PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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Of course, the continuation of Westminster as a bicameral Parliament is not the only institutional issue brought into question. The relationship in each House between committee work and the floor, or chamber, is a critical issue. It may be that Parliament needs to become much more a Parliament of committees, along the lines perhaps of the European Parliament, than it has hitherto been prepared to accept. It may be that it should be rather smaller. In a unicameral Commons of 500 members, 125 could be government ministers, leaving 375 non-governmental members to be divided into (say) 25 scrutiny committees of 15 members each. Commons time could be very differently organised. Currently about half its time is spent on legislation. Perhaps a better balance would be to spend 50 per cent of time on departmental and administrative scrutiny, 25 per cent of time on financial scrutiny, and 25 per cent of time on legislative or policy scrutiny? These are just some of the issues that would be under consideration if we were serious about revitalising Parliament.

As things stand, however, there is a sense that Parliament has become confused about what it really is, and what it is really for. At present it legislates only indirectly, yet neither does it focus sufficient energies on scrutinising the government (although as we have seen its record here is not as miserable as many would have us believe). However, it is clear that improvements are needed. Equally clearly they are attainable. There is the political will, and there are the parliamentary means. By sharpening Parliament's 'mission statement', perhaps it will perform its key tasks better. One reason why it sometimes performs badly now is that it is unsure of itself, caught between the two stools of legislator and scrutineer. By reconceiving of it so that the legislative function becomes part of the scrutiny function, perhaps a way can be found for Parliament to perform its scrutiny functions that much more effectively. Otherwise, what is the point in Parliament? If we are not prepared to take Parliament sincerely, why not simply abandon it? We could simply elect our government every four or five years, subject it to the ad hoc, sporadic and peripheral scrutiny of ombudsman, auditor, regulator and law court, and make do.

House of Lords can be Improved, 2001–02 HL 111, published in May 2002. For an excellent extra-parliamentary commentary on the powers (as well as the composition) of the House of Lords, see M Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford, Oxford University Press, 2000).

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European Governance and Accountability

CAROL HARLOW*

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

[1] R Mulgan, '"Accountability": an Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.

[2] R Rhodes, 'The New Governance: Governing Without Government' (1996) 44 *Political Studies* 652.

[3] K-H Ladeur, 'Towards a Legal Theory of Supranationality: The Validity of the Network Concept' (1997) 3 *European Law Journal* 33. See also S Hix, 'The Study of the European Community: The Challenge to Comparative Politics' (1994) 17(1) *W European Politics* 1.

[4] C Hood, 'A Public Management for All Seasons' (1991) 69 *Public Administration* 3; G Drewry, 'The New Public Management', in J Jowell and D Oliver (eds), *The Changing Constitution*, (4th edn, Oxford, Clarendon, 2000).

[5] V Wright, 'Le cas britannique: le démantelement de l'administration traditionnnelle', in L Rouban and J Ziller (eds), Special Issue, *Les Administrations en Europe: D'une Modernisation à l'Autre* (1995) 75 *Actualité Juridique, Droit Administratif* 355, 356.

European literature for the term '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 European Union in public opinion. The White Paper also lists accountability as one of several values considered essential to good governance,[11] saying:

> 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

[6] Mulgan, above n 1.

[7] P Avril, 'Les Fabriques des politiques', in N Wahl and J-L Quermonne (eds), *La France presidentielle* (Paris, Presses de la FNSP, 1995), 65.

[8] G Drewry and D Oliver, *Public Service Reforms: Issues of Accountability and Public Law* (1996).

[9] But see C Lord, *Democracy in the European Union,* (Sheffield Academic Press, 1998).

[10] European Commission, *White Paper on European Governance* (COM(2001) 428 final, Brussels, July 2001), 32.

[11] White Paper, above n 10, at 10.

'seems both to be expected of the EU by the public, and to follow from the logic of its own mission statements.' [12]

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 democracy' [13] 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 European Union 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.[14] 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 on which the European Union 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.

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, [15] 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 [16] that the Commission could be indirectly elected,

[12] C Lord and D Beetham, 'Legitimizing the EU' (2001) 39 *Journal of Common Market Studies* 443, 446.

[13] See D Wincott, 'Does the European Union Pervert Democracy? Questions of Democracy in New Constitutionalist Thought on the Future of Europe' (1998) 4 *European Law Journal* 411.

[14] M Shapiro, 'The European Court of Justice', in P Craig and G de Burca (eds), *The Evolution of EU Law*, (Oxford, Oxford University Press, 1999).

