Problems of Accountability in the European Union

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European Governance and Accountability

[Summary: This chapter explores the concept of accountability as it operates in the European Union, weighing the importance of political accountability against managerial and audit accountability. The existing machinery for accountability is evaluated and a political “accountability gap” identified. The vertical transfer of functions to the institutions of a transnational system of governance which, it is argued, are not designed for purposes of accountability, is seen as weakening national accountability systems. A horizontal transfer of powers from the institutions of representative democracy to an autonomous and unrepresentative judiciary is also identified. The current Convention on the Constitution and the White Paper on European Governance are considered. The author concludes that accountability is currently weak in the EU and that change needs to start at the lowest level: within the EU institutions and in national parliaments.]
1. Questions about accountability

Unlike the doctrine of ministerial responsibility which, with the notions of legislative supremacy and the rule of law, forms part of our classical constitutional law vocabulary, accountability is not a term of art for lawyers. According to Mulgan, the word was until a few decades ago used “only rarely and with relatively restricted meaning. [It] now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic ‘governance’”.[1] As the punctuation indicates, “governance” is another semantic interloper, as prevalent as it is imprecise. Rhodes has identified at least six streams of usage,[2] ranging from the popular and overworked term “global governance”, through technical uses by experts in systems analysis or “policy network” theory, both gaining credence as methods of studying EU governance,[3] to the “good governance” advocated by devotees of “NPM” - a pushy intruder into the vocabulary of public administration.[4]

This new vocabulary all originates in the English-speaking world and translates badly. Wright, for example, describing for a French audience the management revolution within the public service, found difficulty in finding a suitable vocabulary to express himself. He had to make do with the phrase “état évaluateur”, describing the phenomenon of NPM as “la mise en place d’un système d’évaluation ex post quantifié et externe”.[5] Mulgan cannot find an exact equivalent in the European literature for the term

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“accountability” 6 while Avril states decisively that Italian, Spanish and French possess no equivalent for the term. All need to borrow the English word if they wish to indicate its portmanteau sense of “la responsabilité des gouvernants devant le peuple, au double sens de lui rendre compte et de tenir compte de lui” 7. Avril believes this is no mere chance but indicates a wider lack of correspondence. He suggests, for example, that ministerial responsibility has no exact equivalent in the French political system, explaining the variance by reference to sharply differing attitudes to the functions of parliament in the two neighbouring societies. Perhaps too, the significant semantic transition from “responsibility” to “accountability” reflects a change of practice in the English political system 8 which has not occurred or is incomplete in other European systems. This would help to explain the apparent lack of interest in accountability in institutional studies of the European Union 9 and the dangerous failure to come to grips with the problem of holding the EU institutions accountable at both theoretical and political levels.

In its recent White Paper on Governance the Commission promises to start a process which will respond to “the disenchantment of many of the Unions’ citizens” 10. It recognises the need to construct a genuine, European civil society, based not only on information but also on active and effective communication with the general public. In the White Paper, information and communication are seen as “strategic tools of governance”, with which to combat the negative image of the EU in public opinion. The White Paper also lists accountability as one of several values considered essential to good governance 11, saying

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6 R. Mulgan, “‘Accountability’”, above note 1.


Roles in legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level.

This is an unorthodox idea of accountability, focused on the policy-making process. It pays minimal attention to the more traditional obligation of government to render an account of its doings. And there is almost no reference in the White Paper to classical definitions of responsibility and accountability as recognised within the democratic systems of government of the Member States. The White Paper also seriously downplays the role of parliaments, reducing them to the level of pressure groups and other organisations of civil society, to which the Commission wishes to entrust the task of collecting and collating public opinion - hardly consonant with the view of Lord and Beetham that accountability “seems both to be expected of the EU by the public, and to follow from the logic of its own mission statements”.

This chapter sets out to explore the concept of accountability as it operates in the European Union and to evaluate the existing machinery for accountability. It seeks to consider the respective importance of traditional, political and managerial accountability in the EU system of governance. A political “accountability gap” is identified, caused in part by the weak European political system, in part by structural factors. The vertical transfer of functions to the institutions of a transnational system of governance which, it is argued, are not designed for purposes of accountability, has weakened national accountability systems. It has led to a horizontal transfer of functions at national level from the sphere of domestic policy in which government is subjected to the controls of a representative parliamentary assembly, to the historically less accountable pillar of foreign affairs. This is one form of “perversion of

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democracy” introduced by the phenomenon of transnational governance. The second takes the form of a transfer of powers from the institutions of representative democracy to an autonomous and unrepresentative judiciary a marked feature of global governance systems dominated, as the EU is, by the values of the market and institutions of capitalism. Economic actors, as Shapiro observes, feel comfortable with the apparent certainty of law and legal liability. Whether a “judicial liability system” is truly a form of accountability and whether, if so, it is an adequate substitute for, or is superior to, the democratic accountability which rates highly in national, democratic systems, is a question which needs to be addressed. Arguably, the controls of the European Court of Justice and the on which the EU has relied so heavily for accountability, have helped to erode the control systems of national parliaments and processes of democracy - the second perversion of democracy.

2. Democratic and Political accountability

In the case of the European Union, the elemental notion of democratic accountability in the sense of a process by which a government has to present itself at regular intervals for election, and can be ousted by the electorate, can be quickly passed over. At EU level, governments are not elected. There is not nor is it likely that in the immediate future there will be, an elected government at EU level and, although it has been suggested that the Commission could be indirectly elected, whether by the European Parliament or by national parliaments, both outcomes seem unlikely. The best that can be hoped for is the status quo of choice of President and Commissioners by the Member States subject nowadays to the “approval” of the directly elected European Parliament ( TEC Article 14), a chink opened up by the Amsterdam Treaty and used by the EP rather skilfully to heighten its political powers. This is, however, hardly the same as direct election of a government.


