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The EU's Schizophrenic Constitutional Debate:
Vertical and Horizontal Decentralism in European
Governance

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This Working Paper has been written in the context of the 2003-2004 European Forum programme on 'Constitutionalism in Europe', the overall direction and coordination of which was carried out by Professor Bruno de Witte, with Dr. Miriam Aziz as the scientific coordinator.

In order to preserve a clear focus within this broad theme, the scope of the Forum was limited to four distinct but complementary themes, each of which had its own coordinator. Theme 1: 'The Idea and the Dynamics of the European Constitution' was coordinated by Professor Neil Walker; Theme 2: 'The 'East' Side of European Constitutionalism' was coordinated by Professor Wojciech Sadurski; Theme 3: 'The Constitutional Accommodation of Regional and Cultural Diversity' was coordinated by Professor Michael Keating; and Theme 4: 'The Market and Countervailing Social Values in the Constitution of Europe' was coordinated by Professor Martin Rhodes.

Abstract

Normative discourses on the European institutional set-up have paid attention to both vertical and horizontal decentralism. Decentralism refers to the respect of the autonomy of lower or smaller decision-making levels, the procedures privileging these decision-making levels (subsidiarity), and the involvement of these decision-making units in the case that policy-making is (partially) defined (and implemented) at a more central level. Vertical decentralism indicates these processes with regard to territorial decision-making levels and actors. Horizontal decentralism consists in these processes with regard to functional levels and actors, in particular civil society organisations and private organisations.

This paper argues that the vertical and horizontal dimension of decentralism have always been dealt with separately within the European constitutional debate. For long, the debate has focused on issues of territorial representation, and as far as it has paid attention to decentralism this has been interpreted in vertical terms. It is only by the end of the 1990s that the normative discourse on the European construction starts also to pay attention to horizontal decentralism. However, normative arguments on vertical decentralism meet hardly ever with those on horizontal decentralism, as can still be illustrated by the current constitutional debate, with the Convention-Constitutional Treaty debate on the one hand, and the (follow-up to the) White Paper on European Governance on the other hand. Institutional interests may explain this separation of discourses.

However, in practice European governance is characterised by interactions between public and private actors at multiple territorial levels. Therefore, the vertical and the horizontal dimensions of decentralism are intertwined. As a consequence, the normative debate on the future of the European polity should not deal with these issues in complete isolation from one another.

Keywords

1. Introduction*

In particular since the 1990s, Community discourses and institutional reflections have made reference to ideas of subsidiarity, partnership, dialogue, decentralisation, participation and autonomy of lower or smaller decision-making levels or units. These normative discourses on 'decentralism' have been applied to multi-level governance in territorial terms (European, national, regional and local level) and to the role of civil society and private organisations in European governance.

I will use in this paper 'decentralism' as an encompassing term to avoid the connotations of more established concepts in the European governance debate, such as subsidiarity or partnership. Decentralism refers to the respect of the autonomy of lower or smaller decision-making levels, the procedures privileging these decision-making levels (subsidiarity), and the involvement of these decision-making units in the case that policy-making is (partially) defined (and implemented) at a more central level. Vertical decentralism indicates these processes with regard to territorial decision-making levels and actors. Horizontal decentralism consists in these processes with regard to functional levels and actors, in particular civil society organisations and private organisations.[1] The concept of 'decentralism' is preferred to that of 'decentralisation' which has been more commonly identified with processes of administrative or political reform from more central to more decentralised State structures. 'Decentralism' does not assume the *existence* of a centralised polity which is then reformed in a decentralising way, but refers to the normative encouraging of decentralising processes taking an abstract centralised public authority (in our case at the European level) as reference point. Decentralism is part of the normative institutional debate that we are used to describe as constitutionalism. It refers to the normative favouring of the autonomy and competence of lower or smaller units, as well as their involvement in more central decision-making.[2] It is thus a very broad concept and, as this paper will show, not all its aspects need to be (equally) part of the European constitutional debate.[3]

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* I would like to thank the Forum participants, in particular Michael Keating, for their comments, as well as two anonymous referees.

1 Concepts such as interest groups, NGOs, civil society organisations, profit and non-profit organisations are used with different connotations. In certain cases, discourses on horizontal decentralism are aimed to apply to some of them and not to others.

2 It may be useful here to indicate how vertical and horizontal decentralism relate to the two types of multi-level governance identified by L. Hooghe and G. Marks, 2002. 'Types of Multi-Level Governance', *Cahiers Européens de Sciences Po*, No. 2002/3. Hooghe and Marks (p. 8) describe Type I multi-level governance as a limited number of general purpose jurisdictions at a limited number of levels—international, national, regional, meso, local. They bundle together multiple functions, including a range of policy responsibilities, and in many cases, a court system a representative institutions. The boundaries of such jurisdictions do not intersect and these territorial jurisdictions are intended to be, and usually are, stable for periods of several decades or more, though the allocation of policy competencies across jurisdictional levels is flexible. Type II multi-level governance is composed of specialized jurisdictions. The number of such functionally specific jurisdictions is potentially huge, the scales at which they operate vary finely and there is no great fixity in their existence. One can argue that vertical decentralism favours Type I multi-level governance. Yet, there is no necessary relation between horizontal decentralism and Type II multi-level governance. For sure, when horizontal decentralism favours the autonomy of private actors and functional subsidiarity this will contribute to an increase of functionally specific jurisdictions and to Type II multi-level governance. Yet, horizontal decentralism might also merely favour the participation of civil society actors in public decision-making, which can perfectly be realised in Type I multi-level governance. The other way around, the concept of Type II multi-level governance does not necessarily imply horizontal decentralism. Functionally specific jurisdictions may be limited to public authorities. As Hooghe and Marks argue, we can think about a 'governance system where each citizen […] is served not by 'the' government, but by a variety of different public service industries' (p. 11). It would be difficult, though, to imagine a Type II multi-level governance with many functionally specific pieces if not part of such functionally defined jurisdictions were private rather than public governance structures. However, while Hooghe and Marks 'recognize the significance of distinguishing between public and private actors' this dimension is said to be 'orthogonal' to their own dichotomy. Vertical-horizontal decentralism should thus not be identified with Type I and Type II multi-level governance. In addition to the fact that horizontal decentralism takes the public-private divide as central focus, the idea of decentralism is more related to the level of normative discourse, whereas the concepts of Hooghe and Marks are primarily of an analytical

Normative discourses on the European institutional set-up have paid attention to both vertical and horizontal decentralism. Yet, the main aim of this paper is to indicate how these two dimensions of decentralism have always been dealt with separately. Section 2 of this paper analyses how the (institutional) discourses on vertical and horizontal decentralism have developed. It looks for an explanation for the dichotomous nature of the discourse and analyses how this two-track approach is still present in the current constitutional debate. Section 3 confronts this normative debate with the reality of European governance. In practice, European governance is characterised by interactions between public and private actors at multiple territorial levels. Therefore, the vertical and the horizontal dimensions of decentralism are intertwined. As a consequence, the normative debate on the future of the European polity should not deal with these issues in complete isolation from one another.

2. Decentralism and the Two-Track Normative Debate on EU Legitimacy

Although the issue of the 'democratic deficit of the EC/EU' is not a recent entrant on the European political agenda,[4] it has gained particularly in importance since the end of the 1980s. The debate has focused on issues of territorial representation, and as far as it has paid attention to decentralism this has been interpreted in vertical terms (2.1.). It is only by the end of the 1990s that the normative discourse on the European construction starts also to pay attention to horizontal decentralism, as is exemplified in the governance debate (2.2.). However, normative arguments on vertical decentralism meet hardly ever with those on horizontal decentralism, as can still be illustrated by the current constitutional debate (2.4.). Institutional interests may explain this separation of discourses (2.3.).

