

powers, or under the guise of internal market legislation.⁷ But many of the new legislative powers were deliberately restricted so as to preserve primary national control over those issues.

Thus, despite the growth of positive competence in these ‘flanking’ areas, an essential distinction remained between the EU as an overarching market-liberalizing organization and Member States as the legitimate locus for the provision of social and political welfare. 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.⁸ This hierarchy was evident not only in the actual terms of the treaty and the powers conferred on the institutions, but often also in the way in which the ECJ interpreted and enforced those provisions. Thus while social, environmental, cultural and other policy concerns were certainly not 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, 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 appeared to exempt certain publicly provided services such as education,⁹ air navigation¹⁰ and social security¹¹ from the strictures of EC 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.¹²

7 For accounts of the emergence of EC environmental, consumer and social law respectively, initially as aspects of internal market law but gradually with an autonomous mandate and basis in the treaty, see J. Scott, EC Environmental Law, (Longman, 1998) S. Weatherill, EC Consumer Law and Policy (Longman, 1997) and T. Hervey, EC Social Law and Policy (Longman, 1999).

8 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. See also C-41/90 *Höfner v Macrotron* [1991] ECR I-2010 for the broad applicability of the competition law rules. More recently the ECJ has begun 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 and C-219/97, *Drijvende v Stichting Pensioenfonds voor de Vervoer-en Havenbedrijven* [1999] ECR I-6121.

9 263/86, *Belgium v Humbel* [1988] ECR 5365

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

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

12 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.

A second way of challenging 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 is by pointing to the complex array of institutional actors who have actually been involved in the EU policy-making process. It can be argued that the dense web of committees which has increasingly come to work within and alongside the formal institutional framework,¹³ and the growing set of agencies which supplies those institutions with information, expertise and advice¹⁴ requires a more nuanced characterisation of the constitutional framework and of the role of the key institutional actors. In rebuttal, 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 have decision-making powers, most being advisory and situated ultimately within the umbrella of the Commission's authority.¹⁵ Further, in the case of advisory and implementing committees (the so-called comitology system), these are also situated formally within the institutional framework of the Council and Commission, so that although they provide influential input and clearly limit the discretion of the Commission, all final decisions must be taken either by the Commission or the Council and the committees themselves have no decision-making power.

Nonetheless, these various challenges to the depiction of the EU's traditional model of constitutionalism outlined above demonstrate that this depiction represents merely one view of the dominant, explicit constitutional model underpinning the European Union's

13 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),

14 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.

15 This position is partly the legacy of the early judgment in case 9/56 *Meroni v High Authority* [1957-58] ECR 133 where the ECJ 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 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. For a more recent analysis of the implications of the new breed of 'executive agencies', see P. Craig "The Constitutionalization of Community Administration" Jean Monnet Working Paper 3/03, <http://www/jeanmonnetprogram.org/papers/03>.

development, rather than the only or uncontested perspective. A more complex and fine-grained system of multilevel governance has certainly been developing for many years, and other constitutional models could undoubtedly be described and defended.

More importantly still, there has been a revival over the past ten years – stimulated by the legitimacy crisis which originated in the negotiation and adoption of the Maastricht Treaty in 1992¹⁶ – of normative theories of European constitutionalism which propose a more deliberative, inclusive, contestatory and bottom-up form of constitutionalism based on the equal dignity and human rights of citizens.¹⁷ Such arguments cannot be dismissed as belonging entirely to the realms of academic utopianism, not least because the recognition by political and administrative elites - after the near-failure of the Maastricht treaty's ratification - that the allegedly 'permissive consensus'¹⁸ of the early decades of European integration no longer held, led also to some reforms and novel constitutional steps being taken. The drafting of an EU Charter of Rights,¹⁹ the establishment of the constitutional Convention on the Future of Europe,²⁰ the stimulation of a fairly wide-ranging debate on reform of European governance,²¹ and the formal recognition of a role

16 G. de Búrca "The Quest for Legitimacy in the European Union" (1996) 56 *Modern Law Review* 359.

17 J. Habermas, The Postnational Constellation, (Massachusetts, MIT Press, 2001), chapter 4, and "Why Europe needs a Constitution" *New Left Review* 5, J. Weiler, The Constitution of Europe (Cambridge, CUP, 1999), J. Shaw, "Postnational Constitutionalism in the European Union", (1999) 6 *Journal of European Public Policy* 579, "Process and Constitutional Discourse in the European Union", (2000) 27 *Journal of Law and Society* 1, R. Bellamy and D. Castiglione "Legitimising the Euro-Polity and its Regime: The Normative Turn in EU Studies" (2003) 2 *European Journal of Political Theory* 7, O. Gerstenberg, "Expanding the Constitution Beyond the Court: the Case of Euro-Constitutionalism" (2002) 8 *European Law Journal* 172.

18 L. Lindberg and S. Scheingold, Europe's Would-Be Polity. Patterns of Change in the European Community, (Prentice Hall: Englewood Cliffs, 1970).

19 E. Eriksen, J.E. Fossum, and A. Menéndez, (eds) The Chartering of Europe (Arena Report No. 8, 2001), G. de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 *ELRev* 126.

20 See nn. 28-29 below.

21 See the Commission's initiatives: "European Governance: A White Paper" COM(2001)428, and "Communication from the Commission on the Future of European Union - European Governance: Renewing the Community Method" COM(2001)727. For critical commentary, see the Symposium "Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance" <http://www.jeanmonnetprogram.org/papers/> No. 6 of 2001.

for ‘civil society’ within the EU system of governance²² all reflect, to some degree, increasing political recognition of the need for constitutional reform.

Nevertheless, the legacy of key elements of the EEC’s original mission, following the retreat from more ambitious plans for a European political union in the early 1950s,²³ remains a significant influence on the greatly expanded European Union of today. For all its evolution, and despite the undoubted significance of the new policy spheres and the powers gradually accorded to the Union, a number of fundamental features of its original formation remain present and powerful. Firstly, the EU still stands somewhere between a functionally limited supranational organisation and a political community of open-ended and undetermined goals,²⁴ and any claims made on its behalf to the latter status remain sharply politically contested.²⁵ Secondly, still imprinted in the existing Treaties which continue at present to 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.²⁶

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

The current time, however, 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

22 See the Commission website, http://europa.eu.int/comm/civil_society/. For comment, see O. De Schutter, ‘Europe in Search of its Civil Society’, (2002) 8 ELJ 200, K. A. Armstrong, ‘Rediscovering Civil Society: The European Union and the White Paper on Governance’, (2002) 8 ELJ, 105 and S. Smismans “European Civil Society: Shaped by Discourses and Institutional Interests” (2003) 9 ELJ 473.