[15] S Gustavvson, 'Reconciling Suprastatism and Accountability: a View from Sweden', in C Hoskyns and M Newman (eds), *Democratizing the European Union, Issues for the Twenty-first Century* (Manchester, Manchester University Press, 2000).

[16] S Hix, 'Linking National Politics to Europe', available at www.Network-Europe.net

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 (EC Treaty Article 14), a chink opened up by the Amsterdam Treaty and used by the European Parliament rather skilfully to heighten its political powers.[17] 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.[18] Without an elected, democratic government, the European Union 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.[19] 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.[20] 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

[17] R Corbett, F Jacobs and M Shackleton, *The European Parliament* (4th edn, Harlow, Longman, 2000) 234–38.

[18] PMagnette 'European Governance and Civic Participation: Can the European Union be Politicised?' (Harvard, Jean Monnet Working Paper No 6/01).

[19] See for exposition S Hix, *The Political System of the European Union* (Basingstoke, Macmillan, 1999).

[20] C Turpin, 'Ministerial Responsibility' in J Jowell and D Oliver (eds), *The Changing Constitution* (3rd edn, Oxford, Clarendon, 1994). For a sceptical account, see F Ridley, 'There is no British Constitution: A Dangerous Case of the Emperor's Clothes' (1988) 41 *Parliamentary Affairs* 340. See also Adam Tomkins, Chapter 2 above.

coalition government and consequential reliance on votes of confidence, has led to governments accountable rather to political parties than to Parliament as a whole.[21] 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 European Parliament's subject-based committees or the departmental select committees of the UK Parliament.[22] 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,[23] described as 'a complete break with the French tradition of the executive being the sole player in international negotiations'.[24] 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 judgment 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 too far, be seen as unconstitutional.[27]

[21] A. Manzella, 'La transition institutionelle', in S Cassese (ed), *Portrait de l'Italie actuelle*, (Paris, *La documentation française*, 2001), 60–61.

[22] P Furlong, 'The Italian Parliament and European Integration: Responsibilities, Failures and Successes' (1995) 1 *J Legislative Studies* 35, 44. See, similarly, P Leyland and D Donati, 'Executive Accountability and the Changing Face of Government: UK and Italy Compared' (2001) 7 *European Public Law* 217, 234.

[23] See F Rizutto, 'The French Parliament and the EU: Loosening the Constitutional Straitjacket', Special Issue, *National Parliaments and the European Union* (1995) 1 *J Legislative Studies* 46.

[24] R Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' (1994) 32 *Journal of Common Market Studies* 69.

[25] R Rawlings, 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union (Part One)' [1994] *PL* 254.

[26] A process starting with Select Committee on Procedure, 4th Report, *European Community Legislation* (HC 622-I 1989/90); Government Response (Cm 1081, 1990); Select Committee on European Legislation, 27th Report, *The Scrutiny of European Business* (HC 51–xxvii, 1995/6). See also Reports of the Select Committee on European Legislation at www.parliament.uk/commons/selcom/enrolhome.htm.

[27] *Bundesverfassungsgericht*, 2nd Chamber (Senat) Cases BvR 2134/92 and 2 BvR 2159/92 (12 October 1993) BVerfGE 89, 155; in English, *Brunner v European Union Treaty* [1994] 1 CMLR 57. For comment see P Kirchhof, 'The Balance of Powers Between National and European Constitutions' (1999) 5 *European Law Journal* 225.

'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.[29] 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 United Kingdom, 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.[30] 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.[31] 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 lat-

[28] D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Buckingham, Open University Press, 1991) 22.

[29] A Tomkins, *The Constitution After Scott* (Oxford, Oxford University Press, 1998), 59–63. See also Public Service Committee, *Ministerial Accountability and Responsibility* (HC 813, 1995/6), para 170.

[30] J Ziller, 'European Models of Government: Towards a Patchwork with Missing Pieces" (2001) 54 *Parliamentary Affairs* 102. See also Special Issue, 'Delegation and Accountability in European Integration, The Nordic Parliamentary Democracies and the EU' (2000) *6 J Legislative Studies* 33.