2.1. *The Democratic Deficit Debate and Vertical Decentralism*

As long as the EC/EU could be considered a 'special purpose association',[5] to which a limited amount of well-defined functions were delegated, the 'centre' of the European construction was not developed enough to make 'decentralism' a normative concern. With the steady increase of decision-making power at the European level, the initial concern about the 'democratic deficit' of the EC focused on the need for popular involvement via the European Parliament, to be directly elected. The parliamentary model has been the dominant normative framework to think about the legitimacy of the European polity,[6] leading gradually to increased powers for the European Parliament; namely, budgetary and legislative powers, and control over the Commission. However, while the political discourse on democratic involvement has been most explicit with regard to the European Parliament, the direct parliamentary representation of European citizens at the European level has always been counterbalanced by the remaining central position of the Member States in the European construction. This 'decentralist concern' finds expression in the important role of the Council of Ministers, and more recently the formalisation of the role of the European Council. With the gradual increase of the co-decision procedure and the strengthening of the Parliament's position in that procedure the EU comes ever closer to a bicameral parliamentary democracy,[7] close to the institutional system of a

(Contd.) ————————————

nature. Yet, as far as this paper will confront the European constitutional discourse with the reality of European governance, and as far as Hooghe and Marks also link their concepts to normative biases, the analyses will partially meet.

3   In particular it will result from this paper that the idea of horizontal decentralism has been defined mainly in terms of the participation of civil society and private actors into (more) central European policy-making, whereas the recognition of the autonomy of private governance mechanisms or functional subsidiarity has been nearly entirely absent in the debate.

4   R. Hrbek, 1995. 'Federal Balance and the Problem of Democratic Legitimacy in the EU', *Aussenwirtschaft*, 50, p. 63.

5   H. P. Ipsen,1972. *Europäisches Gemeinschaftsrecht*. Tubingen: Mohr, p. 176.

6   R. Dehousse, 1998. 'European Institutional Architecture after the Amsterdam Treaty: Parliamentary or Regulatory Structure?', *Common Market Law Review*, 35, p.598.

7   N. Nentwich, and G. Falkner, 1997. 'The Treaty of Amsterdam: Towards a New Institutional Balance', *European Integration online Papers*, 1 (15), p. 1; available at: http://eiop.or.at/eiop/texte/1997-015a.htm

number of federal countries, in which the legislative power is shared by two branches, representing the population of the Union and its Member States respectively.[8]

Moreover, the execution of European policy is above all assured by the Member States (and thus by the national administrations) rather than by the centralised European administration of the Commission. Even when European legislation is implemented by the Commission, 'decentralism' may be looked after via 'comitology committees' which ensure the participation of national administrations.

However, while the European institutional set-up ensures a central position for the Member States in the Council, the increasing interference of the EU in more policy domains made clear that decision-making tends to escape ever more from the democratic control of the national parliaments.[9] Therefore, during the 1990s one has seen the development of a normative discourse of 'vertical decentralism' stressing the need to improve the role of national parliaments in European policy-making—a discourse, however, which (until now) has not led to substantial changes in the European institutional set-up and has mainly been dependent on the internal regulations of the Member States to increase the control of their parliament over their ministers in the Council.[10]

A comparable explicit normative discourse in favour of vertical decentralism had already been developed with regard to the role of regional and local authorities. The European integration process has in fact coincided in time with processes of decentralisation in many of its Member States, although its precise influence on these processes remains subject of debate. On the one hand, regional movements found in the European integration process a normative argument to justify a weakening of the bound with the nation-state (given that the regional level could fall-back on European intervention for supra-regional policy questions).[11] European integration also encouraged the development of trans-frontier interregional co-operation. Moreover, in certain cases, European policy-making—in particular via the Structural Funds—has created direct interactions between the regional and the European level.[12] On the other hand, regional authorities have also felt the European integration process as an encroachment on the position they had already acquired within the national context.[13] As a consequence, in particular since the end of the 1980s, normative discourses on the legitimacy of the European construction have stressed the need to respect regional and local autonomy and to involve these actors in European policy-making

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8   Dehousse, 1998, p. 606.

9   Some have argued in this context that European integration has strengthened at national level the executive to the detriment of the parliament. See, A. Moravscik, 1994. *Why the European Community Strengthens the State: Domestic Politics and International Cooperation*. Harvard University Center for European Studies Working Paper Series, No.52.

10 On the failure of the Assises (a powerless congress of members of national parliaments together with members of the European Parliament) mentioned in a Declaration to the Maastricht Treaty, and the limits of the COSAC (Conférence des organes spécialisés dans les affaires communautaires, a biannual meeting of the organs in national parliaments responsible for European affairs along with a delegation from the European Parliament) enshrined in a Protocol of the Amsterdam Treaty, see G. Scoffoni, 1992. 'Les rélations entre le Parlement européen et les parlements nationaux et le renforcement de la legitimité démocratique de la Communauté', *Cahiers de Droit Européen*, pp. 22-41; M. Westlake, 1995. 'The European, the National Parliaments and the 1996 Intergovernmental Conference', *The Political Quarterly*, 66, pp. 59-73; and S. Smismans, 1998. 'The Role of the National Parliaments in the European Decision-Making Process: Addressing the Problem at the European Level?', *ELSA Selected Papers on European Law*, IX (1), pp. 49-76.

11 Yet the idea that decentralisation has led to 'the hollowing out' of the State has not been confirmed by strong empirical evidence. See H. Michel, 1998. 'Government or Governance? The Case of the French Local Political System', *West European Politics*, 21 (3), pp. 146-169.

12 I. Tommel, 1997. 'The EU and the Regions: Towards a Three-Tier system or new modes of regulation?', *Environment and Planning: Government and Policy*, 15, p. 419.

13 For a nuanced evaluation of the German case, see C. Jeffery, 1996. 'Farewell the Third Level? The German Länder and the European Policy Process', *Regional and Federal Studies*, 6, pp. 56-75.

This has led to the creation by the Maastricht Treaty of the Committee of the Regions and the possibility for Member States to be represented in the Council by a regional representative.[14]

The democratic deficit debate that characterised the intergovernmental conferences preparing the Maastricht and the Amsterdam Treaties has equally placed the principle of subsidiarity on the forefront. The origin of the concept of subsidiarity has commonly been attributed to Catholic social doctrine, where it was initially used in designing policy to fight poverty. State intervention, so it is argued, is only desirable in so far smaller social units, like the family, cannot do the job. Such (horizontal) subsidiarity is both meant to describe the means of protecting the sovereign sphere of smaller social groups, and to prevent the state from becoming 'overloaded' with demands from the lower and smaller social groups.[15] However, such a horizontal interpretation of subsidiarity is entirely absent in the European debate where the concept has been defined in territorial terms, namely as a way to attribute competences to the best-suited territorial level. As enshrined into the Treaty,[16] it has even been defined in more restrictive terms focusing on the relation between Community and Member States—with the exception of a Declaration attached to the Amsterdam Treaty which states that 'for the German, Austrian and Belgian governments it remains understood that the actions of the European Community on the basis of the principle of subsidiarity concern not only the Member States, but also their bodies, to the extent that these bodies possess their own legislative powers, conferred on them by national constitutional law'.[17]

This exclusive focus on the territorial dimension of subsidiarity can be well understood if one looks to how the concept has found its way to the European level, namely it resulted on the one hand from the pressure from certain regions—in particular the German Lander—to use subsidiarity as a way to protect their regional autonomy recognised at the national level, and on the other hand from certain Member States—in particular the UK—that saw in subsidiarity a tool to protect themselves against creeping Community intervention.[18]

2.2. *The Governance Debate and Horizontal Decentralism*

Whereas the democratic deficit debate has focused on issues of territorial representation and vertical decentralism, little normative attention has been paid to the role of interest groups or civil society organisations in European policy-making. There is a broad literature on lobbying in the European institutions, but this literature is of a descriptive nature. Neither the academic literature nor the political actors have looked to this reality from a normative angle. Put differently, for long the issue of the participation of interest groups or civil society organisations in European policy-making has not been integrated into the debate on the legitimacy of the EC/EU.

However, there are good reasons to do so. First, because as the lobbying literature illustrates, interest groups play an important role in European policy-making. Moreover, in addition to 'informal' lobbying, the EC has from its inception provided several more institutionalised channels for interaction with interest groups or civil society organisations. The Rome Treaty, for instance created the advisory

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14 Although these elements of regional involvement 'did not figure very highly in the preoccupation of the Member States during the negotiations at Maastricht' (Commissioner for regional policy, Bruce Millan, cited by, J. Loughlin, 1996. 'Representing Regions in Europe: The Committee of the Regions', *Regional & Federal Studies*, 6 (2), p. 157). Pushed onto the agenda by the Belgian, Spanish and especially German regions/Länder, it became only 'bon ton' after the Maastricht Treaty to define regional involvement as a form of legitimacy providing participation.