23 A. H. Robertson ‘The European Political Community’ (1952) XXIX British Yearbook of International Law 383.

24 Maduro argues that the legitimacy of any claim by the EU to the kind of independent authority associated with unlimited political community has not adequately been articulated: M. Maduro ‘Where to Look for legitimacy’, Arena Conference on Democracy and European Governance, Oslo, March 2002. See also R. Dehousse ‘Rediscovering Functionalism’, Jean Monnet Working Paper 7/00, <http://www.jeanmonnetprogram.org/papers/>

25 Fritz 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.

26 C. Closa “The implicit model of constitution in the EU constitutional project’ , Arena Research Paper 2002

confined purely to the remit of elite bargaining and academic debate, but have emerged into a 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,²⁷ to present a range of proposals to the next Intergovernmental Conference (IGC) concerning the famous 50-or-more questions of the European Council's Laeken declaration. These questions covered 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 - or rather more coyly, a 'constitutional text' - for the EU.²⁸

The Convention began its work early in 2002 and finished in July 2003.²⁹ In all, eleven working groups³⁰ and three discussion circles were established, which in conjunction with the praesidium (the twelve-member presidency) and the plenary sessions, undertook the main work of the Convention. A 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 - those on Defence, 'Freedom Security and Justice', Economic Governance, and Social Policy - could be said to have examined substantive policy. Further, within these groups, 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 primary focus of the Convention 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.

Further, despite the fact the establishment of the Convention itself represented a significant challenge to the traditional constitutional model described earlier, a great many of the key elements of traditional EC constitutionalism were present and even dominant within the Convention debate. These include an emphasis on functional limitation, a normative (neo-liberal) bias, a concentration on the formal institutional power-structure and avoidance of the complexities of the multi-level system and the diffusion of power, a deep ambivalence about new modes of governance, and an emphasis on the Charter of Rights as power-limiting rather than transformative or power-

27 See n. 19 above.

28 For an account of the establishment and functioning of the Convention, see K. Lenaerts and M. Desomer (2002) 39 CMLRev 1217.

29 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: (http://europa.eu.int/futurum/forum_convention/index_en.htm)

30 The 11th working group, that on social policy, was belatedly established by the plenary session of the Convention in response to a deep division which emerged within the working group on economic governance between those who felt that the focus should be only on monetary and economic policy, while others felt strongly that issues of social policy should also be considered.

conferring. Thus, while the academic debate on European constitutionalism in recent years may have become more sophisticated and nuanced, in particular in its engagement with social and political theory,³¹ the political currency and persistent hold of the traditional frame of reference has been clearly evident in popular debate, in the discourse of the key political actors, and in the context of the Convention.

Within the Convention, the issues of simplification, clarity, comprehensibility, and ‘delimitation of functions’ were 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 was with establishing clearly articulated limits to the tasks and powers of the EU, and a reassertion of the proper role of the Member States.³² In others, the concern was 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. Debate within the plenary Convention 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, reflecting the perennial debate on supranationalism versus intergovernmentalism.

Returning to the six dimensions of contrast drawn at the outset of the paper between traditional constitutionalism and new governance, virtually all of the features of traditional constitutionalism can therefore be seen 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 discussions within the ‘economic governance’ working group and which inspired the decision to establish a distinct working group on social policy; fourthly, the emphasis on the Charter of Rights as a constraint on the EU rather than a source of positive values for both the EU and the member states, together

31 See e.g. the literature cited at n. 17 above, and for further examples: N. Walker “European Constitutionalism and European Integration” [1996] Public Law 266, D.Grimm “Does Europe need a Constitution?” (1995) 1 ELJ 282, P. Craig, “Constitutions, Constitutionalism and the European Union”, (2001) 7 ELJ 125. For an analysis of the shortcomings of the ‘personificationist’ and ‘no-demos’ theses underlying different conceptions of political community and constitutionalism, see O. 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 (Oxford: OUP, 2001), O. Gerstenberg “The New Europe: Part of the Problem – or Part of the Solution to the Problem?” (2002) 22 O.J.L.S 563 and M. Wilkinson ‘Civil Society and the Re-imagination of European constitutionalism’ (2003) 9 ELJ 451.

32 For the final reports of these working groups, see the Convention website at n. 29 above.

with the concern to ensure that the Charter would lead to no increase in powers³³; 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 and international systems,³⁴ with variants such as ‘reflexive’, ‘responsive’, ‘network’ or ‘post-regulatory’ governance being debated and theorised,³⁵ its emergence and its implications for law in the specific context of the EU have in recent years been subject to intensive analysis.³⁶ 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.³⁷ However, they emphasise also 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 OMC is undoubtedly the best exemplar of the emergence, spread, generalisation and institutionalisation of a particular form of governance characterised by many of the features identified above. The

33 G de Búrca “The Citizenship and Fundamental Rights Clauses of the Draft Constitutional Treaty” in B. de Witte (ed.), *Ten Contributions on the Constitutional Treaty*, www.iue.it/RSCAS/Research/Institutions/EuropeanTreaties.shtml.

34 International examples of similar kinds of governance strategy to the EU’s OMC include the African Peer Review Mechanism established in the context of the New Partnership for African Development, (<http://www.nepad.com/> and http://www.au2002.gov.za/docs/summit_council/aprm.htm); the poverty reduction strategies (PSRPs) used by the IMF and the World Bank (<http://www.worldbank.org/poverty/strategies/>); and the trade policy review mechanism within the WTO context (http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm).

35 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. See also C. Scott “Regulation in the Age of Governance: The Rise of the Post-Regulatory State”, National Europe Centre Paper No. 100, Australian National University, 2003.

36 For a relatively early analysis, see N Lebessis and J. Paterson, *Developing new modes of governance in the European Union*, Commission Forward Studies Unit, Brussels, 1999.

37 J. Scott and D. Trubek ‘Mind the Gap: Law and new approaches to Governance in the EU’ (2002) 7 ELJ 1, together with the other essays in this journal special issue.

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 2000.³⁸ It is a policy approach which was first adopted under 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 first promoted this soft policy approach under the title of OMC, versions of it have been applied to a growing number of policy areas, including social exclusion,³⁹ pensions,⁴⁰ education,⁴¹ health care,⁴² and research and development⁴³ and it 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,⁴⁴ disability policy,⁴⁵ and liberalisation of the market in certain formerly public services such as telecommunications.⁴⁶ Fields such as environmental policy and sustainable development in which a broad range of hard and soft law instruments already exist have begun to be 'integrated' into the Lisbon strategy on economic and social governance,⁴⁷ and OMC-type strategies have also been proposed in areas where at present the EC has few or no legal powers, such as youth policy.⁴⁸

38 A bibliography of the burgeoning official and academic literature on the open method of coordination has very usefully been collected and made available on the website of the University of Wisconsin, Madison, at <http://eucenter.wisc.edu/OMC/>

39 Decision 50/2002 of Parliament and the Council establishing an EC Action Programme to combat social exclusion, OJ 2002 L 10/1.