The absence of democratic accountability in this primary sense helps to explain the
general apathy and indifference which marks European political space. Without an
elected, democratic government, the EU lacks the polarity of a party system. Party
systems appeal to citizens, as they simplify electoral choices. A strong, transnational,
party system, capable of rising above national politics, would, Hix believes, help to
align European democracy with traditional domestic politics. But an elected European
government does not seem to rate high on political agendas, though a Eurobarometer
question asking whether there should be a European government responsible to a
European Parliament, has once received a positive answer. Nor does statistical
evidence show the European electorate queuing up to exercise their democratic rights.
The current clamour for European constitutions and constitutional rights does not
emanate from the people but from an European elite, motivated by a search for self-
legitimation.

This is not, however, the end of political accountability. At the heart of the concept in
the European tradition, we find some obligation for government to answer or account to
a democratically elected parliament or assembly. The idea is perhaps at its strongest in
the classical British doctrine of ministerial responsibility to Parliament, which requires
individual ministers to give an explanation to the House of Commons both of policies
and of the way in which they have been implemented in their department, taking
responsibility in this capacity for their public servants. Other systems of government
may treat this obligation as less fundamental. As already stated, Avril downplays the
force of the doctrine in the French political system, virtually denying to the National
Assembly the scrutiny function without which accountability can never be a reality. His
thesis is to some extent borne out by, and helps to explain, the limited control exercised
by the French Assembly over its government’s conduct of European affairs. The problem

is undoubtedly heightened by the near immunity of French governments from scrutiny of their foreign affairs policies, constitutionally a presidential function. It has too been said that Italy’s long period of fragmented political parties, weak coalition government and consequential reliance on votes of confidence, has led to governments accountable rather to political parties than to Parliament as a whole. The scrutiny function is, in Italy, a late arrival on the scene; parliamentary questions are a new introduction, and there is no equivalent to the EP’s subject-based committees or the departmental select committees of the UK Parliament. Again, such a restricted view of parliamentary accountability would rebound on the Italian parliament’s grasp over the field of European affairs.

Immunity from accountability may on occasion result in opening a gap between government and popular opinion. In the referendum to ratify the treaty of Maastricht, for example, there was near disaster. The fact that Maastricht necessitated an amendment to the French Constitution was exploited by the National Assembly, which seized the opportunity to add on to the amendments an article greatly expanding its own powers in European affairs, described as “a complete break with the French tradition of the executive being the sole player in international negotiations.” On this occasion, popular accountability through the instrument of a referendum came together with representative democracy to provide a starting point for a new accountability to the democratically elected and representative assembly. Similar developments have taken place in other Member States, including the United Kingdom. Here too ratification of the Maastricht Treaty of European Union was a turning point when the Government of John


Major was saved by a whisker from falling 25. Concern over the delegation of powers to Europe has led more recently to reform of the parliamentary select committee system so as to enhance parliamentary control 26. Fear that the Treaty of European Union would heighten the accountability gap between people, government and parliaments led also to the celebrated judgement by the German Federal Constitutional Court warning the German government that cession of powers to the European Union would not be tolerated indefinitely and might, if it went to far, be seen as unconstitutional 27.

“Accountability” in the sense of political responsibility may entail no more than the giving of an “account” in the sense of explanation; governments, indeed, would by and large prefer to believe that this was the extent of their duty. The classical doctrine of responsibility, as adopted in Oliver’s definition of accountability, however, entails more than this: the actor is required not only to give an account or explanation of the disputed actions, but also, where appropriate, to “suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made” 28. Accountability is, in other words, amendatory. In blatant defiance of tradition, the argument has been seriously advanced to a Select Committee of the British House of Commons that full ministerial responsibility, carrying the sanction of censure and resignation, should arise only where the personal involvement of a minister could be shown. Accountability, for these purposes carefully distinguished from responsibility, would then indicate no more than a ministerial obligation to “give an account” of the department’s performance to Parliament and the public. This altogether weaker meaning


was not surprisingly rejected out-of-hand by the Committee. New opportunities for weakening the classical concept of responsibility have also been created through the hiving-off of central government functions to autonomous or semi-autonomous agencies. Again, this is a process which has gone much further in some Member States than others, though all have been affected. In the UK, the development is closely related to the phenomenon of “New Public Management”, discussed further below. In Sweden, and to a lesser extent in other Scandinavian countries, administration has always been to a large extent conducted by autonomous administrative agencies, though apparently without a lessening of parliamentary accountability. Agencies of this type, with extensive regulatory or administrative powers, have not yet taken root in the European Union, and the existing agencies, which exist largely to collect and collate information, have not as yet, with one exception discussed below, created serious accountability problems.