[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).

ter 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 European Parliament gained the significant power to grant formal discharge of the budget, supported by the power of the Court of Auditors (ECA) to make a declaration of assurance on which discharge is based. Three European Parliament 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.[32] After further years of struggle, the European Parliament has finally gained an added concession of some importance. EC Treaty 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 European Parliament. The European Parliament has also secured a measure of budgetary control and a power of audit over the affairs of agencies. Budgetary powers allow the European Parliament 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 ultimately the wider European banking system, designed though it is to be autonomous and largely free from political accountability.[33]

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.[34] 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' (EC Treaty Article 251, as amended at Amsterdam) effectively gives the European Parliament a power of final veto, if agreement cannot be reached during the conciliation procedure between Council and European Parliament. The problem is, however, that this procedure is easily by-passed. There is (as yet) no written constitution and the Treaties 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

[32] For further details, see Corbett *et al*, above n17, Table 17, at 116.

[33] W Buiter, 'Alice in Euroland' (1999) 37 *Journal of Common Market Studies* 181.

[34] The point is discussed more fully in C Harlow, 'Accountability, New Public Management, and the Problem of the Child Support Agency' (1999) 26 *JLS* 150.

[35] EC Treaty Protocol 30 on the application of the principles of subsidiarity and proportionality.

Council possesses an override; 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 at present revert to 'old-style procedures', undercutting the legislative accountability of Council to European Parliament. When, for example, the 'Third Pillar' justice and home affairs powers, were transferred to the Community at Amsterdam, the consultation procedure was retained for a transitional, five-year period (EC Treaty Article 67).

Again, the Council may resort to outline legislation, relying on the Commission's implementation powers (EC Treaty 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 its place in the legislative process. In contrast to the present EU agencies, which in general possess no legislative powers, 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 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 are 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 co-operation, 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

[36] Council Decision 99/468 of 28 June 1999 laying down procedures for the exercise of implementing powers conferred on the Commission, JO L184/23.

[37] See essays in M Andenas and A Turk (eds), *Delegated Legislation and the Role of Committees in the EC*, (Dordrecht, Kluwer Law International, 2000); C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart Publishing, 1999); RH Pedler and GF Scheafer (eds), *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process* (Maastricht, European Institute of Public Administration, 1996).

[38] On the history of the relationship, see K St C Bradley, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 *European Law Journal* 230.

[39] European Commission, *White Paper on European Governance* (COM(2001) 428 final, Brussels, July 2001), 234. See generally J Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-level Agency Structure' in C Joerges and E Vos (eds), above n 3. 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.

European Parliament but it had a seriously detrimental effect on control by national Parliaments.[40] Thus the important Dublin Convention on asylum applications,[41] 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.[42] 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 European Union, and programmes such as the Corpus Juris programme for 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] National Parliaments have not been adequately incorporated into the EU structure, hence necessary documentation is often not available to them as occurred when the United Kingdom House of Commons debated the European arrest warrant.

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 European Parliament into allegations of fraud and mismanagement by the Commission. The Commission's slow and inadequate response to the allegations led the European Parliament to freeze 10 per cent of the Commissioners' salaries. Following further allegations, the European Parliament 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

[40] E Guild, 'The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union' in P Craig and C Harlow (eds), *Lawmaking in the European Union*, (London, Kluwer Law International, 1998).

[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).

[42] E Guild and C Harlow (eds), *Implementing Amsterdam* (Oxford, Hart Publishing, 2000).

[43] M Delmas Marty (ed), *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Paris, Economica, 1997); European Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (Brussels, 11.12.2001, COM (2001) 715 final). For comment see J Spencer, 'The Corpus Juris Project and the Fight Against Budgetary Fraud' (1999) 1 *Cambridge Yearbook of European Legal Studies* 77; W van Gerven, 'Constitutional Conditions for a Public Prosecutor's Office at the European Level', in G de Kerchove and A Weyenbergh, *Vers un éspace judiciare pénal européen* (Paris, Editions ULB, 2000).

[44] J Lodge, 'The European Parliament', in S Andersen and K Eliassen, *The European Union: How Democratic Is It?*, (London, Sage Publications, 1996).

[45] A Tomkins, 'Responsibility and Resignation in the European Commission' (1999) 62 *MLR* 744.

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 experts[49] 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 parlia-

[46] Committee of Independent Experts, *First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission* (Brussels, 15 March 1999), para 9.4.25 (Interim Report).

[47] Interim Report, above n 46, para 9.3.3.

[48] Commisssioner Prodi's speech to the European Parliament available at http:// europa.eu.int/ comm/commissioners/prodi/speeches/130499 en.htm (emphasis added).

[49] Committee of Independent Experts, *Second Report on the Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud* (10 September 1999).