15 K. Van Kersbergen and B. Verbeek, 1994. 'The Politics of Subsidiarity in the European Union', *Journal of Common Market Studies*, 32 (2), p. 223.

16 According to Article 5 EC Treaty 'in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiairity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.' The Single Act contained already a reference to subsidiarity in the field of environmental policy (Art.130r(4)).

17 See, however, below regarding the new provision on subsidiarity in the Constitutional Treaty.

18 Van Kersbergen and Verbeek, 1994, p. 225.

Economic and Social Committee, composed of socio-economic organisations, mainly organisations representing employers, employees, consumers, third sector and agriculture. Interest group participation is thus not only a matter of fact but has been deliberately created in the European institutional set-up. Thinking about the legitimacy of the European institutions focusing only on territorial representation and ignoring elements of functional representation thus provides only part of the picture.

Second, like the European integration process may have effects on the autonomy and role of decentralised territorial actors, this may also be the case for functional actors. German welfare organisations, for instance, have expressed the fear that more European intervention in social issues may threaten their acquired institutional position at the national level, which led to a Declaration added to the Maastricht Treaty stressing the importance, in pursuing the social objectives of the Treaty, of co-operation between the Community and charitable associations and foundations as institutions responsible for welfare establishments and services.[19] In particular in regard to the role of 'the social partners', i.e. the organisations of management and labour, the influence of European integration on established industrial relations systems at the national (but also at the sectoral, firm and even regional) level cannot be underestimated and is only increasing due to monetary union.[20]

It was precisely in relation to the social partners that one has witnessed the development of an explicit normative discourse on 'horizontal decentralism', without, however, linking this discourse to the broader democracy and legitimacy debate of the EU. The first initiatives to institutionalise the role of the social partners at the European level trace back to the early 1970s but it was only in 1985 with the new Commission President, Jacques Delors, that the development of a 'European social dialogue' became a key element in the discourse on the need to develop 'the European social dimension'.[21] This resulted in a Social Agreement added to the Maastricht Treaty, and subsequently integrated into the Amsterdam Treaty, constitutionalising several elements of 'horizontal decentralism', namely, respect for the autonomy of the social partners; a double consultation requirement and a procedure of horizontal subsidiarity in favour of the social partners.

Article 137 para. 4 EC Treaty confirms the autonomy of the social partners at the national level: building on the case law of the ECJ,[22] it enables the Member States to leave the transposition of Directives in the social field to the social partners by way of *national* collective agreements, taking into account that the Member State ultimately retains responsibility for guaranteeing the objectives established by the Directives.

Articles 138-139 constitutionalise a role for the social partners at the European level, including *European* collective agreements. According to Article 138 para.2 and 3 EC Treaty 'before submitting proposals in the social policy field,[23] the Commission shall consult management and labour on the possible

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19 J. Kendall and H. K. Anheier, 1999. 'The Third Sector and the European Union Policy Process: An Initial Evaluation', *Journal of European Public Policy*, 6 (2), p. 295.

20 P. Teague, 2000. 'Macroeconomic Constraints, Social Learning and Pay Bargaining in Europe', *British Journal of Industrial Relations*, 38 (3), pp. 429-452; E. Traversa, 2000. 'The Consequences of European Monetary Union on Collective Bargaining and the National Security Systems', *The International Journal of Comparative Labour Law and Industrial Relations*, 16 (1), pp. 47-54.

21 For a good overview of the development of the social dialogue from the Tripartite Conferences in the 1970s over the Val Duchesse social dialogue to the Maastricht procedures, see M. J. Gorges, 1996. *Euro-Corporatism? Interest Intermediation in the European Community*. Lanham: Unity Press of America.

22 ECJ, Case 91/81 *Commission* v. *Italy* [1982] ECR 723; Case 131/84 *Commission* v. *Italy* [1985] ECR 3531; Case 143/83 *Commission* v. *Denmark* [1985] ECR 427.

23 As results from Commission Communication on the social dialogue and from the consultation practice, the Commission interprets 'proposals' as proposals of a legislative nature. See Commission Communication concerning the Development of the Social Dialogue at Community Level, COM (1996) 448 final; and Commission communication on Adapting and promoting the Social Dialogue at Community Level, COM (1998) 322. On the other hand, 'the social policy field' is not interpreted in a restrictive way. The Commission ,signalled the possibility of formal consultations on envisaged proposals for legislation of a horizontal or specific sectoral nature which have social implications, though, it reserved itself in these cases 'the right to decide whether and how such consultation should be conducted.' See COM (96) 448 final, Annex 1.

direction of Community action. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.'[24]

At the occasion of this consultation the social partners may inform the Commission that they prefer to deal with the issue via bipartite negotiation, according to the procedure described in Article 139:

> '1.Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

> 2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission […]'

This implies a strong element of subsidiarity of which sub-national public authorities can only dream—namely, the drafting of (quasi-)legislative proposals is left over to the social partners if they desire so. They can opt to implement the agreement 'voluntary'—i.e. the terms of the agreement 'will bind their members and will affect only them and only in accordance with the practices and procedures specific to them in their respective Member States'[25]—or they can opt for implementation via Council decision, in which case the agreement will have a generally binding character (*erga omnes* procedure) and will become part of Community law.[26]

Nevertheless, this horizontal decentralism is limited to the fields of European social policy, and its effect is strongly limited in practice due to lack of counterbalancing power between management and labour at the European level.[27] Moreover, the normative argument on the need to develop a European social dialogue has mainly been expressed in terms of the desirability to develop a European social dimension, i.e. in terms of output-legitimacy provided by a particular policy rather than in terms of participatory procedures. In this way, the discourse on horizontal decentralism remained confined to a particular policy sector and was not linked to the broader debate on democratic governance of the EU.

The same can be said of another element of decentralism that entered into European discourse during the late 1980s, namely the principle of partnership. This principle has been introduced by the reform of the Structural Funds in 1988.

Originally meanly aimed at increasing the involvement of regional and local authorities in the implementation of the structural funds policy—and thus as an element of vertical decentralism—the concept has gradually also been used to stress the need for the involvement of civil society actors. In the 1993 revision of the Structural Funds regulation, for instance, partnership is described as an approach consisting in 'close consultations between the Commission, the Member States concerned and the competent authorities and bodies—including within the framework of each Member State's

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24 The consulted organisations are those that are part of a list, established by the Commission with criteria set out in a Commission Communication on the application of the Social Agreement (COM (93) 600 final). The list is currently composed of 44 European confederations of management and labour, either organised at cross-sectoral or sectoral level.

25 COM (93) 600 final, point 37. On the different implications of this option according to the Member States, see A. Jacobs, 1998. 'From the Belgian National Labour Council to the European Social Dialogue', in: C. Engels and M. Weiss, (eds.), *Labour Law and Industrial Relations at the Turn of the Century. Liber Amicorum in Honour of Roger Blanpain*, The Hague: Kluwer Law International, pp. 305-328.

26 S. Sciarra, 1996. 'Collective Agreements in the Hierarchy of European Community Sources', in: P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis, (eds.), *European Community Labour Law: Principles and Perspectives*, Oxford: Clarendon Press, p. 204.

