The European Commission's White Paper on European Governance: The Uneasy Relationship Between Public Participation and Democracy

By Ludger Radermacher
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[1] The European Commission's White Paper on European Governance (1) has attracted numerous critical comments. Some scholars seem to suggest that the whole project was over ambitious and doomed to failure from the outset, since the Commission could not complete the project without calling into question its own functional self understanding. (2) Broadly speaking, most of the comments in the White Paper draw attention to the neglect of what is considered the European Union's core problem, that is the presumed lack of democratic legitimacy. (3)

[2] This report will not deal with the overall institutional architecture of the Union or reflect on solutions to tackle the "legitimacy gap". Instead, it focuses on the Commission's concept of public participation as articulated in the White Paper. In the White Paper, the Commission too easily equates public participation in the policy chain with democratic governance. Such a participation in the policy chain does not, by necessity, lead to a more democratic form of governance; it might instead entail risks that are not even mentioned by the Commission. As a first step in making this argument, the Commission's attitude towards public participation in the policy chain will be presented. As a second step, deeper consideration will be given to the fact that the Commission's approach to public participation, as articulated in the White Paper, in many respects resembles developments that have already become a reality in the field of European environmental law. This striking similarity is helpful in that criticism voiced by (mainly German) scholars with respect to the inclusion of the public in the field of European environmental law can be transferred to the proposed inclusion of the public in European governance in general. While it is finally admitted that the criticism is on its part based on specific presumptions that are not universally applicable, the discussion will still support the conclusion that public participation *as such* cannot be a yardstick to judge the democratic quality of a polity. More specifically, it will be stressed that public participation in the policy chain has to be based on legal rules that provide the individual or a specified group with a right to participate. Public participation cannot be based solely on a code of conduct established by the Commission.

[3] In its White Paper, the Commission stressed the aim of ensuring *wide participation throughout the policy chain.* It asserted that participation is *one of the principles that underpins good governance and that would be important for the establishment of more democratic governance.* Civil society is invited to give voice to the concerns of citizens, offering them a chance to be more actively involved in achieving the Union's objectives. It is very telling that the Commission emphasized that *civil society must itself follow the principles of good governance,* which include accountability and openness. In the same vein, in a discussion with respect to the development of more extensive partnership arrangements, the Commission stressed its expectations that, in return, *the arrangements will prompt civil society organisations to tighten up their internal standards, furnish guarantees of openness and representation, and prove their capacity to relay information or lead debates in the Member States.* It is the Commission's conviction that the establishment of a *culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policy.*

[4] This inclusion of the public in the policy chain deserves a more careful examination. The core problem inherent in this concept has already been expressed in a comment by Christoph Moellers, who stressed that "the White Paper's statement that civil society must also observe the principles of good governance contains a hardly foreseeable potential for limiting freedom and assumes an equality of measurement for private and sovereign action which is basically unknown to liberal political systems." (4) Erik O. Erichsen hints at a similar critique of the Commission's conception of participation. He warns:

The problem here is on the one hand the democratic danger of co-optation or domestication of civil society organizations. When the organizations have a vested interest in certain results they are not in a free position in the opinion formation process. They are not free to counteract policies. The democratic division of labour between state and civil society is endangered when voluntary associations (NGO´s) are used to implement policies more smoothly. Civil society associations are restructured for political or administrative purposes. Civil society is not seen as an arena for voluntary action and for open and free debate. (5)

[5] Most interestingly, this criticism resembles earlier concerns voiced by German constitutional and administrative law scholars with regard to the "Europeanisation" of German administrative law as a result of the influence of Community environmental law. A number of core ideas presented in the White Paper on governance, and more specifically the inclusion of the public into the policy chain, already have become a reality in the realm of European environmental law. The reliance on public participation as a new building block of European environmental law is

