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Editorial: Transparency, accountability and the privileges of power

Carol Harlow¹

When I first turned my attention to the subject of accountability in the European Union, in a series of lectures for the EUI Academy of Law² at the turn of the century, the term, together with its twin ‘transparency’, was just becoming common currency and both were steadily gaining recognition (at least in the English-speaking world) as significant benchmarks for democratic governance. The European Commission took note of this development in the 2001 *White Paper on European Governance*,³ its response to the allegations of incompetence, malpractice and corruption that had brought it so low and led to the resignation of the Santer Commission in 1999. ‘Accountability’ and ‘openness’ were singled out, together with effectiveness, participation and coherence, as key principles underpinning democracy and the rule of law at every level of government, with special relevance to the EU as it sought to move to a more democratic system of governance. Cynics might have noticed the limited nature of the Commission’s commitments; openness meant little more than an undertaking to ‘actively communicate about what the EU does’ in language that was ‘accessible and understandable for the general public’. Accountability required Institutions and Member States to ‘explain and take responsibility’ for what they were doing plus a commitment to ‘greater clarity and responsibility’ from all those involved in developing and implementing EU policy at whatever level. Concrete suggestions for implementation of these assurances were few.

My somewhat legalistic study highlighted the weakness at Union level of the classical, external accountability machinery of parliaments and courts, although in fact the European Parliament was beginning to develop what has since become a significant scrutiny capability, building on its powers of budgeting and audit to keep an eye on the burgeoning network of agencies and other administrative entities that handle Community funds. In this arduous task it was assisted by internal Commission reforms, by a new financial regulation that came into force in 2002 and by the European Court of Auditors. The Parliament’s scrutiny work was, however, undermined by the limitations on its legislative powers and consistently under-valued through the emphasis on so-called ‘democratic deficit’. No role for national parliaments had as yet evolved and, as academic commentators constantly noted, a very real accountability gap was opening up, which allowed Community actors to escape accountability at both levels of the dual-level system. In general, at a time when scholars were beginning to talk in terms of ‘multi-level’ and ‘network’ governance’ there was little sign of parallel development amongst the specialised accountability actors; it was only gradually that national and Union accountability agents such as audit authorities started to come together to cooperate as ‘accountability networks’, although the European Network of Ombudsmen was already in being. In other instances, progress was hampered by inter-institutional rivalry.

¹ Professor of Law, London School of Economics; Member of the Advisory Board of the European Law Journal. All the links to internet sites to be found in the footnotes were last checked on February 25th, 2016.

² C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

³ European Commission, ‘White Paper on European Governance’ COM(2001) 428 final, (2001) OJ C 287, of 12.10.2011, 1-29, available at <http://tinyurl.com/zfcabtm>.

Legal accountability to the Court of Justice was more advanced, though as commentators observed, it was quick to build a role as a 'constitution-maker' and has been described as 'one of the principal engines in the integration process'⁴. This integrationist mind-set (perhaps a consequence of the Court's mission statement to ensure that the law is observed in the interpretation and application of the Treaties) has caused commentators to doubt the Court's even-handedness in exercising its review functions; the Court is said to often accused of interpreting Treaty powers expansively in favour of Union institutions and to look less favourably on member state claims of Union illegality.⁵ Commentators have, for example, noted the Court's preference for 'light touch review': the standard of 'manifest error' that it uses, its deference to Commission discretion in matters of economic or scientific expertise, and its refusal to hold the Commission to account for its use, or more often non-use, of the infringement process. The Court was, however, exceptional in using the preliminary reference procedure (Art 267 TFEU, ex Article 234 TEC) to build working relationships with member state courts, laying the foundations for an 'accountability network'⁶ that might in time operate to fill accountability gaps.⁷