The European Parliament takes accountability seriously. It likes to present itself as the only democratic European institution, and sees success in holding “the government” to account as a vital component of the power struggle in which it is engaged against Council and Commission. It has used the various powers which it has wrested rather painfully from institutions and Member States during the process of Treaty amendment skilfully and to good effect. In addition to the powers it has acquired from the Council with regard to Commission appointments, progress has been made on legislative and budgetary fronts. To take the latter first, an important stage in the struggle for power over Community finance was reached in the early 1970s, resulting from Budgetary Treaties with the Council in 1970 and 1975. In 1975, the EP gained the significant power to grant formal discharge of the budget, supported by the power of the ECA to make a Declaration of Assurance on which discharge is based. Three EP

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31 Many of the most important are in inter-institutional agreements, such as the celebrated *modus vivendi* 1996 OJ C/102 by which the European Parliament started to gain control of the Comitology (below).
committees deal with financial matters: an active and powerful policy-making Committee on Economic and Monetary Affairs; a Committee on Budgets to deal with the allocation of the Community budget, to which the Commission makes regular interim reports; and the Committee on Budgetary Control, which prepares the way for the annual discharge of the Community accounts, to which the ECA makes its annual reports. After further years of struggle, the EP has finally gained a further concession of some importance. TEC Article 270 now prohibits the Commission from acting outside the parameters of the budget, giving an assurance that the overall budget will not be exceeded without recourse to the EP. The EP has also secured a measure of budgetary control and a power of audit over the affairs of agencies. Budgetary powers allow the EP to extend its authority into areas from which it has been deliberately excluded by the Council, notably the Common Foreign and Security Policy (the Second Pillar), which must ultimately involve substantial expenditure. It has even been predicted that the combination of audit power with limited power over the appointment process, will in time be used to exact political responsibility from the powerful and largely autonomous European Central Bank and perhaps the wider European banking system, designed though it is to be autonomous and largely free from political accountability.

Whether the legislative process truly forms part of an accountability system is a moot point; the amendatory element central to the notion of accountability at least points to retrospectivity. However this may be, from the standpoint of parliaments in Europe, legislative accountability is problematic. True, there has been steady progress from the so-called “old-style procedures”, under which the Council can either legislate alone, or after a non-binding consultation of the European Parliament. The most modern variant of the “co-decision procedure” (TEC Article 251, as amended at Amsterdam) effectively gives the EP a power of final veto, if agreement cannot be reached during the conciliation procedure between Council and EP. The problem is, however, that this procedure is easily by-passed. There is (as yet) no written constitution and the Treaties

32 For further details, see Corbett et al, “The European Parliament”, above, Table 17, p.116.


contain no formal division of powers. Since Maastricht, the elusive subsidiarity principle is supposed to “guide the action of the Union’s institutions”, exhorting them “to leave as much scope for national decision as possible” \(^35\). Effectively, however, the Council possesses an over-ride; competence can be transferred to EU level as and when the Council, representing national governments, sees a need. National parliaments do not necessarily have to be consulted. New Treaty articles can revert to “old-style procedures”, undercutting the legislative accountability of Council to EP. When, for example, the Third Pillar justice and home affairs powers, were transferred to the Community at Amsterdam, consultation procedure was retained for a transitional, five-year period (TEC Article 67).

Again, the Council may resort to outline legislation, relying on the Commission’s implementation powers (TEC Article 211) together with their own supervisory powers under the Comitology Decision, which allows regulations to be made by the Commission subject only to the advisory opinions of a network of committees appointed by, and responsible to, the Commission \(^36\). Comitology has been the subject of sustained criticism from academics, on the ground of its impenetrability \(^37\) and is greatly disliked also by the European Parliament on the ground that it usurps the EP’s place in the legislative process. In contrast to the present EU agencies, which in general possess no legislative powers, the Comitology virtually escapes parliamentary control \(^38\). Currently the Commission is leaning away from Comitology and, largely for reasons of expertise, towards agencies with clearly delimited powers \(^39\). This is not, however, a recipe for

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\(^{35}\) TEC Protocol 30 on the application of the principles of subsidiarity and proportionality.


accountability, as the history of agencies in national systems, where the choice of an agency rests often on the need - or desire - for autonomy and reduced accountability, clearly shows. Moreover, the creation of agencies at EU level as the centre of a “policy network” of national agencies and other policy actors is likely seriously to diminish the input of national parliaments at both policy-making and scrutiny stages.

A wide variety of informal methods of collaboration is at the disposal of Member States when they wish to avoid the legal and institutional controls of the EU Treaties. Use of the Third Pillar is indicative. Over the years, the co-operation of Member States in the fields of migration policy led to unaccountable, executive policy-making. The format was one of informal, intergovernmental cooperation, conducted through ad hoc groups, working groups and committees designed to exclude the Community institutions under the pretext of lack of formal EC competence in the field. Not only did this avoid a transfer of scrutiny powers to the European Parliament but it had a seriously detrimental effect on control by national parliaments. Thus the important Dublin Convention on asylum applications, a document with dramatic effect on the rights of third country nationals, was a product merely of the “Schengen group” of national representatives, while the Schengen agreement on open borders was drafted by working groups and input into the text of the rules from representative assemblies or civil society organisations was almost entirely lacking. Yet these texts were later to form the basis of EU migration policy.

Notably, Third Pillar matters have never been properly brought within the formal EU structure. The Justice and Home Affairs agenda has a tendency to grow invisibly, spawning agencies such as Europol, over which there is little control from any parliament in the EU, and programmes such as the Corpus Juris programme for

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*Regulation, Law and Politics*, above. For an example of current thinking on agencies, see Regulation 187/02 of the European Parliament and Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.


41 The Dublin Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities (15 June 1990).

collaboration and harmonisation of the criminal justice process throughout the European Union, conducted in great secrecy by Council working groups with the help of academics ⁴³. This typifies the way in which informal co-operation can result in erosion of parliamentary democracy: the powers of national parliaments are undercut by transfer of competence to European but not EC level yet no commensurate political accountability to the European Parliament is substituted ⁴⁴. When, for example, the European arrest warrant was under debate, the documentation was simply not available to the United Kingdom House of Commons, because the matter fell under the Third Pillar.