most clearly embodied in the European Environmental Information Directive. (6) This directive can be seen as a framework directive that forms a base for a number of other already existing or emerging European approaches that are based on transparency and publicity. (7) It is a paradigmatic new regulatory instrument in European environmental law, signalling a policy by which the public is used as an enforcement assistant and a "counter power." (8) European environmental law reveals another peculiarity: in a growing number of areas, the European legislative body refrains from a direct steering of regulated entities and relies instead on contributions made by these very entities. These entities are encouraged to make, by themselves, substantial contributions to the regulatory process. (9) The emerging picture in the field of environmental law is thus quite similar to the broader ideas of good governance expressed in the White Paper. In a concise summary, the creation of a network of second level organs of governance that incorporate the Commission, sub-national governments, enterprises, courts and NGO´s has been termed "infranationalism". (10) The elements of this approach include the following: first, it is difficult to identify a principal player. The community forms a policy context in which neither national governments nor community institutions have a superior power. The infranational approach downplays both the Community and the member states as principal players and likewise the role of primary state and community institutions. (11)
[6] The impact of European environmental law on the German administrative system has been severely criticized; in particular, this can be observed with respect to the new role that is assigned to interest groups and the public in general. The observance of a concept of shared responsibility has given rise to the fear that the state is, in a way, "invading" society, reducing the realm (protected by fundamental laws) in which the single individual can act freely and in an undistorted way. The role assigned to individual legal protection, so the argument goes, is reduced under the influence of European environmental law that has the effect that the individual is incorporated into the decision structure and thus assigned a responsibility for the decision that is made. Such a development would be specifically problematic in a country like Germany that is characterized by strict legislative standards, administrative case-by-case decisions and comprehensive judicial control. (12)

[7] This differentiation of a state sphere and a social sphere is a crucial point that deserves further elaboration. (13) The line of reasoning offered in support of this concept can be summarized as follows: the state is seen as an organization that is independent from but functionally related to society (relative independence); it constitutes a unit of political decision-making for social action. (14) This relative independence would have the beneficial consequence that social power is not automatically transferred into political power. Political decision-making power is monopolized by the state. The state fulfils only specified decisional functions. As a consequence, the individual is only partly incorporated into the state sphere. Should this distinction be abandoned, a "total democracy" (15) with the total involvement of the single individual in a democratic collective would result. (16) Expressly, the argument is made that movement in this direction might lead to a socialization of the state and, at the same time, to a society under state control. There is concern that state decisional processes will be increasingly dominated by direct societal input. The new role assigned to the public is seen as a fundamental change in the tradition in which common societal interests are given priority over individual rights. Some scholars even argue that the rule of law is endangered in a process where public law processes are converted into political questions. It is indeed a frequently expressed criticism that European law, and especially European environmental law, politicises the law.

[8] The criticism voiced by German scholars should, however, be seen in a wider context, a context that takes into account the German concept of the administrative state which is based on specific presumptions that explain the severe criticism of the Europeanization process. Reservations about allowing public input throughout the policy chain is explained by a fear that social interest groups might "capture" the state. This fear is to be explained by a specific historic experience. This report is not the place to explain this historic trajectory in its entirety. Suffice it to say that the German experience during the Weimar Republic, Nazi-Germany and World War II strongly suggested that the protection of the individual against undue executive intrusion needs to be fortified and better protected. The creation of an untouchable sphere of freedom and liberty, a sphere protected from state intrusion, had utmost priority. This sphere was fenced in by strong constitutional protections that bind all state branches which are protected by comprehensive judicial control. At the same time, this character of the German administrative system had the consequence that citizens could not challenge, before the courts, general (objective) administrative action, thereby denying them a political control function. Popular control is exercised by citizens when they vote for representatives affiliated with political parties; (17) the administrative process, to the contrary, should be safeguarded from these "disturbing" influences. (18) This strict legislative steering and assignment of rights is safeguarded by an elaborate judicial control system.

[9] Unsurprisingly, other countries with different administrative cultures have much less difficulty incorporating the new regulatory strategy established by the European community. (19) This is particularly true for countries whose administrative law is more or less limited to final programming and discretion granted to the administration; in those countries, the incorporation of the public into the policy chain causes much less difficulty.

[10] It is illuminating to compare the German demand for a relative independence of the state with the development that took place in the US in the 1970s, a period during which, it was argued, that the administrative agencies had

been captured by the very firms they were supposed to regulate. The proposed remedy was a greater public openness of agency decision-making as well as participation by public interest advocates for consumer and environmental interests. (20) But we do not only observe that countries that are certainly democratic have different traditions with respect to public participation in administrative procedures. Beyond that, we can observe that even countries that have a long-standing tradition of public participation in administrative procedures seem to foster public involvement for different reasons and purposes. The US, for example, can be described as a liberal and individualist polity that is based on pluralist interest participation. Individual persons are licensed as legitimate and rational social actors whose interests have a collective standing. (21) Scandinavian countries, equally known for their long-standing tradition of an open administration that includes the public in the policy chain, seem to invite the public less for pluralist considerations but instead take it for granted that there is not a substantial difference between state and social interests. (22)