40 See Stockholm European Council Conclusions of March 2001 and Laeken European Council Conclusions of December 2001, and the Joint Report by the Commission and Council on Adequate and Sustainable Pensions, March 2003.

41 COM(2002)629 Commission Communication on European Benchmarks in Education and Training: Follow up to the Lisbon European Council, and Council Conclusions of May 2003 on European Benchmarks in education and training, OJ 2003 C 134/3.

42 See Götenberg and Barcelona European Council Conclusions of June 2001 and March 2002, and the Joint Council and Commission Report on supporting national strategies for the future of health care and care for the elderly of February 2003, 6528/03.

43 See Brussels European Council Conclusions of March 2003, and COM(2003)226 Commission Communication on Investing in Research: An Action Plan for Europe.

44 COM(2001)387 and COM(2001)710.

45 See the Economic and Social Committee proposal for a Council Decision, OJ 2002 C 36/72, and the Committee's Opinion on "Integration of Disabled People into Society" OJ 2002 C 241/89.

46 See the original Lisbon European Council Conclusions of Spring 2000, and the Commission's subsequent eEurope Action Plans for 2002 and 2005.

47 See Götenberg European Council Conclusions of June 2001, and the Commission Communication COM(2001)264 and its 2002 Document, 'A European Strategy for Sustainable Development'. For critique, see the Economic and Social Committee opinion on 'The Lisbon Strategy and Sustainable Development' OJ 2003 C 95/54.

48 COM(2001)681 Commission White Paper on a New Impetus for European Youth.

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 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 normally blends the setting of guidelines or objectives at EU level with the elaboration of Member State action plans or strategy reports in an iterative process 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.⁴⁹ The most structured is probably the employment policy coordination process which is provided for in the EC Treaty, while the pensions process, in relation to which it was far less easy to reach initial agreement, is considerably lighter. 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 national policy.⁵⁰

There are four key elements to the process as it was enshrined in the employment policy OMC included in the Amsterdam Treaty, three years before the Lisbon summit first coined that descriptive term. The first is the setting of EU level guidelines for achieving certain goals/objectives, the second the establishment of benchmarks and specific indicators as a way of comparing best practices, the third the translation of the European guidelines into national (and regional) policies suited to the needs of different states and regions and the fourth entails monitoring, evaluation and peer review on a periodic basis. The Lisbon European Council summit 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 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.⁵¹ On the basis of these, the Council of Ministers, after consulting other actors, including an employment committee newly established for that purpose, evaluates what the states have done, and can 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, which forms the basis for the European Council’s drafting of the annual guidelines for the following year. As indicated above, the ‘recipe’ elaborated in the Treaty for employment policy is not the same as those used in the field of social inclusion or pensions (agreement on indicators, and the power to issue recommendations being two typically more contentious features), nor is it likely to be the

49 See the metaphor introduced by Frank Vandebroucke 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.

50 See the first joint report of the Commission and Council concerning the national strategy reports, n. 40 above.

51 See E. Szyssczak, “The New Paradigm for Social Policy: A virtuous circle?,” (2001) 38 *CMLRev* 1125 and J. Kenner, EU Employment Law: From Rome to Amsterdam and Beyond (Hart, 2003).

same as those proposed for areas such as immigration, industry, education, or health, but key elements are present in every OMC.⁵²

Returning to the six points of tension between the traditional model of constitutionalism and the features of new governance which were outlined at the outset, the OMC presents a clear contrast in virtually all respects. In the *first* place, the emphasis on limited competences is absent. The policy fields in which the OMC has been used or proposed tend to be those in which the EC Treaty either does not explicitly provide powers (e.g. youth policy) or provides a relatively weak policy competence (e.g. 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). In the *second* place, an attempt to define distinct and separate roles for the Member States and the EU respectively is 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. *Thirdly*, as far as policy segmentation is concerned, the OMC method constantly emphasises policy-linkage and the importance of integrating different policy considerations – so that the connections between economic policy, employment, social inclusion, pensions, immigration, environment etc., are expressly taken into account. Further, 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. *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. Instead, reference has been made in a number of instances to provisions of the Charter as relevant standards for the development of policy in the context of an OMC.⁵³ Indeed, the notion of justiciability as traditionally conceived seems ill-suited to the soft and fluid policy process of the OMC.⁵⁴ In the *fifth* place, the OMC involves not only representative governmental actors but is also intended – at least if the mandate of the Lisbon European

52 A useful indicator of these key elements can be found in the Convention's Social Europe Working Group proposal for a general treaty clause on OMC, 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". See CONV 516/1/03, to be found on the address at n. 29 above.

53 See nn. 83-85 below.

54 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 and J. Kenner (eds) Economic and Social Rights under the EU Charter of Fundamental Rights (Hart, 2003).

Council summit which coined the OMC is taken seriously - to involve local and regional actors, civil society organisations and others, although the precise mechanics of involvement are left for each Member State to ensure in accordance with its national laws and practices. And *finally*, although the OMC has encountered considerable criticism – both 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 interests, in particular at the expense of the European Parliament,⁵⁵ as well as for allegedly permitting the Europeanisation or centralisation of areas which have often previously been almost exclusively or largely within national control, such as welfare⁵⁶ - the process in fact is difficult to characterise either as a form of intergovernmentalism or supranationalization. It is quintessentially an example of complex multilevel governance which defies ready classification along traditional polar lines.

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

Arguably, some of the newer forms of governance in the EU, and in particular the OMC, may be understood in part as a reaction to certain of the constraints of the traditional constitutional model and forms. While clearly the trend towards new forms of governance is a broader international phenomenon, and there are many reasons for its emergence,⁵⁷ at least some of the specific reasons for the way in which it has emerged and spread in the context of the EU can be related to features of the EU's economic constitutional framework.

55 See the European Parliament's rejection of its committee's report on introducing an OMC in asylum policy, for this reason amongst others: A-5/257/2002, rejected by a vote of the plenary session on 24 September 2002. See also the cautionary note in the Smet Report "Analysis of the Open Coordination Procedure in the Field of Employment and Social Affairs, and Future Prospects" on the dangers of the Parliament being marginalised OMC processes: A5-143/2003.

56 See e.g. P. Syrpis 'Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination', European University Institute Law Department Working Paper 10/2002.

57 See nn. 34 and 35 above, and also the Review of Regulatory Policy in OECD Countries: From Interventionism to Regulatory Governance (OECD, 2002). More generally, M. Dorf and C. Sabel, *The Constitution of Democratic Experimentalism* (1998), and O. Gerstenberg and C. Sabel, *Directly Deliberative Polyarchy: An Institutional Ideal for Europe* in C. Joerges and R. Dehousse (eds) Good Governance in Europe's Integrated Market (Oxford, OUP 2002).