For the European Parliament, the high-point of accountability so far was reached with the resignation of the Santer Commission in 1999, following an unsuccessful vote of censure tabled against the College of Commissioners in the European Parliament ⁴⁵. The resignation followed an investigation carried out on behalf of the EP into allegations of fraud and mismanagement by the Commission. The Commission’s slow and inadequate response to the allegations led the EP to freeze 10% of the Commissioners’ salaries. Following further allegations, the EP adopted a Resolution calling for a Committee of Independent Experts to be established, to report jointly to Commission and Parliament. Publication of their Interim Report on 15 March 1999 occasioned the unprecedented resignation not merely of individual Commissioners at the behest of President Santer but of the Commission as a whole, nominally accepting a principle of collective responsibility.


The Experts’ analysis is couched primarily in terms of the classical terminology and doctrine of political responsibility. In their terse and celebrated conclusion, they speak of the “growing reluctance among the members of the hierarchy to acknowledge their responsibility” and suggest that it is “becoming difficult to find anyone who has even the slightest sense of responsibility.”\(^{(46)}\) Towards the end of the conclusions, however, the Experts make an important statement of principle\(^{(47)}\)

The principles of openness, transparency and accountability…. are at the heart of democracy and are the very instruments allowing it to function properly. Openness and transparency imply that the decision-making process, at all levels, is as accessible and accountable as possible to the general public. It means that the reasons for decisions taken, are known and that those taking decisions assume responsibility for them and are ready to accept the personal consequences when such decisions are subsequently shown to be wrong.

The incoming President, Romano Prodi, picked this up in a speech, where he said\(^{(48)}\)

I am firmly convinced that increasing the efficiency and accountability of the Commission in future largely depends on greatly reducing the grey areas which currently tend to blur demarcation lines of autonomy and responsibility between those performing more political tasks and those more involved with administration.

Prodi acknowledged the concern of the public with good government and promised reform. “Once we have increased the Commission team’s capacity to provide political direction, we will be able to set about increasing the transparency, efficiency and accountability of their departments, as required by the Treaty of Amsterdam and demanded by European public opinion”. In this way, the two reports of the Independent


\(^{(47)}\) Interim Report, para 9.3.3.

Experts had brought accountability into the vocabulary and on to the political agenda of the European Union. Essentially, this was taken to mean the responsibility, collective and individual, of the College of Commissioners to the European Parliament. There is little reference to national parliaments in the Experts’ Reports yet to close the yawning accountability gap, a much greater input is required from national parliaments.

At present, the degree of control exercised over EU matters by national parliaments depends essentially on two variables: the balance of power inside the national system between parliament and government; and the degree of parliamentary control over the conduct of foreign affairs, an aspect of the first, larger question. Different parliaments conceive their roles very differently and prioritise different aspects of their functions, with the result that their contribution to accountability, and the seriousness with which they undertake their scrutiny function, may vary greatly. Some parliaments have reacted more forcefully than others to the challenge of lawmaking by the Community. The most stringent control is through mandate, but this is exceptional; the Danish Folketing is the only successful example of this model. The Folketing has assumed the power to mandate ministers in policy-making and, on accession to the Community, this rule was simply extended. No other national parliament has taken political accountability to such limits, and it is, indeed, doubtful if the EU could function if mandate were to be tried more widely. Attempts to tie national parliaments into the EU system are presently at a stalemate. Protocol 8 on the Role of National Parliaments in the European Union added to the TEC at Amsterdam tries to address the problem. It requires the Commission to forward all consultation and Green and White papers “promptly” to national parliaments, while Commission proposals for legislation “shall be made available in good time”. Access to documentation, essential for the work of legislative scrutiny, has been a perennial cause for complaint, and is only just beginning - if it is beginning - to be resolved. Protocol 8 again speaks to the desire of the institutions to “encourage greater involvement of national parliaments in the activities of the European


Union and to enhance their ability to express their views on matters which may be of particular interest to them”. The inter-parliamentary Conference of European Affairs Committees (COSAC) is now able to scrutinise proposals forwarded to it by Member State governments, and empowered make joint contributions to the legislative process, more specifically in the area of freedom, security and justice or concerning the rights and freedoms of individuals. It may in addition address to the institutions “any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights”. It is, however, questionable whether this is a useful power or, indeed, whether a committee of this type can claim adequately to represent fifteen and more parliaments and their several thousand representatives of diverse political parties and groupings. The institutions, more especially the EP, which has a direct interest in the outcome, are undoubtedly keen to find a place for national parliaments in the EU policy-making process but the dilemma which goes to the heart of the relationship is spelled out in Protocol 8, which was, after all, drafted for and signed by Member State governments. The Preamble to the Protocol demonstrates fear on the part of the European Council, representing national governments, of being seen to trespass on sensitive parliamentary terrain. In a significant caveat, the High Contracting Parties recall “that scrutiny by individual national parliaments of their own government in relation to the activities is a matter for the particular constitutional organisation and practice of each Member State”, while the Protocol concludes with the timorous assertion that “contributions made by COSAC shall in no way bind national parliaments or prejudge their position”.

Martin Westlake, who describes national parliaments as “partners and rivals”, notes their tendency to “talk past one another”. Yet for the accountability gap to be closed, it is essential for national parliaments to take matters into their own hands; they need to ensure that relationships between national parliaments are strong and in good repair. By collaborating with each other, they could achieve greater success in securing accountability for EU affairs. Only if national parliaments can use influence enhanced by collaboration at the EU level to secure the stricter observance of the subsidiarity

principle can they play their full part in EU governance. Robin Cook, when Foreign Secretary, called for a forum in which national parliaments could meet to discuss problems of subsidiarity. But the risk national parliaments face is that such a forum would operate to provoke turf wars between the three tiers of European parliaments, the outcome being a huge and unwieldy “forum”, enlarged to accommodate regional parliaments. This could minimise parliamentary input in to policy and decision-making, while seeming to enhance it. It would also undermine the scrutiny role of parliaments. Yet if national parliaments are to retain their central place in European democracy, it is essential that they should find innovative ways to collaborate with each other. Even without the help and resources of the EP, a programme of close cooperation between European parliaments is both possible and urgently needed.