27 W. Streeck and P.C. Schmitter, 1991. 'From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market', *Politics and Society*, 19 (2), pp. 133-164; and W. Streeck, 1996. 'Neo-voluntarism: A New European Social Policy Regime', in: G. Marks, F. W. Scharpf, P. C. Schmitter and W. Streeck, *Governance in the European Union*, London: Sage, pp. 64-94.

national rules and current practices, the economic and social partners, designated by the Member State at national, regional, local or other level with all parties acting as partners in pursuit of a common goal.'[28]

However, even more than for the social dialogue the partnership principle has been shaped by the research for efficiency within a particular policy sector,[29] inspired by the 'new' paradigm in territorial politics to encourage indigenous development of regions rather than financing large-scale infrastructure.[30] For the Commission partnership was meant to be a tool in developing direct relations with the sub-national level, bypassing the national one.[31] Moreover, while subsidiarity has been defined in the Treaty in a way to protect the Member States from too much European intervention—and thus to drive back the Commission—the principle of partnership may appear as a way for the Commission to come in via the back door by encouraging a 'governance approach' enabling administrative and public-private interaction with the central European administration.[32]

It is only by the end of the 1990s that the horizontal dimension obtains a central place in the normative debate on European governance, via a discourse on the role of civil society organisations in European policy-making.[33] Initially the idea of 'civil dialogue' had been confined, just like the concepts of social dialogue and partnership, to a particular policy sector. The concept of 'civil dialogue' was proposed in 1996 by the Commission Directorate General responsible for social affairs to stress the need for stronger relations with NGOs in the social sector. Such a strengthened dialogue with non-profit and welfare organisations should complement the already well-established dialogue with the social partners. Encouraging such a dialogue was a welcome and rather innocent activity for a Commission that had been criticised for too pro-active interventions in the social policy sphere in the beginning of the 1990s.[34] Moreover, the Commission hoped to build through civil dialogue a supportive network for future social policy initiatives.

It is only in the context of the Commission's White Paper on European Governance that the use of the concept of civil dialogue and civil society has been broadened and become part of the general legitimacy debate. In the context of the legitimacy crisis of international institutions (brought to the public's attention by civil society organisations),[35] and in reply to the legitimacy crisis of the European Institutions and of the Commission in particular, the discourse on civil society has become part of the Commission's project for administrative reform, as well as its attempt to legitimate itself and its functions.

The concept is no longer the tool of one particular Directorate of the Commission, but is used by the Commission as a whole. It is no longer limited to stressing the need for interactions with NGOs in the social sphere but is said to be a key for administrative reform of the entire Commission. On the one

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28 Council Regulation 2081/93 OJ 1993 L193/5, Article 4 (1).

29 L. Hooghe, 1996. 'Building a Europe with the Regions: The Changing Role of the European Commission', in: L. Hooghe, (ed.), *Cohesion Policy and European Integration. Building Multi-level Governance*, Oxford: Oxford University Press, p. 113.

30 R. Y. Nanetti, 1996. 'EU Cohesion and Territorial Restructuring in the Member States', in: L. Hooghe, (ed.), *Cohesion Policy and European Integration. Building Multi-level Governance*, Oxford: Oxford University Press, pp. 59-88.

31 L. Hooghe, 1996, pp. 89-127.

32 See also H. Heinelt, 1997. 'What Happened to the Commission's Partnership Approach?', paper presented at the Conference *Territorial Politics in Europe: A Zero-Sum Game?*, European University Institute, Florence 21 and 22 April 1997.

33 For an in-depth analysis, see S. Smismans, 2003. 'European Civil Society; Shaped by Discourses and Institutional Interests', *European Law Journal*, 9 (4), pp. 482-504.

34 J. Kendall and H. K. Anheier, 1999, p. 294.

35 By the end of the 1990s NGO activity and social movements caught the attention of the media with the massive and 'heated' manifestations during the summits of the world leaders, contesting the legitimacy of international decision-making structures: first at the global trade and WTO summits (in Seattle, Sidney, and Davos), and subsequently also at the European summits (in Nice and Göteborg). It is not by accident that from 1998 onwards, the Commission's DG for trade starts to organise ad hoc meetings with NGOs in order 'to explain to the worried people that there was nothing to worry about', R. Goehring, (forthcoming). 'Interest Representation and Civil Society Formation', in: A. Warleigh and J. Fairbrass, (eds.), *Integrating Interests in the European Union: The New Politics of Persuasion, Advocacy and Influence*.

hand, the Commission stresses the need for increased interaction with 'civil society organisations', on the other hand, it uses the concept to legitimate is own institutional position pointing to the many different forms of interaction with civil society organisations it has already established. As a consequence, by using the concept as a tool of legitimisation, it is defined in ever-broader terms, which may include also the Commission's contacts with private firms, its interaction with scientific experts or with national administrations.

2.3. *The Two-Track Normative Debate and Institutional Interests*

Both vertical and horizontal decentralism have thus found a place in the normative debate on the European construction. Yet, mainly in separation from one another. On the one hand, 'the democratic deficit debate' that developed in particular in the context of the Intergovernmental Conferences (IGC) post Single European Act, has focused on the vertical dimension, paying attention to national and sub-national (parliamentary) representation and to subsidiarity in territorial terms. On the other hand, an initially more 'efficiency-driven' approach to the involvement of the social partners and civil society organisations has led to the recognition of an element of 'horizontal subsidiarity' in favour of the social partners and an explicit normative discourse on civil society involvement in the context of the 'governance debate'.

The separation of these discourses on vertical and horizontal decentralism can be linked to 'institutional interests'. Thus it comes as no surprise that IGCs focus on the vertical dimension, given that the actors in the debate are representatives from the Member States, i.e. representatives from governments elected on a territorial basis. The same applies to the more recent 'constitutional technique' of a Convention, used first to draft the Charter of Fundamental Rights of the EU and then for the Constitutional Treaty. Most participants in the Convention have a—national or European—elected mandate.[36]

The reluctance of territorial representatives towards horizontal decentralism can be illustrated by the position of the European Parliament and the Committee of the Regions on the civil society discourse that emerged with the White Paper on European Governance. In its comments on the Commission's White Paper on European Governance, the EP stressed that 'the involvement of both the European and national parliaments constitutes the basis for a European system with democratic legitimacy', and that 'organised civil society […] whilst important, are (sic) inevitably sectoral and cannot be regarded as having its own democratic legitimacy.'[37] According to the Commission, the EP 'was particularly keen no to grant civil society organisations a role which, either wholly or in part, was that of those holding political responsibility and who were elected by universal suffrage.'[38] Yet, the EP itself has well-developed contacts with civil society organisations. The EP is, for instance, seen as very receptive to the demands of the NGO sector.[39] However, these contacts are not defined as participatory

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36 The second Convention has been composed of representatives of the Heads of Governments of the Member States and candidate countries, of the national parliaments and of the European Parliament, in addition to two representatives from the Commission. The ESC had three representatives as observers, the CoR six, the social partners three and the Ombudsman one. Civil society has been given an opportunity to make its voice heard via the online Forum and via 'contact groups' with the Presidium of the Convention. Although civil society organisations felt initially relatively satisfied with this involvement, satisfaction strongly decreased as soon as the Convention started the phase of drafting the constitutional text. See also, S. Smismans, 2004. *Law, Legitimacy and European Governance. Functional Participation in Social Regulation.* Oxford: Oxford University Press, Chapter 3. In relation to the first Convention it has been argued that the consultation of civil society organisations in 'hearings' and their informal involvement via email contributions and contacts with Convention members may—even if not influential—have contributed to the outcome (in that case the Charter) being seen as representative of the common European values; see F. Deloche-Gaudez, 2001. *The Convention on a Charter of Fundamental Rights: A Method for the Future?*, Notre Europe Research and Policy Paper No.15.

37 'EP Resolution on the Commission White Paper on European governance', A5-0399/2001, points 8 and 11a.