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.⁵⁸ In many policy fields and issue areas, member states have either not been willing to concede powers to the EC under the Treaty, or were willing to grant express power only in very circumscribed form. At the same time, various economic pressures together with the constraints of internal market policies have 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 and the growth and stability pact,⁵⁹ and the simultaneous restrictions imposed by internal market law on states' capacity to provide various kinds of support measure (industrial aid, reservation of public employment etc.) which would traditionally have been available to states to counter shocks caused to their economies by EMU. While the states were therefore hampered from adopting such action in the context of these EU 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 serious prospect. Quite apart from objections in principle, or on grounds of effectiveness, to centralising policies of this kind within such 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., 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 IGCs - have been unwilling, to the point of inserting specific exclusions into the Treaty, to cede power or 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 this areas. This is arguably because, in the first place, coordination strategies such as the OMC are voluntaristic in their reliance on willing

58 Indeed, the report of one of the UK parliamentary select committees which scrutinises EU proposals has suggested that it considers that the existence of some Treaty-based legal competence is required even for the establishment of an OMC in any given policy area: see in relation to the EU's education OMC, the 6th Report of the House of Commons Select Committee on European Scrutiny, 2001, para 13.8.

59 F. Scharpf, "The European Social Model: Coping with the Challenges of Legitimate Diversity" (2002) 40 JCMS 645, and in his earlier writing, e.g. "Democratic Policy in Europe" (1996) 2 ELJ. See more generally D. Trubek and J. Mosher, "New Governance, Employment Policy and the EU Social Model" in J. Zeitlin and D. Trubek, (eds) Work and Welfare in Europe and the US (OUP, 2003) 33 for an account of the economic and political constraints and incentives which led to the emergence of the OMC in employment.

participation by all states⁶⁰; secondly, the states retain a good deal of discretion in the operation of these strategies; thirdly, there are no legally binding rules and rarely any binding sanctions; 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 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 did agree in the Treaty to provide stronger legal powers for the EC, such as in immigration, asylum, the liberalisation of certain services sectors, and the environment,⁶¹ yet where something like the OMC method has been proposed or chosen for different reasons. These tend to be 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 appear not to have been 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 is a reaction in part 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 effects have been omitted or limited in specific ways. Further, in the case of issues such as the information society and aspects of electronic commerce, the rigidity and pace of the traditional lawmaking processes under the Treaties and their perceived lack of

60 Voting in the Council does however take place by qualified majority in the context of the Treaty-based economic policy and employment coordination processes, both in adopting guidelines under Articles 99 (2) and 128(2) EC respectively, and in issuing recommendations to a member state under Articles 99(4) and 128(4) EC respectively.

61 In EC environmental policy, although a formal OMC method has not yet been applied, the European Council at Göteborg declared that 'sustainable development' should be integrated as a third dimension into the Lisbon strategy alongside economic and social governance, see n 47 above. The environment is a field of European policy activity which perhaps best exemplifies the shift from older regulatory methods to new modes of governance. The EC over time was accorded 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 the 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. See J.Scott, EC Environmental Law, n 7 above, also "Flexibility, 'Proceduralization' and Environmental Governance in the EU" in G. de Búrca and J. Scott (eds), Constitutional Change in the EU: From Uniformity to Flexibility? (Oxford, Hart, 2000) 259, and A. Lenschow "New Regulatory Approaches in 'Greening' EU Policies" (2002) 8 ELJ 19.

adaptability have been suggested as reasons for trying the potentially more fluid, iterative and responsive OMC method instead.

As may already be evident from the discussion above, the emergence and spread of the OMC has met with very different responses. For some, it represents a weak and insufficient form of action for achieving the broad strategic goal articulated by the Lisbon summit: i.e. “to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion”.⁶² For others, it represents a troubling retreat from harder and firmer legal commitments to a more social Europe, relegating policies such as employment, social inclusion, pensions and health to the uncertain sphere of soft law, bypassing the traditional “Community method”⁶³ and sidelining the European Parliament and other conventional means of democratic scrutiny,⁶⁴ while others see it as a vehicle for the pursuit by “one particular economic policy coalition” of a US-type economic policy reform agenda where the Commission will be replaced by the European Council as the key actor.⁶⁵ Others still – in particular those Member States which do not welcome a European role in specific policy areas – who perceive it as a non-binding and therefore a weak form of governance, appear to welcome rather than regret these features precisely because of this weakness.⁶⁶

Others, however, have welcomed the appearance and spread of this new form of governance for a variety of reasons. For some, it represents a second-best way forward where the first-best solution of adopting binding legislative measures cannot be found.⁶⁷

62 For a recent reflection some years after the summit, see H. Martens, L. Allio and A. Bosco “The Lisbon Process – how to pick up momentum”, Challenge Europe, www.theepc.be.

63 See J. Goetschy, ‘The European Employment Strategy, Multilevel Governance and Policy Coordination: Past Present and Future’ in J. Zeitlin and D. Trubek, eds, Governing Work and Welfare in a New Economy: European and American Experiments (OUP, 2003). See also the report of the Convention’s Social Policy Working Group, n 52 above.

64 See n. 55 above.

65 D. Chalmers and M. Lodge “The OMC and the European Welfare State” LSE ESRC Centre for Analysis of Risk and Regulation, Discussion Paper No. 11, 2003. Contrast the argument of J. Jensen and P. Pochet who see in the OMC a forum within which a range of actors have sought to promote an alternative to mainstream neoliberal economics: “Employment and Social Policy since Maastricht: Standing up to EMU”, <http://www.ose.be/files/docPP/JJPPdec02.pdf>

66 See e.g. the first report of the House of Commons Select Committee on European Scrutiny, 2001 citing the disagreement of the UK Minister for Education with some aspects of the EC’s proposed action plan COM(2001)172 in the field of e-Learning, and quoting her response: “as these proposals are for open negotiation, are listed for Member State action, and are not binding on UK policy, it is not anticipated that they will cause difficulties”.

67 A number of the contributions to the collection, Manifesto Social Europe (Brussels, European Trade Union Institute, 2001) incline in this direction. For further discussion

From this perspective, the hope is that soft law is a precursor to further action and may well harden or ripen into a more binding set of commitments and prescriptions.

For many, however, new modes of governance seem inherently more suitable and more 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,⁶⁸ and not simply as a second-best to legislation when consensus cannot be reached. Thus Scott and Trubek have 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”.⁶⁹ Sabel and Cohen have argued 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.⁷⁰ Further, from such perspectives, new governance forms such as the OMC also represent something more substantive and ideologically significant than simply flexible regulatory tools: they form part of a new social vision for Europe and

see D. Trubek “The OMC and Alternative Paths to Social Europe: Making Sense of the Debate about “Hard and Soft Law”, paper delivered at the EUSA Biennial Conference, Nashville, March 27 2003.