3. Audit and Accountability

Christopher Hood describes financial control as “deeply embedded in the European tradition of constitutional (limited) government and formal public accountability in financial affairs.” Financial accountability is certainly seen as an essential ingredient of “good governance” throughout the Member States; it may, indeed, be the common element in definitions of the elusive concept. Financial probity figures high too on the list of issues important to the European public. The fall of the Santer Commission was precipitated by charges of fraud and fiscal irregularity. The collegial resignation after the Interim Report of the Committee of Independent Experts not only attracted an unusually high level of media attention but also focused public attention on the work of the European Parliament, raising its profile in a Eurostat survey by a figure of 8%. This suggests that focus on its budgetary functions would provide the EP with an easy path to greater legitimacy.

In a sense, the Committee of Independent Experts usurped the place of the European Court of Auditors, in whose annual reports the Santer affair first surfaced. For a number of reasons, the ECA has found difficulty in establishing a firm role for itself in the EU political space. The Court itself attributes its difficulties to the absence of a powerful Ministry equivalent to the French Ministry of Finance or British Treasury, which has meant that management and audit were never basically “pushing in the same direction.” Lack of interest and firm support on the part of the Council, and occasional outright hostility from the Commission are other important factors. Before the Independent


54 The Annual Reports of the ECA and of the British NAO are regularly reported in the quality press. And see S. Grey, “Tackling fraud and mismanagement in the European Union”, London, Centre for European Reform, 2000?


Experts reported, internal audit of the Community finances was overseen by DG XX of the Commission - equivalent in national terms to siting the Treasury in a major spending ministry. The Commission ethos is not geared towards audit or accountability; it views itself as policy-maker and engine of the European Union, whose function it is to push the Member States down the path of European integration. Financial responsibility is made harder by old-fashioned systems of personnel management, a problem only just beginning to be addressed by reforms set in place by Vice-President Neil Kinnock as a response to the strictures of the Independent Experts. The most important reforms to result from the Reports of the Committee of Independent Experts were undoubtedly of the Commission’s internal audit system, moved to a unit directly responsible to the President and of the Office européen de lutte anti-fraude (OLAF), responsible for the investigation of frauds against the Community budget, which was given greater autonomy and put under the supervisory jurisdiction of a new and active committee which reports to the European Parliament.

These were rather basic, though necessary, reforms. A much more radical programme of improvements is necessary to generate public confidence in the EU fiscal system and how to achieve this is more problematic. The financial structures of the EU are notably complex, partly due to the vast number of cross-border financial transactions, partly to the EU administrative system. The European Commission is not the equivalent of a national or federal public service. It does not itself engage in service delivery. The programmes which it operates, notably the two largest, the common agricultural and structural funding programmes, are administered on its behalf by national and sub-national administrations, or national agencies in the Member States. In addition, the Commission enters into contracts with private companies, and operates through the voluntary sector, whose books may not be subject to public audit. These complex

57 B. Laffan, “From policy entrepreneur to policy manager: the challenge facing the EC” (1997) 4 Journal of European Public Policy 422.

58 European Commission, Reforming the Commission, COM 200 (2000); European Commission, New Staff Policy, IP/01/283, Brussels (28 February, 2000); followed by a further series of internal Commission working papers (SEM).

programmes involve in the region of 18 billion individual financial transactions annually, of which it seems that more than one in seven may be procedurally irregular. And, as the investigations of the Committee of Independent Experts proved beyond a shadow of doubt, the Commission has been a lax and inefficient manager. It has not devised techniques for the effective co-ordination of networks nor does its reform programme so far prove that it is capable of so doing. The ethos of the Commission is not managerial. It has not been wholly receptive to public management techniques as increasingly adopted in national administration, though they are beginning to find a place in the Kinnock programme of reform. Not only have its own audit systems proved inadequate but the Commission has also failed signally to set in place in respect of its major programmes of structural funding, grants and subsidies, the “audit trails” which are the sine qua non of modern audit systems. Long before they came up against the magisterial reproofs of the Committee of Independent Experts, the Commission’s arrangements for scrutiny of EU finances were severely criticised by the European Court of Auditors in its Annual Reports. Disparities in national audit systems add to the problems of auditing a set of already exceptionally complex transactions. In its Annual Report for 1998, the ECA noted that “the separate accounts kept by the Member States contained significant errors”, while a House of Lords inquiry has questioned “how far national audit institutions are actually able to police the expenditure of Community funds once the money has been paid over to national governments”.


Ibid, para.1.11.

House of Lords Select Committee on the European Communities, “Court of Auditors”, HL 102 (1986-7), p.11, para. 22 (Mr Jo Cary).
incentives for national authorities to deal with fraud within their boundaries, even if they have the capacity to do so, and the Commission has been slow in trying to provide them. Techniques of audit also differ widely within the Member States, and there are at least four variants of audit body 66. The ECA can only operate through a system of “spot sampling” according to which about 600 of 360,000 transactions are on average examined - in the view of accountancy experts, too small a base from which to extrapolate 67. The external audit system operated by the ECA is thus far from foolproof, even with help from national audit offices, on whose assistance it is entitled to draw. To iron out the differences and weld the disparate systems into a new, and more professional, audit structure for the EU will involve hard choices, made harder, as indicated, by the absence of an independent Treasury, and a Commission ethos neither geared to audit nor to managerialism.

