PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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mentary 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 law-making 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.[50] No other national Parliament has taken political accountability to such limits, and it is, indeed, doubtful if the European Union 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 EC Treaty 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 is 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 15 and more parliaments and their several thousand representatives of diverse political parties and groupings. The institutions, more especially the European Parliament, 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

[50] D Arter, 'The Folketing and Denmark's "European Policy": The Case of an "Authorising Assembly"' in Special Issue, *Parliaments in Western Europe* (1990) 13 *W European Politics* 110.

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'.[51] 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.[52] 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 into 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 European Parliament, a programme of close co-operation between European Parliaments is both possible and urgently needed.

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'.[53] 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.[54] 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

[51] M Westlake, 'The European Parliament, The National Parliaments and the 1996 Intergovernmental Conference' (1995) *Political Quarterly* 59, 70.

[52] *The New Statesman*, 14 August 1998.

[53] C Hood, 'The Hidden Public Sector: the "Quangocratization" of the world', in F-X Kaufmann, G Majone and V Ostrom (eds) *Guidance, Control and Evaluation in the Public Sector*, (Berlin, de Gruyter, 1986).

[54] The Annual Reports of the ECA and of the British NAO are regularly reported in the quality press. See S Grey, *Tackling Fraud and Mismanagement in the European Union* (London, Centre for European Reform, 2000).

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 per cent. This suggests that focus on its budgetary functions would provide the European Parliament 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.[55] The ECA 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'.[56] 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 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.[57] 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.[58] 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.[59]

These were rather basic, though necessary, reforms. A much more radical programme of improvements is necessary to generate public confidence in the European Union 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

[55] B Laffan, 'Becoming a "Living Institution": The Evolution of the European Court of Auditors' (1999) 37 *Journal of Common Market Studies* 251.

[56] Report in response to the conclusions of the European Council of 18 June 1983, [1983] OJ C287/1. See F White and K Hollingsworth, *Audit, Accountability and Government*, (Oxford, Clarendon, 1999), 194–96.

[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).

[59] See *First Report of the Supervisory Committee of the Anti-fraud Office* (OLAF), [2001]OJ C365 (20.12.2001).

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 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.[60] 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.[61] The ethos of the Commission is not managerial. It has not been wholly receptive to public management techniques as increasingly adopted in national administration,[62] 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 progammes of structural funding, grants and subsidies, the 'audit trails' which are the *sine qua non* of modern audit systems.[63] 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,'[64] 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'.[65] There are at present few 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

[60] *Annual Report of the ECA 1998*, paras 2.41–2.52.

[61] L Metcalfe, 'The European Commission as a Network Organization' (1996) *Publius: The Journal of Federalism* 43; 'Reforming the Commission: Will Organizational Efficiency Produce Effective Governance?' (2000) 38 *Journal of Common Market Studies* 817; and 'Reforming the European Governance: Old Problems or New Principles?' (2001) 67 *International Review of Administrative Sciences* 415.

[62] C Pollitt *et al*, *Performance or Compliance? Performance Audit and Public Management in Five Countries* (Oxford, Oxford University Press, 1999); D Farnham *et al*, *New Public Managers in Europe* (Basingstoke, Macmillan, 1996).

[63] M Power, *The Audit Society: Rituals of Verification*, (Oxford University Press, 1999).

[64] Annual Report, above n 60, para 1.11.

[65] House of Lords Select Committee on the European Communities, *Court of Auditors* (HL 102 (1986–7)), 11, para 22 (Mr Jo Cary).

[66] National Audit Office, *State Audit in the European Union* (London, NAO, 1996), as updated.

[67] Power, above n 63, at 89. The comment is based on interviews with auditors.

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 European Union 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 EC Treaty Article 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 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 European Union. Driven on by the European Parliament 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.[69] Whether the difficulties can be overcome through the new arrangements for co-ordinated criminal justice policies pushed forward at Laeken[70] is very questionable.

[68] M Power, *The Audit Explosion* (London, Demos, 1994).

[69] Grey, above n 4, at, 4.

[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 2001, OR 13758/01.