68 See the UK House of Lords Select Committee on the European Union, Second Report 2001-2, “Open Co-ordination has proved a highly effective alternative to regulation in the past and we are pleased that it retains a high profile in the current Social Agenda... We feel that the open co-ordination method provides the ideal vehicle with which to take forward an issue such as social exclusion, since it allows the benefits of co-operation and co-ordination to be reaped while respecting national diversity.”

69 J. Scott and D. Trubek ‘Law and New Approaches to Governance in the EU’ (2002) ELJ.

70 C. Sabel and J. Cohen ‘Sovereignty and Solidarity in the EU’ in J. Zeitlin and D. Trubek, eds, Governing Work and Welfare in a New Economy: European and American Experiments (OUP, 2003). See also C. Sabel and J. Zeitlin “Networked Governance and Pragmatic Constitutionalism: The New Transformation of Europe” (2003), available online at <http://wiscinfo.doit.wisc.edu/eucenter/OMC/>

indeed elsewhere, capable of combining the needs of a competitive modern economy with a commitment to social justice.⁷¹

6. The problems of new governance – and the possibilities for constitutional reform?

In this final section some of the problems of this new mode of governance will be outlined, and the possibility of addressing them in the light of other attempts to ‘renew’ European constitutionalism in recent years will be considered.

An optimistic reading of some recent developments would suggest that the traditional model of EU constitutionalism depicted earlier with its emphasis on entrenched economic rights, limited powers, and formal organs of government is gradually being challenged by demands for and the emergence of a form of post-national constitutionalism which is founded on the notions of participation, equality and self-government.⁷² This emergence – even if still in its infancy - can be perceived in a variety of developments over the past decade. These include the introduction of the notion of EU citizenship into the Treaty in 1993, the mobilization and gradual recognition of civil society as a voice in the European policy debate,⁷³ the expansion both politically and judicially of the principle of transparency,⁷⁴ the gradual process of de facto accession of the EU to the European Convention on Human Rights,⁷⁵ the drafting (via a new and reasonably open process) of an EU Charter of Fundamental Rights apparently based on the notion of equal human dignity and containing commitments to economic and social as well as civil and political rights⁷⁶, and the challenge posed to the traditional IGC method of treaty revision by the Convention method. Thus the Convention itself, even while reflecting strong elements of the traditional constitutional model in its focus, nonetheless also represents by its very

71 See e.g. M. J. Rodrigues ‘The Open Method of Coordination as a New Governance Tool’ (2001), F. Vandebroucke “Sustainable Social Justice and Open Coordination in Europe” in G. Esping-Andersen, D Gallie, A. Hemerijck, and J. Myles (eds) Why We Need a New Welfare State (Oxford, OUP, 2002), C. de la Porte and P. Pochet, Building Social Europe Through the Open Method of Coordination (Brussels, P.I.E, Peter Lang SA, 2002), J. Zeitlin and D. Trubek (eds) Governing Work and Welfare in a New Economy: European and American Experiments (OUP, 2003), and the report on ‘Connecting Welfare Diversity within the European Social Model’ prepared by a group of academic experts for the Greek Presidency’s Conference on “The Modernisation of the European Social Model: EU Policies and Instruments” at Ioannina, 21 May 2003.

72 See e.g. n. 17 above.

73 N. 22 above.

74 See S. Peers, ‘From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU’, in V. Deckmyn (ed.), Increasing Transparency in the European Union (Maastricht EIPA, 2002).

75 R. Harmsen ‘National responsibility for EC acts under the European Convention on Human Rights: recasting the accession debate’, (2001) 7 EPL 625

76 See n. 19 above.

establishment, composition and functioning, a challenge to the state-dominated, diplomatic-bargaining style of polity-making exemplified by the IGC, and represents the possible beginnings of a different constitutional approach.⁷⁷

Below, three problems of the emerging forms of new governance exemplified by the OMC will be outlined, with some reflections on how elements of a renewed model of European constitutionalism might offer ways forward in addressing these. The problems concern first, the risk that built into the very edifice of the OMC is a subordination of social policy priorities to the imperatives of economic policy coordination; secondly, the role of rights within the OMC, and thirdly the genuineness of the commitment to participation and transparency.

The primacy of economic policy coordination

The first problem differs somewhat from the other two discussed below, and concerns the continuing neo-liberal emphasis of the EU project as a whole. To be more specific, 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. The fear is that rather than encouraging, by virtue of its new methodology and its aim of renewing Europe's social model, a challenge to and a disruption of this hierarchy, the latter is simply mirrored within the political dynamics and operation of the OMC processes. Such a hierarchy obviously weakens the commitment of the OMC process to policy-integration and linkage, and constrains the ways in which social goals can be pursued within the OMC.

The economic policy coordination process is the most powerful of the existing OMC processes, and is anchored within the Treaty, including something close to a sanction for states which breach the guidelines which are drawn up annually by the Council of Finance Ministers. Further, other OMC processes must be 'consistent with' these Broad Economic Policy Guidelines (BEPG), implying a subordination of the former to the latter.⁷⁸ 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. There have been a number of proposals for 'streamlining, synchronising

77 L. Hoffman "The Convention on the Future of Europe: Thoughts on the Convention Model", Jean Monnet Paper 7/2002, www.jeanmonnetprogram.org/papers/02, K Lenaerts and M. Desomer "New Models of Constitution-Making in Europe: The Quest for Legitimacy" (2002) 39 CMLRev. 1217, and J. Shaw, "Process, Responsibility and Inclusion in EU Constitutionalism" (2003) 9 ELJ 45.

78 This issue was debated within both the Economic Governance and the Social Europe Working Groups of the Convention, without consensus being found in either group on whether or how this should be changed. For the final reports, see CONV 357/02 and CONV 516/1/03 respectively, and in particular paragraphs 51-51 of the latter.

and coordinating' the various processes, in particular for coordinating the social protection OMCs with those of employment and economic policy, but these have not directly addressed the question of the perceived hierarchy of the economic policy process.⁷⁹

While this problem to some extent simply replicates the original (im)balance in the EC's economic constitution, one modest means of addressing it in a way that could support the model of integrated policy making represented by the OMC, would be to introduce an "integration clause" into the constitutional treaty, so as to weave the requirement of consideration of the aim of social protection throughout its other policies and powers, as has been done under the existing treaties for gender equality and environmental protection. Such a proposal, which would entail a further symbolic and legal move away from the narrower economic constitutional model enshrined in the original EC treaty, was put forward by the Belgian minister for social security.⁸⁰ He suggested giving constitutional status to such a "mainstreaming" principle for social protection, by imposing an obligation on all EC institutions and all OMC actors to integrate consideration for social protection requirements into their formulation of policy. His proposal was not however adopted by any Working Group nor in the draft constitutional treaty produced by the Convention, which indicates that the political divisions over whether any particular economic and social model should be expressed in Europe's new constitutional document remain deep.