38 Report from the Commission on European Governance, 2003, p.16.

39 See for instance, with regard to environmental and consumer associations, J. Greenwood, 1997. *Representing Interests in the European Union.* London: Macmillan, pp. 191 and 203.

structures providing legitimacy.[40] They are but sources of information to the parliamentarians whose democratic legitimacy resides in their electoral mandate. This electoral mandate also allows parliamentarians the broad discretion to consult who they want. The EP has always opted to allow parliamentarians fairly unrestricted liberty in their interactions with socio-economic and civil society actors, imposing only a minimal set of standards to ensure 'smart' and 'clean' lobbying practices.[41]

The Committee of the Regions (COR) also remains particularly silent on the issues of civil society and civil dialogue. Composed of representatives from regional and local authorities,[42] it prefers to make use of a discourse on subsidiarity, 'proximity' and 'closeness to the people',[43] rather than stressing the role of civil society organisations. In fact, local and regional authorities often have well-established relations with civil society organisations, since they are the most natural direct interlocutors for grass roots organisations. The COR is also perfectly aware of this fact and uses it as legitimisation for its proper role. However, the COR has avoided recognising the 'democratic credentials' of civil society organisations, stressing the unique role of territorially elected representatives in democracy. Although the COR 'supports the Commission's intention for wide-ranging consultation of the representatives of civil society', it 'thinks that the democratic legitimacy of representatives elected by direct universal suffrage must not be confused with the greater involvement of NGOs and other arrangements for the representation of individual interests within society.'[44]

In contrast to the institutions with a territorially based elected mandate, the European Commission and the European Economic and Social Committee (ESC) have been the key actors in developing a normative discourse on civil society participation in European governance. For both institutions the recognition of the 'legitimating potential' of interaction with civil society would have a spill-over effect on their own institutional position, given that within the European institutional set-up these two institutions have a particular role in connecting with civil society organisations. Their discourse introduces elements of 'participatory democracy', defined as the possibility for those concerned by the decision to participate in the decision-making process. These elements of 'participatory democracy' are said to complement 'representative democracy', which resides in the electoral mandate of the parliament. Reshaping in this way the normative framework for EU democracy, the Commission and the ESC become less dependent on the Parliament as unique source of legitimisation. For the Commission the civil society discourse was a welcome tool to reply to the critics on the Brussels' bureaucracy and in particular to the legitimacy crisis which hurt the Santer Commission. Reframing the legitimacy debate in terms of participatory democracy the Commission becomes a key source of legitimisation given its central role in consultation procedures interpreting 'the general European interest'.

For the European Economic and Social Committee the discourse is useful to redefine its proper role, given the risk of being marginalized within the European institutional framework due to the creation of a

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40 Through its contacts with civil society organisations the EP has acted as an advocate for 'European citizenship' although not for 'European civil society' or 'civil dialogue'. See for instance, J. Vogel, 1999, 'Le Parlement européen face à l'émergence d'une société civile européenne', in: P. Delwit, J. M. De Waele, and P. Magnette, (eds.), *A quoi sert le Parlement européen?*, Bruxelles: Ed. Complexe, pp. 199-219.

41 See B. Kohler-Koch, 1997. 'Organized Interests in the EC and the European Parliament', *European Integration online Papers (EIoP)*, 1 (9), available on: http://eiop.or.at/eiop/texte/1997-009a.htm; and T. Schaber, 1998. 'The Regulation of Lobbying at the European Parliament: the Quest for Transparency', in: P. H. Clayes, C. Gobin, I. Smets, and P. Winand, (eds.), *Lobbying, Pluralism and European Integration*. Brussels: Editions de l'Université de Bruxelles, pp. 208-221. For the EP, the issue of lobbying became above all linked to the financial status of parliamentarians, namely the need for each parliamentarian to declare remunerated activities and any gifts or payments received in connection with their mandate, whereas the Commission linked the question of lobbying much more with the issue of transparency of its work as a fundamental aspect of democratic governance.

42 The Nice Treaty introduced the explicit requirement that COR members need to have an electoral mandate.

43 For example, 'COR Resolution on The outcome of the 2000 Intergovernmental Conference and the discussion on the future of the European Union', 4 April 2001, CdR 430/2000 fin; and 'COR Report on Proximity', 6 November 2001, CdR 436/2000.

44 Ibid, indent 3.2.

myriad of other advisory committees and the development of a social dialogue outside the Committee.[45] The Committee has therefore stressed that it represents (and will also better represent) other civil society organisations in addition to the social partners. Referring to the legitimacy problem of the EU, it argues that—as the only Treaty based institution representing civil society organisations—it plays an important role as forum of organised civil society, which provides an additional source of legitimacy, in complement to the legitimacy provided by the representation of citizens via the European Parliament.[46]

The institutional interests of both the Commission and the ESC have shaped the discourse on the role of civil society organisations in a particular way. Thus the interaction between public authority and civil society organisations has above all been related to the Community method of policy-making in which the roles of the Commission and the ESC are most strongly established. More precisely, the Commission and the ESC pay above all attention to the involvement of civil society organisations in the drafting of new policy measures.

However, the involvement of civil society organisations in policy-making is a multi-level reality; not only limited to the drafting at the central European level of new policy-measures (under the Community method). Even under the Community method one should also take into account their role in implementation, and their involvement at different territorial tiers of policy-making. Moreover, they equally play a role within intergovernmental procedures or within new policy instruments such as the Open Method of Coordination. Regarding the latter, policy instruments (drafted by the Commission) have more recently and increasingly stressed the need for 'a fully decentralised approach' and the importance of civil society involvement,[47] but the precise interaction between this policy discourse and the civil society discourse and initiatives introduced on basis of the White will need further clarification.

2.4. *Decentralism and the Current Constitutional Debate*

The split nature of the normative discourses on the European polity—and the importance of decentralism therein—is reflected in the current constitutional debate. This debate takes place on two fronts; on the one hand, there is the follow-up of the debate on European governance resulting from the Commission's White Paper; on the other hand, there is the Convention and IGC debate on the Constitutional Treaty. While both the 'White Paper follow-up' and the Constitutional Treaty debate pay attention to the vertical and the horizontal dimension, the first still priviliges the horizontal dimension whereas the second focuses on the vertical dimension. Moreover, as far as they pay attention to the two dimensions, none of them provides a clear normative map on how vertical and horizontal decentralism are and should be interrelated in a multi-level polity.

2.4.1. *The Follow-Up to the White Paper*

As argued above the White Paper has placed the horizontal dimension in the core of the legitimacy debate of the EU. As a follow-up to its discourse on civil society involvement the Commission has adopted 'General Principles and Minimum Standards for Consulting Non-institutional Interested Parties'[48] which provide inter alia for a period of at least eight weeks for responses, issuing confirmation of receipt, and displaying of the results of public consultation on the Internet. It has,

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45 For a more extensive account of this argument, see S. Smismans, 2000. 'The European Economic and Social Committee: towards deliberative democracy via a functional assembly', *European Integration online Papers*, 4 (12), available at: http://eiop.or.at/eiop/texte/2000-012a.htm

46 ESC, Own-initiative opinion on the role and contribution of civil society organisations in building Europe, adopted on 22-23 September 1999.

47 See also, S. Smismans, (forthcoming). 'Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive-Deliberative Polyarchy as a Normative Frame for the OMC', in S. Deakin and O. De Schutter, (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*. Brussels: Bruylant.

48 COM (2002) 704.

moreover, created a database 'CONECCS' ('Consultation, the European Commission and Civil Society') on the EUROPA server, which provides an overview of Community advisory structures and a non-exhaustive list of NGOs active at the European level.[49]

In addition to instruments and principles to consult civil society organisations, the White Paper also suggested the possibility of co-regulation with and self-regulation by civil society actors. Yet, one may wonder why these elements of 'horizontal subsidiarity' have only been dealt with under the title of 'better regulation' without making an explicit link to the normative 'civil society discourse' focusing on consultation procedures.[50] First, it may not be in the Commission's institutional interest to plaid strongly in favour of delegating regulatory powers to civil society actors. Second, normative narratives about co-regulation with and self-regulation by non-public entities remain underdeveloped and may not be the easiest way to sell European governance as legitimate. In fact, in their reaction to the White paper, the other institutional players—the European Parliament in particular—have been reticent to co-regulation and soft-regulation and considered further examination is required.[51] As a consequence, the Commission's legitimating discourse on civil society, and even more general the European debate on horizontal decentralism, remains mainly confined to the issue of consultation, and more particular to consultation at European level. Both the General Principles and CONECCS address above all European associations, neglecting largely the (vertical) multi-level character of organised civil society in Europe.

While acknowledged in particular for its focus on the horizontal dimension, the White Paper did pay also some attention to vertical decentralism. Under the title 'Reaching out to citizens through regional and local democracy' the White Paper pleads in favour of 'a systematic dialogue with European and national associations of regional and local government', a more active role for the CoR (for instance through the preparation of exploratory reports in advance of Commission proposals, or by organising the exchange of best practice among sub-national authorities), increased attention to assessing the territorial impact of EU sectoral policies, and the possibility to sign 'tripartite contracts' between the Commission, the Member States and regions and localities to ensure better implementation of European policies. However, the White Paper pays attention to the vertical dimension by addressing the relation between EU level and sub-national public authorities, but it neglects the horizontal dimension that may take place at that level; contrary to some of the preparatory work that had been done for the White Paper.