[11] What conclusions can be drawn from this discussion with reference to the Commission's approach to public participation set out in the White Paper? Taking into account the different state traditions regarding public participation in administrative procedures, at least one result seems to be compelling: public participation in the administrative process *as such* and without further qualification cannot be a yardstick by which the democratic quality of a polity can be judged. It is demonstrated that public participation is not a "catch-all" principle of good governance that *necessarily* underpins and fosters democracy. The caveats and dangers hinted at in the literature are by no means purely theoretical and might come about if public participation in the policy chain is not employed in a thoughtful manner. This is specifically true for a "new polity" like the European Union in which the public does not have a pre-defined standing that results from a specific historic trajectory and state tradition. It is, therefore, not convincing if the Commission simply insists upon, without further qualification, the democratic surplus that results from public participation. Such a position underestimates both the dangers associated with the inclusion of the public into the policy chain as well as the importance such an inclusion *might* have in specific instances. It is important to note that public participation *might* further democracy under specific circumstances. There are a number of conceivable factual situations where public input might be needed. In general, such input is desirable in instances that are characterized by uncertainty and a changing knowledge base (like the regulation of hazardous substances). In those cases, the parliament is unable to guarantee a comprehensive legislative steering of the administration. (23) But since public participation has *such an importance*, and since the preceding discussion has underlined that it is necessary to avoid capture by specific interest groups, the *European legislative body* has to decide on minimum requirements for public participation, focusing on what issues require consultation, when, with whom and how to consult. An answer has to be given to the question: at what stage in the policy chain should a specific group of stakeholders or the public in general participate. Such fundamental questions cannot be decided upon solely by the Commission in a flexible code of conduct. Those questions have to be tackled by the European legislative body in a clear legislative framework, if necessary, at the expense of the efficiency considerations that have been spelled out by the Commission. Such a legislative framework would provide the individual or group that is invited to participate with a *legal right to participate* and not only with a mere chance to be consulted if it pleases the Commission. Otherwise, there would exist a risk that has been spelled out with respect to the "infranational" approach (24) used in European environmental law. This threat has been described as follows:

As a second best solution, the paralysed commission mobilizes instruments at lower levels of governance, organised interests and so forth. The result is a crosscutting network of policy makers and private organizations otherwise not legitimated to participate in EU-decision- making. This approach can be conceived of as a toolbox, with the commission using whatever instruments it perceives as appropriate. Such an ad hoc approach can hardly produce sustainable policies within a durable institutional and legal framework. (25)

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(1) European Commission, European Governance, A White Paper, COM (2001) 428.

(2) C. Moellers, Policy, Politics or Political Theory. This webpaper (http://www.jeanmonnetprogram.org/papers/01/012801/rtf) is a part of contributions to the Jean Monnet Working Paper No. 6/01, Symposium: Responses to the European Commission´s White Paper on Governance. If not indicated otherwise, the following citations also refer to contributions to the Jean Monnet Working Paper 6/01.

(3) F. W. Scharpf , European Governance: Common Concerns vs. the Challenge of Diversity, contribution to the Jean Monnet Working Paper No. 6/01, at 3-5 (http://www.jeanmonnetprogramorg/papers/01/010701.rtf). The author argues that the White Paper is generally not interested in discussing the substantive problems confronting the EU and its Member States at the present time. Such a substantive problem would be the asymmetric political economy of Europe. While the pressures of regulatory and tax competition give rise to increasingly urgent demands for more effective market-correcting policies at the European level, agreement on effective European solutions is most difficult precisely for those problems about which the citizen of the Member States care about most.

(4) C. Moellers (note 2) at 4.

(5) E. O. Eriksen, Governance or Democracy? The White Paper on European Governance, contribution to the Jean Monnet Working Paper No. 6/01, http://www.jeanmonnetprogram.org/papers/01/011201.rtf at 4.

(6) Council Directive 90/313, 1990 O.J. (L158) 56.