These differences of opinion were evident in the lively Convention debates over how the aims and objectives of the EU should be expressed in the draft constitutional treaty, in order to reflect an appropriate balance between economic competitiveness and growth on the one hand, and social protection and solidarity on the other. The mixed wording eventually adopted by the Convention in Article 3 of the draft treaty commits the EU to "the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress", leaving the priority between these different objectives to be resolved within the political process.⁸¹ Thus, while inclusion of the phrase 'social market economy' may be seen by some as a victory by comparison with the reference to an "open market economy with free competition" in Article 4 of the EC Treaty, it remains to be seen whether the dominance in practice of the neo-liberal economic model which underpinned much of the previous development of the EC and EU, will persist. Certainly, it cannot be said that the draft constitutional treaty embodies an entirely new constitutional vision which breaks free of the economic constitutional legacy of the past, even if it opens up a number of

79 See recently COM(2003)261 "Strengthening the social dimension of the Lisbon strategy: Streamlining Open Coordination in the field of social protection".

80 F. Vandenbroucke, n.49 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"

81 CONV 850/03, Article I-3(3).

interesting possibilities for future evolution. Consequently, as far as the OMC is concerned, institutional design and input remains very important to the political strength and priority of the various processes and substantive goals within the overall Lisbon strategy.

The role of rights

The second problem concerns the role of rights within the OMC. One of the virtues of OMC which has been identified is its apparent flexibility and non-rigidity. In other words, rather than prescribing outcomes or defining specific results and setting them in law, it is essentially a process: through the procedures of information exchange, identification of best practices, reporting, monitoring and iteration, it is anticipated that learning will take place, and that satisfactory policy outcomes will emerge over time.

However, one of the fears expressed – and which has given rise to opposition to the prospect of applying the OMC to areas such as immigration or asylum policy where vulnerable individuals and groups are particularly concerned⁸² – is that there is no mechanism for checking against the dangers either of a race to the bottom, or an undesirable slippage of protection, in respect of certain fundamental values. The question is therefore whether there is a way for constitutional values – for traditionally conceived rights - to be reflected and protected within OMC-type processes other than as flexible policy standards which are capable of being revised in any direction.

One proposal in this context is that the OMC method could be combined with a more familiar constitutional instrument in the form of the Charter of Fundamental Rights. While within the traditional model of EU constitutionalism depicted above, fundamental rights have generally been presented as judicially enforceable negative constraints on EU action, the Charter of Rights – which currently exists in non-binding form, but will in all likelihood be incorporated into a new constitutional treaty if the latter is adopted - can also be more broadly regarded as an expression of the fundamental values which underpin the polity, and which ought to be integrated within all of its policies. While there is some evidence of the Charter and other human rights instruments being cited as reference-points within certain OMC processes, this has so far been ad hoc and uneven. One example was the insistence of the European Parliament that reference be made to the European Social Charter and the EU Charter of Fundamental Rights in relation to the right to protection against poverty and social exclusion, in the decision establishing an

82 Some of these concerns were expressed in the report of the Committee on citizens' rights, justice and home affairs of the European Parliament, Report A5-0257/2002, (including most strongly in the dissenting minority opinion) on the application of the OMC to asylum policy, and in the Parliamentary debate on that report on September 23-24 2002. A majority of the Parliament in the plenary session however voted against the adoption of the report and against the application of the OMC in this field. See also some of the concerns expressed in the opinion of the Economic and Social Committee that the OMC could replace or delay the adoption of legislation in this field: OJ 2002 C 221/49.

action program as part of the OMC on social inclusion.⁸³ Similarly, in its communication on the long-term objectives of European health care policy (not yet the subject of an OMC proper although initiatives have begun in the field of health care and care for the elderly⁸⁴), the Commission referred to accessibility of health care for all as an objective flowing from the guarantee in the Charter of Rights of access to preventive health care and medical treatment, as an essential element of human dignity.⁸⁵

More specifically, a systematic and constructive interplay between the rights set out in the Charter and the OMC has already been proposed.⁸⁶ There are at least two different ways in which such an interplay could be imagined. The first is that the OMC process itself could be used as a way of giving concrete contextual meaning to the various rights set out in the Charter.⁸⁷ Thus, rather than thinking in purely court-centric ways about the Charter – in particular since the compromise reached on the Charter provisions of the draft constitutional treaty seems to re-introduce the non-justiciability of certain Charter provisions⁸⁸ - the OMC with its process of information sharing, comparison, and benchmarking of best practices could constitute a suitable vehicle through which the general and abstract guarantees of the Charter – e.g. the rights to education, access to health care, asylum etc. - are given flesh in particular settings and in the context of particular policies. Such a proposal was in fact made recently by the network of legal experts on human rights established by the Commission in 2002, in their first annual report on fundamental rights in the EU, advocating the establishment of ‘an open method of co-ordination in implementing the fundamental rights set out in the Charter’.⁸⁹ Whether this proposal takes flesh or not, and what kind of effects such a process may have will depend very much, of course, on the resources which are devoted to the exercise, but in principle it seems a promising way forward.

83 Decision 50/2002/EC of the European Parliament and Council.

84 N. 42 above.

85 COM(2001)723.

86 See N. Bernard ‘Economic, Social and Cultural Rights in a Multi-level legal Order’, in T. Hervey (ed) 2003, forthcoming; 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 European Union: Law Politics and Society*, Volume III, (Oxford, 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.

87 N. Bernard, *ibid*: “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.” Also C. Sabel and J. Zeitlin, n. 70 above.

88 See CONV 850/03, Article II-52(5). For comment see G. de Búrca “Fundamental Rights and Citizenship” in B. de Witte (ed) *Ten Reflections on the Draft Constitutional Treaty*, http://europa.eu.int/futurum/documents/other/oth020403_en.pdf.

89 [Http://europa.eu.int/comm/justice_home/cfr/doc/rapport_summary_2002_en.pdf](http://europa.eu.int/comm/justice_home/cfr/doc/rapport_summary_2002_en.pdf), published in March 2003.