The White Paper's Working Group on 'Decentralisation. Better Involvement of National, Regional and Local Actors'[52] had, contrary to what the name of the working group may suggest, given a broad interpretation of 'decentralisation', namely in both vertical and horizontal terms. Decentralisation is a 'process that involves a wide range of actors in shaping policy, increasing responsibility at various levels that can be coupled with greater flexibility in implementation.' 'Involvement should include national and sub-national governmental entities as well as a wide spectrum of non-governmental representative stakeholders.' The ESC and the COR are equally treated as possible channels for this involvement. It was also the Working Group on Decentralisation that made the suggestion to use tripartite contracts to improve 'co-operation with decentralised territorial entities as well as functionally decentralised entities which have responsibilities for implementing EU policies and law'. The initial proposal of the Working Group for such a contractual approach to implementation included also civil society organisations as

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49 The database is described as 'a directory of non-profit civil society organisations', but includes also private interest organisations such as the World Federation of Advertisers, the European Demolition Association or the Banking Federation of the European Union. The inclusion in the database does not imply an accreditation system.

50 White Paper on European Governance, COM (2001) 428 final, of 25/7/2001, p. 21; and Commission Communication, Action plan Simplifying and improving the regulatory environment', COM (2002) 278 final, of 5/6/2002, p.11-13.

51 Report from the Commission on European Governance (2003), Annex I – The Public Consultation, p.36.

52 Report from Working Group 3b, Decentralisation. Better Involvement of National, Regional and Local Actors, June 2001.

potential contractors. Yet, this horizontal dimension has disappeared in the White Paper and in the follow-up Communication on Tripartite Contracts[53] which define the contracts only in vertical terms.

The only trace of a link between vertical and horizontal decentralism could be found in the White Paper's attention for 'connecting with networks'. The Commission acknowledges the existence of networks that link business, communities, research centres and regional and local authorities, but which feel often disconnected from the EU policy process. The White Paper proposes to support these networks, in particular regional and city networks that strengthen transnational and cross-border co-operation.

2.4.2. *The Convention and IGC Debate on the Constitutional Treaty*

The European Council Summit in Laeken (14/15 December 2001) convened the European Convention on the future of Europe[54] which was asked to draw up proposals 'to bring citizens closer to the European design and European Institutions, […] to organise politics and the European political area in an enlarged Union, and […] to develop the Union into a stabilising factor and a model in the new world order.'[55]

The Convention and IGC debate has largely been dominated by the need to ensure a 'workable institutional solution' in the light of future enlargement.[56] The focus has been on the main Community Institutions, reconsidering their composition and powers, their inter-institutional relations, and the way in which power relations among Member States should be structured within them. Put differently, the territorial dimension has prevailed over the horizontal one. The idea of horizontal decentralism has been nearly entirely absent in the debate.

Moreover, also regarding the territorial dimension, the idea of territorial decentralism has mainly been interpreted in a restrictive way, focusing on the relation between the Union and the Member States, strengthening the position of the Council, and stressing the need for a better delineation of EU competences to safeguard national competencies.

Two articles introduce the sub-national territorial dimension, but the main focus on the Community-Member States relation is never far away. Thus Article I-5 states that 'the Union shall respect the quality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government'* (stress added). However, this means primarily a recognition of the Member States' autonomy in organising regional and local government, rather than the recognition of these territorial levels *in se*. It is worth to note that Title VI of the Constitutional Treaty, which defines 'the democratic life of the Union' does not explicitly mention the role of regional and local authorities. Although Article I-45 states that 'decisions shall be taken as openly as possible and as closely as possible to the citizen', the principle of representative democracy on which the Union is founded is only defined with reference to the role of the European Parliament, and the representation of the Member States in the European Council and the Council of Ministers by their governments, themselves accountable to their national parliament. Representative democracy at regional and local level is not mentioned.

More innovative is the formulation of the subsidiarity principle, which recognises the sub-national level. According to Article I-9 al.3 'under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action

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53 Commission Communication, A Framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities, COM (2002) 709 final, of 11/12/2002.

54 http://www.europa.eu.int/futurum/index_en.htm

55 The Laeken declaration itself resulted from a Declaration added to the Nice Treaty which had urged the European Council to present at its meeting in Laeken a declaration regarding further institutional reform of the Union.

56 The references are to the Provisional Consolidated version of the draft Treaty establishing a Constitution of Europe (CIG 86/04 of 25 June 2004), made available by the Secretariat General of the Council after the IGC Summit of 18 June 2004 agreed on the Constitutional Treaty.

cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

The 'Protocol on the Application of the Principles of Subsidiarity and Proportionality',[57] to be annexed to the Constitutional Treaty, also mentions that the Commission, which has to consult widely before proposing legislative acts, should, where appropriate, take into account the regional and local dimension of the action envisaged. However, the Protocol has identified above all the national parliaments as the 'watchdogs' of the principle of subsidiarity by introducing a new *ex ante* political monitoring mechanism through which any national parliament or any chamber of a national parliament will be enabled to issue a reasoned opinion regarding compliance with the principle by proposals of a legislative nature. Where reasoned opinions on a Commission's proposal's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to national parliaments and their chambers,[58] the Commission shall review its proposal—although, after such review, it may still decide to maintain the proposal. It will be for each national parliament or each chamber to consult, where appropriate, regional parliaments with legislative powers. The latter are thus not directly allowed to issue a reasoned opinion.[59]

Regions (even with legislative powers) and local authorities are neither allowed to act before the Court of Justice in case of infringement of the principle of subsidiarity. According to the Protocol, this right is the privilege of the Member States, and of the Committee of the Regions 'as regards legislative acts for the adoption of which the Constitution provides that it be consulted'.

While the horizontal dimension remains entirely absent in the new definition of subsidiarity, which sticks to a purely territorial interpretation (that still ensures in particular the compentencies of the national level, even if integrating some recognition of the sub-national one), some traces of horizontal decentralism can be found in the Draft Constitution's description of 'the democratic life of the European Union'.

According to Article I-47 'the European Union recognises and promotes the role of the social partners at Union level, taking into account the diversity of national systems; it shall facilitate dialogue between the social partners, respecting their autonomy'. Moreover, Article I-46 introduced the principle of participatory democracy, which implies that 'the Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society'.

While the explicit introduction into the Constitutional Treaty of an article on 'participatory democracy', including 'civil dialogue', may surprise, given the composition of the Convention and the IGC (namely, elected representatives), one should add that the Convention hasn't provided any new procedures to bring horizontal decentralism beyond the mere level of 'principle'; neither in terms of developing a multi-level industrial relations system,[60] nor in terms of creating rights of participation and spaces for self-regulation for civil society organisations. Moreover, like the White Paper (follow-up) debate, the Convention has failed to see the link between horizontal and vertical decentralism.

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57 CIG 86/04 ADD1 of 28 June 2004.

58 The national Parliaments of Member States with unicameral Parliamentary systems shall have two votes, while each of the chambers of a bicameral Parliamentary system shall have one vote.

59 Although the Protocol does not allow regions with legislative powers to issue a reasoned opinion, they can do so indirectly if they agree within the Second Chamber. It is worth to note that the final version of the Protocol is stronger in this sense than the previous drafts. Originally only 'national parliaments' were said to be able to issue reasoned opinions, while urged to organise internally the consultation of each chamber in the case of parliamentary parliaments. The final version allows a Second Chamber to issue a reasoned opinion even if the First Chamber does not agree.

60 Regarding the potential and difficulties to develop a multi-level industrial relations system within the EU, see B. Bercusson, 1999. 'Democratic Legitimacy and European Labour Law', *Industrial Law Journal*, 28 (2), pp. 153-170; A. Lo Faro,1999. *Funzioni e finzioni della contrattazione colletiva comunitaria*. Milano: Giuffrè Editore; and M. Biagi, 2000, 'The European Monetary Union and Industrial Relations', *The International Journal of Comparative Labour Law and Industrial Relations*, 16 (1), pp. 39-45.