Some commentators see the way forward through alignment of audit methodologies to produce 'the beginnings of a "Community" model of financial control and audit.'[71] 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 systems of control are justified so long as each system is effective.'[72] This is a more sensible approach, though it begs the crucial question: are they or can they be made so?

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:[73]

> 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 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.[74] Reasoned decisions are also a

[71] White and Hollingsworth, above n 56 at 194–96.

[72] House of Lords, Select Committee on the European Communities, *The ECA: the case for reform* (HL 63, 2000/1) Conclusions, para 13.

[73] D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, n 28 above.

[74] See for the EU, H-P Nehl, *Principles of Administrative Law*, (Oxford, Hart Publishing, 1998).

basis for administrative accountability; indeed, for Shapiro, they provide the basis for all judicial review of administrative discretion and arguably, of all judicial review.[75] EC Treaty Article 253 (ex 190) contains an obligation for the institutions to 'state the reasons on which [their decisions] are based' and the European Court of Justice 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.[76]

From a procedural point of departure, many supreme courts have been able to add to their portfolio the function of 'higher law judicial review.'[77] 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,[78] allegedly built into its competence by the Treaty obligation 'to ensure that, in the interpretation and application of this Treaty, the law is observed' (EC Treaty Article 220). The Court possesses (or has assumed, according to one's viewpoint) the last word in interpreting the Treaties. It polices the competences of the European Union, decides on the validity of European Union 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*.[79] 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

[75] M Shapiro, 'The Giving Reasons Requirement' (1992) *University of Chicago Legal Forum* 179, 180.

[76] D Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?' (2000) 37 *CML Rev* 7. See also Case T-174/95 *Svenska Journalistforbundet v Council* [1998] ECR II-2289; Case T-14/98 *Hautala v Council* [1999] ECR II-2489 and, on appeal, 6 December 2001 (Opinion of A-G Leger, 10 July 2001); Case T-111/00 *British American Tobacco International (Investments) Ltd v Commission*, 10 October 2001; Case T-188/98 and T-211/00 *Aldo Kuijer v Council* (6 April 2000 and 7 February 2002).

[77] Defined by M Shapiro, 'The European Court of Justice', above n 14 at 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.

[79] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

capacity as courts of the national legal systems but also as EU courts.[80] The machinery which links the two tiers of the EU legal order is the preliminary reference procedure put in place by the Treaties (EC Treaty 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,[81] 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.[82] Here Mulgan seems to be separating law's standard-setting or declaratory function, prioritised by constitutional 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'.[83]

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.[84] Two celebrated cases are particularly significant in this respect. In *Factortame*,[85] 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 judgment 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*,[86] 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

[80] I Maher, 'National Courts as EC Courts' (1994) 14 *Legal Studies* 226.

[81] See T de la Mare, 'Article 177 and Legal Integration' in P Craig and G de Burca (eds), *The Evolution of EU Law*, (Oxford University Press, 1998).

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

[83] C Lord, *Democracy in the European Union* (Sheffield, Academic Press, 1998), 96 (emphasis added).

[84] J Steiner, 'From Direct Effects to *Francovich*: Sifting Means of Enforcement of Community Law' (1993) 18 *European Law Review* 3.

[85] Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame (No 3)* [1990] ECR I-2433.

[86] Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357. And see Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany; R v Transport Secretary ex parte. Factortame (No 4)* [1996] ECR I-1029 and Case C-392/93 *R v HM Treasury, ex parte British Telecommunications* [1996] 3 WLR 203, [1996] ECR I-1631.

paralleling the liability of the institutions under the Treaties to pay compensation for loss caused through their actions (EC Treaty Articles 235 and 288), in practice it took some time for the ECJ to recognise the need for equality in this respect[87]—not the only case in which the legal accountability of the Member States under European Union law has allegedly been greater than that of the European Union 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 Treaty on European Union (above), with the weight of public opinion beginning to tip decidedly in the direction of subsidiarity.

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

[87] See now Case C-352/98P, *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission*, 4 July 2000.

[88] R Crauford Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection' in P Craig and G de Burca (eds), above n 81; T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down' (2001) 38 *CML Rev* 301.

[89] Famously by H Rasmussen, *On Law and Policy in the Court of Justice* (Hague, Martinus Nijhoff, 1986). See, for a different slant, T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *LQR* 95.