Antipathy to public management is reflected too in suspicion of “Value-for-Money” auditing, a technique which allows auditors, by recourse to comparators of performance, to identify practical ways in which managers may better target their efforts, but also allows them gradually to extend their remit deep into policy-making, an aspect of audit which has made it most attractive to public managers 68. The ECA has for some time been anxious to extend its activities into VFM auditing, building on the word “sound” in TEC Art 188(c). The ECA hopes that the introduction of VFM audit could stiffen Commission accountability in financial matters; it would also favour the extension of accountability for the execution of policy through the introduction of NPM techniques. The Commission, on the other hand, is jealous of its position as the policy motor of the Community, and keen to preserve the discretionary monopoly to which it has became accustomed. Since VFM audit is now in place in a majority of Member State public audit systems, it can only be a matter of time before it permeates Commission practice. In practice, the Commission would certainly find VFM helpful in the construction of management networks designed to render the various operators accountable for


67 M. Power, “The Audit Society”, p. 89. The comment is based on interviews with auditors.

implementation of EU policy; to put this differently, VFM would seem to be an essential ingredient of a system of managerial control of EU administration networks.

Accountability through audit will, however, never be easy in the EU. Driven on by the EP and ECA, and latterly by the OLAF supervisory committee, the Commission has at last recognised the necessity of introducing a minimum degree of uniformity into the management of EU finances. It is, for example, currently negotiating protocols on management and audit with Member States participating in the administration of structural funds. Enlargement is, however, likely to make everything more difficult. Boundaries will be widened, audit chains lengthened, new, perhaps less effective, systems and techniques of audit introduced. In case of fraud, there will be the necessity of intervention from a greater number of police forces and new systems of criminal justice. To date, it should be remembered, there has never been a successful prosecution of an EU official for fraud, with the Commission normally claiming diplomatic immunity if charges are threatened. Whether the difficulties can be overcome through the new arrangements for co-ordinated criminal justice policies pushed forward at Laeken is very questionable.

Some commentators see the way forward through alignment of audit methodologies to produce “the beginnings of a ‘Community’ model of financial control and audit”. But an audit system must be chosen for effectiveness and efficiency, and not because it combines elements of all or most of the audit models in use through the Community. Such a hybrid would probably fail as an administrative transplant, and might actually undercut the efficiency of the most effective national systems, in which case it would be heavily resisted by those Member States with most to lose. The House of Lords has asked in contrast only for minimum standards, accepting that “differences between

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70 Presidency’s conclusions on justice and home affairs, Laeken, 17 December, 2001. See also proceedings of Council, Justice, Home Affairs and Civil Protection, Brussels, 16 November 201, OR 13758/01.

systems of control are justified so long as each system is effective”. This is a more sensible approach, though it begs the crucial questions: Are they or can they be made so?

4. Accountability through Law

The relationship between courts and government is not usually formulated in terms of accountability. Lawyers, including EU lawyers, prefer the classical vocabulary of rule of law, guaranteed, with liberty, democracy and respect for fundamental rights and freedoms, as fundamental values by the Treaties. In states with strong systems of public law, however, law is not only the framework within which government is held accountable but stands also at the centre of the constitutional system of accountability. Equal, or even greater, trust is placed in courts than parliaments. Oliver links the two ideas of rule of law and accountability when she describes accountability as creating a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill conceived; and to make amends if mistakes and errors of judgement have been made.

This is the role which lawyers traditionally allocate to the rule of law.

Sometime in the nineteenth century, the term “control” lost its close link to financial audit and entered the standard vocabulary of administrative law: jurisdictional control or judicial review of administrative action began to be recognised as a way to hold government answerable to courts. During the twentieth century, judicial review has tended to expand its empire, becoming the standard means of challenge to administrative action. The chief medium by which judicial review protects private

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interests and exercises control over administrative decision-making is through a cluster of procedural rights, recognised in slightly variant forms in all major European legal systems. Reasoned decisions are also a basis for administrative accountability; indeed, for Shapiro, they provide the basis for all judicial review of administrative discretion and arguably, of all judicial review. TEC Art 253 (ex 190) contains an obligation for the institutions to “state the reasons on which [their decisions] are based” and the ECJ has not been slow to recognise its potential; its standard formula justifying the reasoning of decisions stresses the control function of judicial review. It also contains a reference to an embryonic principle of transparency, a second area in which courts can act strongly to enhance accountability; recently, the Court of First Instance has begun to take transparency very seriously.

From a procedural point of departure, many supreme courts have been able to add to their portfolio the function of “higher law judicial review”. When they rule in this way on the validity of legislation, constitutional courts undoubtedly hold government to account. Boundary demarcation based on the Treaties and on a body of constitutional principle developed by the Court has emerged as a primary function of the European Court of Justice, allegedly built into its competence by the Treaty obligation “to ensure that, in the interpretation and application of this Treaty, the law is observed” (TEC Article 220). The Court possesses (or has assumed, according to one’s viewpoint) the last


77 Defined by M. Shapiro, “The European Court of Justice”, in P. Craig and G. de Burca (eds), The Evolution of EU Law, Oxford University Press, 1999, p.321 as “the invalidation of laws enacted by the normal or regular legislative process, because they are in conflict with some higher law, typically a constitution or treaty”.