2.4.3. *Towards an Integrated Constitutional Debate?*

The White Paper debate and the Constitutional Treaty debate have been set on track by different actors and have different aims. The Convention and IGC had to prepare the Treaty revisions that would adjust the European institutional set-up to the challenges of the future, in particular enlargement. The White Paper had the aim to change the governance style of the Commission without having to wait for Treaty reforms. With the White Paper the Commission had mainly the aim to rebuild its own legitimacy, making also recourse to the concept of 'governance' to avoid that the issues would be defined as 'constitutional' and therefore more contested.

However, there are good reasons to argue that the two debates should be more strongly related to each other. First, because the White Paper addresses constitutional issues as much as the Convention. It addresses the basic institutional set-up and fundamental principles of the European polity such as horizontal decentralism or the principle of transparency. Second, changes deemed necessary by the White Paper should not be condemned by the straitjacket of the existing Treaty.

To a limited extent the Convention debate has picked up some issues of the White Paper debate, such as the introduction of the principle of participatory democracy. However, the constitutional debate for a complex multi-level polity as the EU should far more take into account that the vertical and the horizontal dimension are interlinked. As will be analysed in the next section, vertical and horizontal decentralism are no separate realities; and therefore, should not be dealt with in separate constitutional discourses.

3. Vertical and Horizontal Decentralism: Intertwined Realities

The normative debate on decentralism in European governance contrasts with reality; contrary to what the twin-track normative debate seems to suggest, processes of vertical and horizontal decentralism are intertwined. Policy-making is increasingly characterised by division of power over (and interaction between) different territorial levels and by a blurring of the distinction between public and private realms.[61]

The second half of the twentieth century has been characterised by an ever increasing involvement of the State in more and more domains in society. The Western European welfare state developed in the framework of a State with a well-defined territorial constituency and a hierarchically structured public authority. Nevertheless, in contrast to the 'classical' Weberian assumption of a 'neutral bureaucracy',[62] public administration increasingly interacted with private and civil society organisations. The range of issues over which government took responsibility meant that in practical terms it is not possible for all such matters to be dealt with through detailed legislation (being the outcome of parliamentary politics) which is then simply applied to the concrete case by a neutral bureaucracy.[63] In the Western European countries interactions between public authority and civil society intermediaries have mainly taken the form of corporatist settings in which a fixed and limited number of encompassing organisations (mainly representing management and labour) negotiate with state agencies.[64] The 'territorial constituency' of these encompassing civil society organisations corresponded mostly with the State territory, and their hierarchical internal structure allowed for macro-economic concertation with public authority. In this concertation, public authority retained a

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61 A. C. Aman, Jr., 1998. 'The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy', *Vanderbilt Journal of Transnational Law*, 31 (3), pp. 769-870; C. Harlow, 1980. ''Public' and 'Private' Law: Definition without Distinction', *Modern Law Review*, 43, p. 241.

62 See M. Weber, 1958. 'Bureaucracy', in: H. H. Gerth and C. W. Mills, (eds.), *From Max Weber*, Oxford: Oxford University Press, (translation of original texts),pp. 196-244 (especially pp. 196-204).

63 P. P. Craig, 1990. *Public Law and Democracy in the United Kingdom and the United States of America*. Oxford: Clarendon Press, p. 64.

64 See especially P. S. Schmitter and G. Lehmbruch, (eds.), 1979. *Trends towards Corporatist Intermediation*. London: Sage; and G. Lehmbruch and P. C. Schmitter, (eds.), 1982. *Patterns of Corporatist Policy-making*, London: Sage.

central position, without dispersing authority over multiple functional units. Therefore, while it would be wrong to describe the State in past-world-war II Europe in monolithical terms,[65] one could still relatively easily identify public authority with the State—representing both well-defined territory and hierarchy—and the public and private realms could be distinguished.

This is no longer the case today. The nature of policy-making and public authority in Western (European) democracies has changed importantly over the past couple of decades. The relationship, which could long be upheld within nation-states, between territorial constituencies and functional fields of activity is disappearing.[66] The identification of public authority with the State has become more problematic due to processes of globalisation, the complex policy-making demands in a 'post-industrial society', the end of Keynesian politics to the benefit of neo-liberalism, the shift from redistributive social/welfare governance to more market oriented governance, and the popularity of 'deregulation' since the 1980s.

'Deregulation' has not meant less regulation, it signifies only that the State has retreated or has partially retreated from regulating in certain domains, whereas State regulation increased in other domains or has been taken over by semi-public or private authorities.[67] The issues in which the State intervenes, as well as the extent to and the mode in which it intervenes have changed. Partially because of the technical nature of some issues, the State has increasingly delegated authority to independent administrative authorities, semi-public institutions, central banks, private standardisation organisations.[68] While encompassing social partners' organisations retain a certain role, public authority has developed multiple interactions with other civil society organisations with different sectoral and territorial constituencies. Moreover, there is an increasing tendency to leave a self-regulatory space to certain parts of civil society.[69] Power is more dispersed,[70] and policy-making can be increasingly described in terms of 'policy networks', i.e. structures of governance involving private and state actors linked together through varying degrees of resource dependencies that determine which actors dominate the network and how decisions are made.[71]

We have been witnessing a development from a 'command and control' type of state towards an 'enabling' state, a model in which the state is not proactively governing society but is more concerned

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65 The State had, for instance, different tiers of government; although often more hierachically structured and/or lacking a meso-level of regional government. Also corporatist interest intermediation has taken place at several levels; macro-corporatism refers to the involvement of the national peak associations of labour and management in macro-economic policy, especially employment and income policies; meso-corporatism regards public policies with sectoral rather than system-wide concerns which have been characterised by the involvement of sectoral employers' associations and trade unions organised on the basis of industrial sectors. Micro-corporatism consists in corporatist intermediation in which state agencies negotiate policy directly with firms. See A. Cawson, 1986. *Corporatism and Political Theory*. Oxford: Blackwell.

66 R. J. B. Schobben and R. A. Boschma, 2000. 'Governance in the European Union: Some Concluding Remarks', *Regional and Federal Studies*, 10 (2), p. 130.

67 W. Van Gerven, 1996. 'The Legal Dimension: The Constitutional Incentives for and Constraints on Bargained Administration', in: F. Snyder, (ed.), *Constitutional Dimensions of European Economic Integration*. The Hague: Kluwer Law International, p. 79.

68 See on 'the fourth branch of government', M. Shapiro, 1998. *Who Guards the Guardians?*. London: The University of Georgia Press; and G. Majone, 1996. *Regulating Europe*, London: Routledge.

69 See, for instance, C. Graham, 1994. 'Self-Regulation', in: G. Richardson and H. Genn, (eds.), *Administrative Law & Government Action*. Oxford: Clarendon Press, pp. 189-214. On 'reflexive law' that provides the procedural framework for such self-regulatory space, see G. Teubner, 1993. *Law as an Autopoietic System*. Oxford: Blackwell.

70 For an example of the dispersion of the administration within a nation-state context, see for Belgium, D. Albrecht and J. De Groog, (eds.), 1984. *Versnippering van overheidsinstellingen: noodzaak of onmacht?*. Antwerpen: Kluwer.