(7) C. Demmke, Die EG-Informationsrichtlinie und die Vollzugsdefizite in der EG-Umweltpolitik, in UMWELTSCHUTZ DURCH UMWELTINFORMATIONEN – CHANCEN UND GRENZEN DES NEUEN INFORMATIONSANSPRUCHES 38, 46-48 (Dorothea Hegele & Ralf Röger eds., 1993) (making the argument that the Environmental Information Directive constitutes an important step towards the European ambition to introduce new instruments in environmental law).

(8) See J. Masing, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: Europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht, at 19-53.

(9) At the same time, the public is given the opportunity to make an input at several intermittent stages throughout the process. Examples of this new risk communication approach include the "Seveso-II Directive" (Council Directive EEC 96/82) and the European Environmental Impact Assessment Directive (Council Directive 97/11/EEC amending Directive 85/337/EEC, O.J. No. L 73/5).

(10) See J.H.H. Weiler/U. Haltern/F. Mayer (1995), European Democracy and Its Critique – Five Uneasy Pieces, HARVARD JEAN MONNET PAPERS 5, at 32.

(11) S. Kux and U. von Allmen, Pushers, Laggards and Free Riders: Explaining the international framework and the domestic bases of climate politics, Paper prepared for the small Group Session Environmental Governance 1997 Open Meeting of the Human Dimension of Global Change Research Community, 1997, at 11.

(12) T. von Danwitz, Verwaltungsrechtliches System und Europäische Integration, 1996, at 253. The German administrative system would loose its ability to guarantee a high standard with respect to the protection of basic laws.

(13) The following description relies on the arguments of E.W. Böckenförde, Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit, GEISTESWISSENSCHAFTLICHE VORTRÄGE 6183 (1973). He criticizes efforts to blur the distinction between state and society and explains in a historical overview that the separation of state and society was a crucial precondition for the emergence of a social sphere of freedom.

(14) Id. at 26-28.

(15) Id. at 36/37, underlining that the use of the word democracy is ambivalent: if democracy is understood as the subjection of all areas of societal freedom under the power of partial collectives, the danger of a totalitarian development exists.

(16) H.P. Vierhaus, Umweltbewusstsein von oben – zum Verfassungsgebot demokratischer Willensbildung (1994), who points out that the distinction between a state sphere and a social sphere is a necessary one in order to preserve the ability to identify in an clear manner a state intrusion in one's right. (at 277, note 167).

(17) K.H. Ladeur, Öffentlichkeitsbeteiligung an Entscheidungsverfahren und die prozedurale Rationalität des Ordnungsrechts – Selbstaufklärung der Verwaltungsentscheidung im öffentlichen Diskurs?, in REFORMPERSPEKTIVEN IM UMWELTRECHT, 171, 172-173 (Rossnagel/Neuser eds., 1996).

(18) It is telling that in German administrative law, the very notion of public interest is often used to justify the protection of secrecy interests. This differs from countries like the U.S. where the same notion is always used in the sense of demanding a greater openness of administrative procedures and a furthering of public participation.

(19) T. A. Börzel, Pace Setting, Foot-Dragging, and Fence-Sitting. Member State Responses to Europeanization, Queen´s Paper on Europeanisation No. 4/2001 (Webpaper, available under http://www.qub.ac.uk/ies/onlinepapers/poe4-01.pdf). She argues that member states seek to shape European policy-making according to their interests and institutional traditions since it lowers the cost of adaptation in the implementation process. She demonstrates that the new approach to environmental regulation at the level of the European Union was caused by a successful push for "British-Style" procedural regulation (at 3-5).

(20) S. G. Breyer and R. B. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY-TEXT AND CASES 926 (1992), 26-29.

(21) See, for this view from a sociological perspective, R. L. Jepperson and John W. Meyer, The Public Order and the Construction of Formal Organization, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, 220 (1991).

(22) From the equation of state and societal interests follows as well that there is no perceived need – contrary to the German case – to protect the individual from state intrusion that endangers individual liberty.

(23) It is interesting to note that German administrative law with its described characteristics has been criticised for not being able to cope with the complex regulatory tasks that arise in areas that are characterised by uncertainty and a changing knowledge base. Due to the described historical developments, a universal rationality of law would be upheld. A substantive rationality would prevail, based on "if/then" relationships and a stable knowledge base. The mode of decision-making would be based on a stable pattern of causality and experience. See for this criticism K.H. Ladeur (note 17) at 173.

(24) See, note 11 and the corresponding text.

(25) S. Kux/U. von Allmen (note 11) at 13.