[90] A term introduced by J Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) *Comparative Political Studies* 510. And see R Dehousse, *The European Court of Justice* (Basingstoke, Macmillan, 1998).

[91] See Conclusions of the Laeken Council, above n 70.

'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 law-making 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 reconsidered 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 the Commission's White Paper on European Governance,[93] the European Union's main attempt to tackle problems of efficiency and legitimacy of the governance process 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',[94] 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,[95] are entirely glossed over in this White Paper.

Again, there is little or no reference to the programmes of reform underway 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.'[96] The right is, of course, expanded in the European Ombudsman's recently published

[92] D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CML Rev* 17.

[93] European Commission, *White Paper on European Governance* (COM(2001) 428 final).

[94] C Lord and D Beetham, 'Legitimizing the EU' above n 12, 446.

[95] See C Scott, 'Accountability in the Regulatory State' (2000) 27 *JLS* 38.

[96] J Soderman, 'The Struggle for Openness in the European Union', speech of 21 March 2001, available at www.euro-ombudsman.eu.int.

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.[97]

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[98] 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 European Union.

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.[99] 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 its 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.'[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

[97] European Parliament, Constitutional Affairs Committee, *Report on the Commission White Paper on European Governance* (Rapporteur: Sylvia-Yvonne Kaufman), 23.

[98] White Paper, p 8.

[99] *Hautala v Council*, above n 76.

[100] White Paper, above n 93, at 3.

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 [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 Europe are accustomed. Yet fears over accountability are, as Micosi stresses,[102] 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 intergovernmental 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.'[103]

A written constitution, federal in character and with a clear list of those powers which are devolved to the European Union and those retained by Member States, although it has powerful advocates, notably in Germany,[104] 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

[101] White Paper, above n 93, at 20–23.

[102] S Micosi, 'The mandate of the Convention' in *Institutional Reforms in the European Union, Memorandum for the Convention* (Rome, Europeos, 2002).

[103] *Ibid* at 10.

[104] C Dorau and P Jacobi, 'The Debate over a "European Constitution": Is it Solely a German Concern?' (2000) 6 *European Public Law* 413.

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.

This chapter was completed before the Convention had started to publish working papers and drafts. No attempt has been made to incorporate these or its newly published draft Constitution into the text or footnotes.

5

Devolution and England: What is on Offer?

RICHARD CORNES*

INTRODUCTION

IN MAY 2002, John Prescott, Deputy Prime Minister and Stephen Byers, then Secretary of State for Transport, Local Government and the Regions, set out the Government's proposals for a new level of regional government within England in a white paper entitled *Your Region Your Choice: Revitalising the English Regions* ('the White Paper').[1] The next indication of the Government's plans for England came in the speech from the throne on 13 November 2002, in which a Bill allowing for referendums in the English regions on establishing regional assemblies, was promised. That Bill, the Regional Assemblies (Preparations) Bill 2002, was passed in 2003. It empowers the Secretary of State, having assessed the level of regional interest in a regional assembly, to call one or more regional referendums.[2] The Act contains no further detail as to the precise structure and organisation of the proposed assemblies; that detail will only be forthcoming once at least one region has voted for a regional assembly. At that point the:

> Government [will] ... introduce a second Bill, when Parliamentary time allows, to enable regional assemblies to be set up where people have voted for them. Elections for those assemblies would be held within months of the second Bill becoming law. This should allow the first regional assembly to be up and running early in the next Parliament.[3]

Until that Bill is introduced the only detail available about the proposed regional assemblies is contained in the White Paper; and an analysis of that document from the perspective of constitutional law is at the heart of this chapter.

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[1] *Your Region Your Choice: Revitalising the English Regions* (Cm 5511, 2002).

[2] Regional Assemblies (Preparations) Act 2003, s 1.

[3] 'Bill Paves the Way for England's First Directly Elected Regional Assemblies' (News Release 122, Office of the Deputy Prime Minister, 14 Nov 2002). On 16 June 2003 referenda were announced for three northern regions during 2004. 'Prescott go-ahead to devolve regions', *The Guardian*, 16 June 2003.