Further, while the process of benchmarking and revisable standard-setting could be seen as a way of giving concrete contextual meaning to the abstract rights, the latter in turn could operate as ideal norms in relation to which the outcome of the process would be appraised, and which could be used to stimulate reform or revision of the standards which emerge when the outcomes are considered substantively unsatisfactory.⁹⁰ The institutional mechanisms for operationalising this proposal require further thought, but the essential argument is that a judicial monitoring role can readily be imagined, without necessarily running the risk of undermining the flexibility of the OMC by subjecting it to an ultimate judicial determination of appropriate outcomes. This kind of role is not entirely unfamiliar to the European Court of Justice. In a recent case concerning not the Charter of Rights, but another kind of non-binding legal guideline, the ECJ ruled that even if the guidelines were not formally legally binding, the decision-maker had to show that they were taken into account and adequate reasons had to be given where there was a departure from the criteria for guidance laid down.⁹¹ In the somewhat different context of the Charter and the OMC, the judicial role could at least involve imposing a Rawlsian public-reason type of obligation to demonstrate that the rights specified in the Charter had been taken into account within the OMC process, to indicate how this was done, and to explain in what way the outcome was considered to satisfy the normative requirements of the right in question.⁹²

Participation

A third problem of the OMC concerns the genuineness of its commitment to participation and transparency.⁹³ Although one of the attractive features of this new form of

90 For a useful discussion in an analogous context of how to conceive the appropriate role of courts in relation to compliance with general equality norms in the context of complex discrimination cases, see S. Sturm “The Role of Courts in Complex Discrimination Cases” (forthcoming).

91 C-378/00, *Commission v Parliament and Council* [2003] ECR I-937, concerning the non-binding guidelines as to the choice of comitology committee contained in Council Decision 1999/468/EC.

92 In his recent article “The Constitution, Social Rights and Liberal Political Justification” (2003) 1 *International Journal of Constitutional Law* 13-34, F. Michelman argues that the constitutionalization of social rights need not necessarily fall foul of majoritarian or other arguments, if the constitutional guarantee of social citizenship were simply understood as imposing a public-reason requirement on all those involved in public decision-making to demonstrate how legislative or other outcomes are consonant with a rationally acceptable constitutional interpretation of this commitment.

93 See for a discussion of different notions of deliberation and democracy underpinning the call for participation, P. Nanz and C. de la Porte “OMC – an important tool to improve transparency and democratic participation? The case of pension reform from the perspective of deliberative democracy”, paper delivered at the workshop on New Governance and Constitutionalism, Harvard Law School, February 28 2003; also J. Zeitlin “Opening the OMC”, Presentation at the Committee of the Regions Conference on “The OMC: Improving European Governance?” 30 September 2002, and C. de la

governance is its alleged openness to greater range of non-traditional actors, this seems in practice to vary a great deal from one policy sector to another.⁹⁴ The strongest of the existing 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,⁹⁵ 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 make their concerns heard within those contexts, to influence the development of objectives and indicators, and to argue for the setting of targets.⁹⁶ In the employment policy OMC, on the other hand, the social partners – management and labour - are involved, but again the extent of this involvement varies from state to state. Further, the involvement of local and regional actors has so far been patchy, something which the Commission has recognised and has attempted to address.⁹⁷ However, the Member States clearly do not all share this commitment to greater participation, as is evident from the way in which the Commission’s proposal for a

Porte and P. Pochet “The Participative Dimension of the OMC”, paper delivered at the conference on “Opening the Open Method of Coordination”, EUI Florence, 4-5 July 2003.

94 According to de la Porte and Pochet, *ibid.*, the social OMCs in particular have two dimensions, (1) political bargaining at European level against the ECOFIN’s liberal economic line and (2) the search for better rules of governance to modernise national social models, and they argue that the participatory element within a given OMC will depend on which of these two is prioritised.

95 See D. Hodson and I. Maher “The Open Method as a New Mode of Governance: the Case of Soft Economic Policy Coordination” (2001) 39 JCMS 719.

96 See however for a cautious assessment, K. Armstrong, n 86 above.

97 See on the 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. Also J. Zeitlin “The OMC and the Future of the European Employment Strategy”, presentation prepared for the mini-hearing of the Employment and Social Affairs Committee of the European Parliament on the first five-year evaluation of the Employment Guidelines, July 8 2002, available on <http://eucenter.wisc.edu/OMC/>

decision on guidelines for the employment policies of the Member States⁹⁸ was amended and ultimately adopted.⁹⁹

There has also been a more classic criticism of the OMC by the European Parliament on the ground of its own exclusion from participation, since, of all three of the traditional EU actors, it is the least involved within OMC processes. However, a number of Parliamentary reports and resolutions, although critical of aspects of the OMC, have nonetheless supported its use subject to certain reforms and amendments.¹⁰⁰ The gist of the criticisms is that the OMCs lack democratic legitimacy, and that binding legislative procedures would be preferable not least because the latter ensure a degree of accountability and democratic input through the involvement of the European Parliament. This argument draws on 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 which might be better suited to the reality of a vast and complex multi-level European system. From the latter perspective, however, although Parliament ought to have a greater involvement in the OMC processes than it does at present, consultation of the Parliament provides only a certain limited form of representation, which should be supplemented by other more direct forms of functional, territorial and civic participation.

One of the obvious ways in which the institutional weaknesses of the OMC, including the lack of consistency in relation to participation, could be addressed would be by making provision for the OMC as a distinct instrument or mode of governance within the constitutional treaty, and subjecting it clearly to certain broad constitutional requirements and principles. While at first glance, this might appear to be simply a way of transforming new governance into classic constitutionalism by rigidifying it and reducing it to binding legal rules, such constitutional inclusion need entail no more than an outline

98 COM(2003)176.

99 The Commission's proposal included a section on promoting better governance, emphasising the need to ensure close involvement of relevant parliamentary bodies in the implementation of the guidelines, that all main stakeholders including civil society should play their full part in the EES, and that participation of regional and local actors in the development and implementation of the guidelines, together with the strong involvement of the social partners, should be promoted. The Council, however, downgraded the reference to participation of civil society and of national and regional parliamentary bodies, emphasising instead the need to 'fully respect national traditions and practices' and the responsibility of the Member States to implement the guidelines. The mandatory language of the Commission proposal was dropped and the final wording specifies only that national parliamentary bodies and other actors "have important contributions to make": Council Decision 2003/578, OJ 2003 L 197/13.

100 See in particular the Smet Report, n.55 above, and also the provisional Resolution B5-282/2003, T5-268/2003 on the application of the OMC to other fields such as media, youth, culture and sport. Compare the range of the views expressed in the plenary Parliamentary debate and vote on the report on the application of the OMC to asylum policy, n 82 above.

of the key features of the OMC process in the treaty, without further prescriptive detail for any particular policy area, but including, crucially, the fundamental requirements of full participation and transparency.