78 For the start of this practice, see A. Lorenz, “General principles of law: their elaboration in the Court of Justice of the European Communities” (1964) American Journal of Comparative Law 12; A. Akehurst, “The Application of General Principles of Law by the Court of Justice of the European Communities” (1981) 52 British Yearbook of International Law 29.
word in interpreting the Treaties. It polices the competences of the EU, decides on the validity of EU legislation and in so doing preserves the “institutional balance” of the Treaties, maintaining the balance of power between the EU institutions.

A further body of constitutional jurisprudence concerning the relations between the EU legal order and that of the Member States has been developed from the seminal case of *van Gend en Loos*. Many EU lawyers see this jurisprudence as the culmination of the integration process; European democracy may be in deficit, but the European legal order emphatically is not (the antithesis is deliberate and habitual.) The jurisprudence has by and large been both activist and integrationist in character, the objective being to create an effective legal system by which EU law can be enforced. It is primarily the Member States, rather than the EU institutions which are being held accountable, a process requiring the acquiescence and, occasionally, active co-operation of national courts. Essentially, co-operation is based on a legal fiction that national courts function in a dual capacity as courts of the national legal systems but also as EU courts. The machinery which links the two tiers of the EU legal order is the preliminary reference procedure put in place by the Treaties (TEC Article 234), whereby national courts refer points of EU law which arise in cases before them to the ECJ for a ruling. This procedure has, until recently, been used very freely and generally speaking in an integrationist fashion, again with the objective of creating an effective legal system by which EU law can be enforced.

For Mulgan, the law is not in itself an accountability mechanism, nor is compliance with the law an act of accountability; the legal accountability mechanism is confined to that part of the law which lays down enforcement procedures. Here Mulgan seems to be separating law’s standard-setting or declaratory function, prioritised by constitutional

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80 I. Maher, “National Courts as EC Courts” (1994) 14 Legal Studies


82 R. Mulgan, “‘Accountability’: an Ever-Expanding Concept?” (2000) 78 Public Administration 555
courts and EU lawyers, from the machinery by which administration is brought to account and law is enforced. This tallies with the views of Lord, who sees legal accountability as one of the four elements which go to make up democracy’s “irreducible core”. For Lord, democratic accountability requires that citizens must be able to access a court “with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account”.

The ECJ is conscious of the importance of enforcement and, again with effectiveness in mind, has gone some way to harmonise the system of legal remedies available from courts in the European Union. Two celebrated cases are particularly significant in this respect. In *Factortame*, where interim relief pending a ruling from the ECJ on legality was claimed from English courts, the ECJ answered questions posed in an Article 234 reference by saying that

> [T]he full effectiveness of Community law would be... impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgement to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

In *Francovich*, the ECJ, walking boldly on to uncharted terrain, authorised the *creation* of a remedy in damages against Member States for failure, deliberate or otherwise, to implement EU directives. While this development could be seen as paralleling the liability of the institutions under the Treaties to pay compensation for loss caused

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through their actions (TEC Arts 235 and 288), in practice it took some time for the Court to recognise the need for equality in this respect[^87] - not the only case in which the legal accountability of the Member States under EU law has allegedly been greater than that of the EU and its institutions. On these two cases, the ECJ could have predicated an integrated system of legal remedies, greatly strengthening the elements of enforceability and reparation in legal accountability. Instead, an apparent loss of confidence has brought a period of unpredictable and unstable case law[^88].

Courts which take seriously their function of constitutional adjudication and use the process of judicial review to bring government to account are likely to face questions about their own accountability. The ECJ is no exception to the rule. It has been attacked as integrationist, activist, and for usurping the policy-making function[^89]. On the other hand, it can be argued that the curious structure of the EU judicial system contains a guarantee of “judicial balance”. So long as the ECJ and CFI satisfy their main “interlocutors”[^90], keeping on the right side of national courts, the precarious balance between holding government to account and self-accountability inherent in the public law function of the judiciary is probably being maintained. This may be one explanation for a decline in the integrationist enthusiasm of the early years, another being the introduction of the subsidiary concept by the TEU (above), with the weight of public opinion beginning to tip decidedly in the direction of subsidiarity.


5. Conclusions

Two opportunities for reform lie before the European Union as it faces the enormous challenge of enlargement. The first is the Convention set up by the European Council at Laeken with a mandate to “identify the key issues for the Union’s future developments and the various possible responses” 91. The Laeken Declaration invites the Convention to concentrate on four broad themes: reorganisation of the Treaties, competences, legislative procedures, and the efficiency and democracy of the institutions. This broad brief would allow the rambling European structure of “bits and pieces” 92 to be made more coherent, helping on the one hand to heighten the doubtful legitimacy of the EU and on the other to close the accountability gap which so frightens citizens and undercuts and threatens legitimacy. A significant first step in the right direction would be to complete the unfinished business of Amsterdam by removing all policy-making in the fields of Justice and Home Affairs from unaccountable committees and working groups. This could be done either by bringing it formally within the perimeters of the Treaties or by decisively returning policy-making to the Member States, restoring the responsibility of national parliaments. A further improvement in the field of lawmaking would be to shift the balance decisively in favour of representative and democratically elected parliaments. The present hiatus, which allows the Council to revert at will to the “old procedures” and act as sole legislator, with or without consultation of the European Parliament, should be re-considered in the context of qualified majority voting. Co-decision procedure should become the norm.

Moves of this type in the direction of definition and clarity would unfortunately go against the grain of

91 See Conclusions of the Laeken Council, above note 69.

the Commission’s White Paper on Governance, the EU’s main attempt to tackle problems of efficiency and democracy of the institutions and its second opportunity for reform. As already indicated, the White Paper includes accountability in the list of values recognised as essential for good governance but it uses a highly unorthodox definition. Rather than taking its rightful place as a “core attribute of democratic rule”, accountability has here been reduced to an element in the policy-making process. It has become prospective rather than retrospective, internal rather than external, in this way departing from traditional understandings. Moreover, key questions of accountability, notably who is to be accountable for what to whom, are entirely glossed over in this White Paper.