71 Renate Maynts argues how interorganisational networks, such as policy-networks, are not merely a discovery by social scientists of an already existing reality, but a more general phenomenon of structural change in modern societies. See R. Mayntz, 1991. *Modernization and the Logic of Interorganizational Networks*. Discussion Paper, Max-Planck-Institut Köln. For an example of policy network analysis, see R. A. W. Rhodes, 1997. *Understanding Governance*, Buckingham: Open University Press; for a theoretical overview of the different approaches, see T. Borzel, 1997. *Policy Networks – A New Paradigm for European Governance?*'. European University Institute Working Paper, RSC 97/19.

with defining objectives and mustering resources from a wide variety of sources to pursue those goals.[72] A common feature of the political project pursued by contemporary Western states has been to make state-centred societies less state-centred; recent institutional reform in different national contexts has aimed at opening up new patterns of interaction between authorities at different tiers of government and key actors in their external environment.[73] The increased interaction between public and private realms and the involvement of the latter in the provision of (semi-)public services cannot be looked at in entire separation from the increasing divergence of territorial tiers of government and governance. Research on the reform of public administration in Italy, for instance, revealed that processes of *contracting out* and *outsourcing* by public administrations to private or non-profit actors has gone hand in hand with territorial decentralisation to the benefit of local government.[74] In a comparable way, 'welfare reform' in Spain has been characterised by both a tendency to privatisation and to territorial decentralisation, with the latter having had the strongest influence.[75] Yet, horizontal decentralism is no automatic guarantee for vertical decentralism. Reform in public administration in the UK, for instance, revealed that *contracting out* and *outsourcing* has been accompanied by centralisation to the detriment of local government.[76] Whatever may be the precise interactions between the horizontal and the vertical dimensions of decentralism within the administrative reform processes within the European states, it is clear that they cannot be treated as entirely independent realities.

Moreover these processes are not only taken place within the nation-states but are linked to growing globalisation and integration of certain sectors of social activity.[77] Some of the networks and the private realms in which regulation finds its source, are bypassing the territorial boundaries of the nation-state. Globalisation—not only in the economy, but also in science, culture, technology, transport etc.—seems to lead to legal pluralism. In multiple sectors of civil society rules are formulated independently of the laws of nation-states.[78] Policy-networks of public and private actors are thus woven over multiple territorial levels; the local, the regional, the national, the global, and—not at least—the European level.

The European integration process has created an additional vertical tier of government; not an additional upper-level in the linear hierarchical structure of public authority, but a supra-national level interacting and interdependent with other territorial tiers of government. Thus one has talked about 'a fusion of administrations',[79] denoting the process of increased exchanges between partly autonomous but increasingly interdependent local, regional, national and European administrations. Moreover, this multi-level European governance is characterised by interactions and partnerships with civil society organisations and private actors at the various territorial levels, including in certain cases the transfer of authority to private or semi-public institutions, such as standardization bodies in health and safety issues,

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72 J. Pierre and B. G. Peters, 2000. *Governance, Politics and the State*. Basingstoke: Macmillan.

73 B.G. Peters and J. Pierre, 2001. 'Developments in Intergovernmental Relations: Towards Multi-level Governance', *Policy and Politics*, 29 (2), p. 133.

74 F. Cafaggi, 2002. 'Riforma del welfare, modelli di governo e ruolo delle organizzazioni senza scopo di lucro', in: F. Cafaggi, (ed.), *Modelli di governo, riforma dello stato sociale e ruolo del terzo settore*. Bologna: Il Mulino, pp. 7-71.

75 MORENO, L. and ARRIBA, A. 1999, 'Welfare and Decentralization in Spain', EUI Working Paper EUF No.99/8, Florence.

76 P. Vincent-Jones, 1997. 'Hybrid Organization, Contractual Governance, and Compulsory Competitive Tendering in the Provision of Local Authority Services', in: S. Deakin and J. Michie, (eds.), *Contracts, Co-operation and Competition*. Oxford: Oxford University Press.

77 See, for instance, V. Schmidt, 1995. 'The New World Order Inc: The Rise of Business and the Decline of the Nation-State', *Daedalus*, 30 (2), pp. 75-106; A. C. Aman, Jr., 1997. 'Administrative Law for a New Century', in: M. Taggart, (ed.), *The Province of Administrative Law*. Oxford: Hart, pp. 90-117.

78 G. Teubner, (ed.), 1997. *Global Law Without a State*. Aldershot: Dartmouth.

79 W. Wessels, 1999. 'Comitology as a Research Subject; A New Legitimacy Mix?', in: C. Joerges and Vos, (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart, pp. 259-269. What can be called from a European angle 'a fusion of administrations', could be described from a national angle as 'a growing fragmentation of the State'; in this sense, see R. Dehousse, 1997. 'Regulation by networks in the European Community: the role of European agencies', *Journal of European Public Policy*, 4 (2), p. 552.

or the social partners in labour law issues. Not surprisingly, policy network analysis has become a tool to analyse European policies such as the structural funds,[80] telecommunications and environmental policies.

The reality of European governance thus shows a complexity that does not correspond with the linear separation of the vertical and horizontal dimensions of decentralism expressed in the (institutional) normative discourses.

Several conclusions can be drawn from this finding:

First, even at the analytical level we are in need of further research on the interactions between vertical and horizontal decentralism. Analyses of multi-level governance, for instance, have been pre-dominantly focusing on the 'multi-level' aspects (relations between the territorial levels of government) of multi-level governance thereby neglecting the 'governance' component (relations between the public and private spheres),[81] whereas policy-network analyses tend rather to focus on public-private fusion without always taking into account the extra variable of different territorial tiers of government. While different analytical tools may provide particular lenses on reality, the confrontation of different angles of view allows for a more correct understanding of reality.

Second, in particular in developing a normative discourse on how the European polity should best be structured, one cannot limit himself/herself to a design that only addresses a limited part of the complex reality. As argued by Jachtenfuchs 'the political debate is in desperate need for models of the European polity which give a realistic analytical image of the EU and at the same time serve as normative guideposts for feasible reforms balancing democracy and governance.'[82] Any serious normative theory on European governance should, therefore, take account of both the horizontal and the vertical dimensions of decentralism and their relation.

Third, if one argues in favour of on the one hand, giving priority to lower territorial levels, and on the other hand, involving civil society organisations in policy-making, there is no reason to limit the latter to the highest territorial level. If both vertical and horizontal decentralism is supposed to be important in European governance, there are no good arguments to justify the current tendency of the Community to limit its 'civil society discourse' to the Community method and interactions between (European) associations and the Commission (and the ESC). It is worth to note that one of the frequent comments on the White Paper from civil society organisations was the need to recognise the multi-level nature of European civil society, i.e. the Commission should not concentrate on transnational structures *only*.[83]

Fourth, if Community Institutions or political actors plead in favour of vertical and horizontal decentralism—by way of different institutional proposals—one may look how lower or smaller territorial and functional entities would benefit from it. Or put differently, from a bottom-up approach, one can ask whether the actors that may most directly profit from decentralism have conflicting interests or whether they can rather imagine strategic alliances.

4. Conclusion

Normative discourses on the European institutional set-up have paid attention to both vertical and horizontal decentralism. However, these two dimensions have appeared in the EU legitimacy debate on different moments and have been proposed by different institutional actors. The 'democratic deficit debate' hold during the IGC's of the 1990s, and the normative discourses of institutions with an electoral

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80 R. A. W. Rhodes, I. Bache and S. George, 1996. 'Policy Networks and Policy-Making in the European Union: A Critical Appraisal', in: L. Hooghe, (ed.), 1996, pp. 367-387.

81 T. A. Borzel, 1997, *Policy Networks: A New Paradigm for European Governance?*. EUI Working Papers RSC 1997/19, p.22.

82 M. Jachtenfuchs, 1997. 'Democracy and Governance in the European Union', *European Integration online Papers*, 1 (2), p. 11, available at: http://eiop.or.at/eiop/texte/1997-002a.htm

83 Report from the Commission on European Governance (2003), Annex I – The Public Consultation, p.35.

basis, have focused on elements of representation and subsidiarity in territorial terms, whereas the more recent 'governance debate', centred around the Commission (and the ESC) has focused on the horizontal dimension. This 'schizophrenia' is also characterising the current constitutional debate, split up between the Constitutional Treaty debate and the follow-up to the White Paper on European Governance.

This split between the vertical and the horizontal dimension of decentralism does not correspond with the complex reality of multi-level governance in the European polity. The contradiction between the split discourses and the intertwined reality implies both an analytical and a normative challenge. Analytically, there is need for further research on the complex relationships between the vertical and the horizontal dimension, including such questions as how processes of vertical and horizontal decentralisation relate to each other, who—in institutional terms—are the 'winners' and the 'losers', and whether smaller/lower territorial and functional units have common interests or are competitors. Normatively, any serious constitutional design for the European polity should take into account the two dimensions and their intertwining. A normative discourse for the European institutional design that focuses only on one dimension cannot do justice to the constitutional challenge of a multi-level polity.

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