There has been great reluctance to be prescriptive about participation within OMC processes, both because of the danger of rigidifying the procedure and undermining the perceived value of its flexibility,¹⁰¹ but also because of sensitivity to the different constitutional systems and practices of regionalism within different member states.¹⁰² But the choice between ensuring a commitment to full participation and avoiding undue prescriptiveness is a false one. One way of strengthening both the “transparency and democratic character” of the OMC would be to include within the constitutional treaty explicit *requirements* for transparency and broad participation in all OMC processes.¹⁰³ For example, an obligation could be imposed to ensure that the OMC is conducted *as openly as possible in accordance with the principle of transparency*; and to ensure *the fullest possible participation of all relevant bodies and stakeholders*, including social partners, civil society organisations, national parliaments, and local/regional authorities, in accordance with national laws and practices. A similarly limited but significant judicial role, comparable to that suggested above in relation to triggering consideration of the Charter of Rights, could apply to ensuring that these requirements of participation and transparency have been observed in any given OMC context. And while there are difficult and complex questions to resolve about who the relevant actors and participants should be in any given policy process, a fundamental constitutional requirement would at least be a first step in that direction.¹⁰⁴

Unfortunately, however, none of the four Convention working groups which recommended that the OMC should be recognised and anchored in the constitutional treaty,¹⁰⁵ went so far as to propose a constitutional requirement of full participation, although the Economic Governance group report did acknowledge the importance of

101 See the report of the Social Europe Working Group, n. 52 above.

102 See nn. 98-99 above.

103 See G. de Búrca and J. Zeitlin “Constitutionalising the Open Method of Coordination: What Should the Convention Propose?” Centre for European Policy Studies Policy Brief, 2003, www.ceps.be. In a more modest proposal not requiring treaty change, Parliament Resolution B5-282/2003, T5-268/2003 called for an interinstitutional agreement to be adopted laying down rules governing the selection of policies for OMC and providing for the equal involvement of the European Parliament.

104 For a recent discussion of the problem of identifying relevant stakeholders and interests, in the context of the kind of role courts might properly play in relation to experimentalist regulation, C. Sabel and W. Simon, “Destabilization Rights: How New Public Law Litigation Succeeds” (Harvard Law Review, forthcoming; online at www.yale.edu/law/law/papers/law-simon.doc)

105 These were the Working Groups on Economic Governance, Social Europe, Simplification, and Complementary Competences respectively.

such participation within OMC processes.¹⁰⁶ In this respect, however, the outcome of the Convention in relation to the OMC was a considerable disappointment.

Initially, despite the positive recommendations of the four working groups, one of the Vice-Presidents announced, following a debate in the plenary and the circulation of draft proposals for a general constitutional clause governing OMC, that the Praesidium had decided against including any such provision, in part because it “feared that a new general article on that method might weaken rather than strengthen the possibility of having recourse to it and that such an article might introduce some confusion as regards the delimitation of competences between the Union and the Member States”.¹⁰⁷ The Praesidium also argued that there was already sufficient provision for the coordination of national policies in the draft articles of the treaty which provide for ‘supporting action’ by the EU.¹⁰⁸ However, although the categories of competence listed in the draft treaty include the competence to coordinate Member State policy,¹⁰⁹ no stipulation is made as to how these coordinating powers are to be exercised. Article I-14 refers to the coordination of economic, employment and – more weakly - social policies, which are of course the three principal areas in which existing OMC processes operate. The more detailed provisions which correspond to the current provisions of the EC Treaty on economic policy and employment are then contained in part Three of the draft constitutional treaty, but these also contain no new provisions governing participation or transparency.¹¹⁰

One final last-minute concession was made, however, between the Thessaloniki European Council meeting on June 20 2003 and the final meetings of the Convention on 4th and 10th July,¹¹¹ to those Convention members and participants who continued to insist on a broader inclusion of OMC within the constitutional treaty. This concession involved adding mention of specific forms of coordination in the fields of research, social policy, public health and industry, which elaborate somewhat on the provisions currently contained in the EC Treaty concerning coordination in these fields, by referring expressly to some of the principal characteristics of the OMC method (although without naming them as such)¹¹²: i.e. “the establishment of guidelines and indicators, the organization of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation” and adding a weak reference to the role of the European Parliament, viz. “the European Parliament shall be kept fully informed”.

106 CONV 357/02, available on the website cited at n. 29 above.

107 See the statement of Jean-Luc Dehaene, during the plenary session of April 3-4, 2003, CONV 677/03. This decision was confirmed in the plenary of 7-8 May 2003.

108 These are now mentioned in Article I-16 of the draft treaty, CONV 850/03.

109 See Articles I-11(3) and (5), elaborated in Articles I-14 and I-16, *ibid*.

110 Articles III-71 and III-100, *ibid*.

111 See CONV 849/03 for a brief explanation of the changes, and CONV 848/03 which shows the last-minute amendments to the draft treaty in bold.

112 See Articles III-107, III-148, III-179 and III-180, CONV 850/03.

However, in keeping with the decision of the praesidium to reject the call for a general OMC clause in the treaty, these specific sections were added only in the fields of social, health, research and industry policies, and no provision relating to participation and openness was made, nor to the institutional structures and mechanisms for the operation of the OMC. Indeed, the phrase “open method of coordination” appears nowhere in the entire draft constitutional treaty concluded by the Convention in July 2003.¹¹³

7. Conclusion

This article began with a deliberately stylised but nonetheless stark contrast between the traditional model of EU constitutionalism, premised on a functionally limited system based on entrenched market-liberalisation norms and administered by a set of formal EU institutions, and the existence of a dense and complex system of multilevel governance spreading into all fields of policy. This contrast was focused by examining the emergence of the new form of governance known as the OMC, against the background of the activities of the Convention on the Future of Europe, in which many of the tensions inherent within the contrast were brought into sharp relief. The emphasis on the need to delimit and clarify the respective competences of the EU and the Member States, and to underscore and safeguard the traditional Community legislative methods, militated in the end against an open embrace within the new constitutional treaty of the OMC. With its quintessentially multilevel, soft and ambiguous legal character, the OMC was ultimately absorbed, following a last-minute compromise, in a partial, piecemeal and silent way into the existing EC treaty framework. The opportunity to examine and address its weaknesses and its strengths in a more overt and robust way, including both its procedural promise as a novel mode of multi-level governance for Europe, and its substantive promise as a means of strengthening the European social model and striking a better balance between economic and social goals within the EU framework, was not taken. If the outcome of the Convention and the IGC on the draft treaty are taken as the markers of Europe’s new constitutional settlement, and as a moment of *finalité*, then the constitutional place of the new mode of governance known as the OMC seems destined to remain at best ambivalent and contingent. But if we see the Convention and the constitutional-treaty drafting process instead only as a particular point in a longer-term, deeper and organic process of EU constitutional reform and renewal, then it is rather time which will tell whether the OMC in practice fulfils the potential which is claimed for it.

113 CONV 850/03. Nonetheless, while the solution adopted does not expressly provide for the possibility of an OMC being used in other policy fields, this omission seems unlikely to prevent their emergence, as has happened in the past, on an informal non-Treaty basis in other fields.