Again, there is little or no reference to the programmes of reform under way in the Commission in the wake of the Reports of the Independent Experts, designed to strengthen financial accountability and to introduce the Commission to the basic precepts of NPM. Perhaps the Commission sees these as a private affair, for which it is not publicly accountable. This could explain (though not justify) the omission from the White Paper of any reference to the right of every person, established by Article 41 of the recent European Charter of Fundamental Rights, “to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions of the Union”. This is the more surprising in that, according to the European Ombudsman, “The Charter is the first in the world to include a right to good administration as a fundamental right in a human rights declaration.” The right is, of course, expanded in the EO’s recently published Code of Good Administrative Behaviour. The omission to mention either Code or Charter in the White Paper was heavily criticised by the European Parliament, which expressed regret that


although the White Paper mainly deals with matters falling under good administration, the Commission has not been able to take a position on the European Parliament’s and the European Ombudsman’s initiative on good administration.\footnote{European Parliament, Constitutional Affairs Committee, Report on the Commission White Paper on European Governance, Rapporteur: Sylvia-Yvonne Kaufman, p. 23.}

This underlines the fact that the Commission’s interpretation of the term “governance” is as one-sided as its definition of accountability. Ignoring those aspects of the myriad meanings of the imprecise term which emphasise the efficiency targets of NPM, the Commission has produced its own novel definition in a footnote\footnote{White Paper, p. 8.} to mean the “rules processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence”. The Commission has incorporated its own agenda of participatory democracy into its definition. It has then proceeded at the level of macro-governance, presenting a bundle of vague and inchoate suggestions for consultation of civil society and its organisations, without any proper analysis of the way in which these may impact on the existing structure of the EU.

Member State governments, European Councils and the Commission, have on numerous occasions expressed their concern at the lack of popular support for the European Union, and the lack of interest in its institutions and policy-making. The Council is inclined to focus on transparency, a value which it sees as very important - so long, at least, as its own privileges are not too greatly affected.\footnote{Hautala v Council, above.} It has also emphasised, though without specific proposals, the role of national parliaments. Both are essential elements in democratic accountability. The Commission, in contrast, puts it faith in stimulating the growth of a truly European civil society, a much tougher proposition. It suggests that the problems are largely systemic, that “many people are losing confidence in a poorly understood and complex system to deliver the policies
that they want”\textsuperscript{100}. Their response, to involve society and sections of society in policy-making, would in fact shift political and rule-making power to the Commission without increasing either its efficiency or its accountability towards the public and the member states. More serious still, the Commission’s recommendations seem capable of undercutting the institutions of representative democracy, on which the public tends to rely for exacting accountability from government. In the rush to promote participation by civil society and non-governmental organisations, adequate consideration has not been given to the question whether the Commission’s proposals may not undercut more orthodox representative machinery. Strengthening the place of regional assemblies is, for example, likely in the end to prove impractical for logistical reasons, but at the same time to weaken national parliaments. Practical proposals to enhance the representative institutions of Europe and encourage the participation of the people of Europe through traditional representative machinery, on which the Commission is supposed to have been working since Protocol No 8 was added to the Treaties at Amsterdam, are, on the other hand, entirely wanting. It is to be hoped that this critical obligation will surface on the agenda of the Convention. Again, the proposals for “framework legislation”, leaving space for the Commission to fill in “technical details”, and for “co-regulation”, which would instal a general regulatory framework to be implemented by various actors through legal and non-legal instruments\textsuperscript{101}, is, from the standpoint of legislative accountability, highly suspect. No doubt it would avoid problems of delay and complexity but once again it would succeed in evading legislative accountability at both European and national levels, undercutting the authority of both the European Parliament and national parliaments.

The White Paper, in short, does not adequately address the numerous questions of accountability which plague the European Union nor are its proposals truly democratic in terms of the democratic systems of government to which the people of

\textsuperscript{100} White Paper, p.3.

\textsuperscript{101} White Paper, pp.20-23.
Europe are accustomed. Yet fears over accountability are, as Micosi stresses, amongst the deepest fears of people in the face of European union. This is partly why public opinion seems unfavourable to further transfers of national sovereignty and does not seem to want the full democratic accountability of the Commission as an elected government on which President Prodi has set his sights. As Micosi describes the process of integration, the expansion of EU tasks has been driven by Member States in response to the demands of large and powerful constituencies within European society, notably the transnational business community, without the explicit approval either of the peoples of Europe or of their elected representatives. Integration is thus the de facto consequence of a series of incremental and piecemeal decisions taken at various inter-governmental conferences and by the institutions, for which governments have largely escaped political accountability to national parliaments. “Public opinion may have supported each increment, but Europe’s citizens are unhappy with the overall result because of their inability to exercise control.”

A written constitution, federal in character and with a clear list of those powers which are devolved to the EU and those retained by Member States, although it has powerful advocates, notably in Germany, is not the most likely outcome of the Convention on the Constitution. Nor is essential structural change, controversial at the Nice IGC, likely to prove less so in the context of the Convention. The White Paper, with its pretentious though vague agenda is another missed opportunity. The struggle for accountability is always formulated at the macro level of structures, institutions and constitutions. In truth it needs to start at a lower and more pragmatic level: in the practice of politicians and officials within the EU institutions and, above all, in national parliaments.


103 At p.10.