My short survey noted serious accountability black spots. Despite the commitment to openness, policy-making was secretive and opaque. The structural underbelly of the Communities, an undergrowth of committees, working groups and other bodies where, although they were nominally advisory, real power actually lay, was scarcely visible. Neither the Council nor the Commission seemed particularly minded to open the windows and let in the daylight, although a formal procedure for accessing documents in the possession of the institutions was for the first time passing from soft into hard law as Regulation 1049/2001.⁸ This Regulation, however, contained severe mandatory exceptions to disclosure of information. Problems were greatest in the Second and Third Pillars that had been tacked on to the Community structure by the Maastricht Treaty, where the reach of both the parliamentary and legal accountability machinery was severely limited. The twin Maastricht pillars were, in other words, designed deliberately as barriers against accountability. Built up by a secretive network of committees and working groups, bricks were added in a piecemeal and apparently random fashion and not until the framework was safely in place was the principle of accountability conceded and the principal barriers to possible opposition removed. Similar problems began to emerge at a later stage, with the introduction of European agencies.

Fifteen years on, when the EU is mired in a series of crises that absorb all the attention of public and press, may seem an inapposite time to question aspects of the EU governance system that are – or certainly should be – more routine. Yet these are important questions on which the fate of European democracy may depend. Has progress been made in installing procedures to underpin values today rated by the public as principles lying at the heart of any system of democratic governance? There

⁴ R Dehousse, *The European Court of Justice* (Palgrave Macmillan, 1998) p. 74.

⁵ See M. Shapiro, 'The European Court of Justice' in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 1999).

⁶ C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2007) 13 *European Law Journal* 542-562.

⁷ As it had done in the famous case *C-269/90 Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469, ECLI:EU:C:1991:438.

⁸ 'Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents', OJ L 145, of 31.5.2001, 43-48.

are some positive signs. The demolition of the Third Pillar at Lisbon is a clear victory for courts and Parliament, the classical accountability partners. There have been too some significant court victories. In *Kadi*,⁹ the Court of Justice took a stand as the Union's primary accountability agent by assuming the role of ultimate arbiter over the compliance of Union acts with fundamental human rights. The two Courts then came together to tighten their grip on the administration by insisting on the observance in human rights cases of the due process requirements of notice, access to information, reasoned-decision-making and a right to make representations; these were given Treaty status at Lisbon in Article 41 of the Charter of Fundamental Rights. This manifestation of judicial activism was the more remarkable in that the Council was operating inside its normally privileged security zone. In *Sweden and Turco*¹⁰ the Court of Justice went rather far in upholding a 'citizens' right' to access an opinion from the Council's legal service on the legality of proposed legislation, while in *Access Info Europe*¹¹ the Court upheld the claim of the plaintiff (a civil society organisation campaigning for open government) to see Member State proposals for amendments to a legislative draft reforming Regulation 1049/2001 on access to institutional documents, which had been tabled (significantly) at a Council working party. In both cases, the arguments for the institutional needs of 'frank, objective and comprehensive advice', the risk of 'seriously undermining the Council's decision-making process' and of exposing lawmakers to lobbyists were comprehensively rejected in favour of 'the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act' as 'a precondition for the effective exercise of their democratic rights'. Access was obtained, however, only long after the process was completed.

These limited victories have to be balanced, however, against the Council's clear unwillingness to enhance and extend the currently limited freedom to access information by reforming the restrictive exceptions to openness in Regulation 1049/2001, not to say the greater omission to consecrate a 'public right to know' as a fundamental 'Citizens' Right' in the Charter. When Emily O'Reilly, the current European Ombudsman, opened an own initiative investigation into the transparency of the 'trialogue' stage of EU legislation with a view to 'boosting transparent law-making in the European Union',¹² the reaction of the three institutions involved was both disappointing and typical. The immediate response from the Council was to contest the European Ombudsman's competence to investigate in what it saw as a clearly legislative procedure. The Commission, while also querying competence, took the opportunity to reassure Ms O'Reilly that it already had the matter well in hand with the negotiation of an inter-institutional agreement on better regulation¹³ - a typical 'Calm down dear' reaction that mirrors the Commission response to the three Citizens' Initiatives listed on the Commission website as 'successful' though in fact none has actually succeeded. Although the EP also queried competence and stressed the need to weigh transparency to the public against the necessity for 'an orderly, reliable, and accountable way of negotiating between the Institutions', it

⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, ECLI:EU:C:2008:461.

¹⁰ Joined Cases C-39/05 and C-52/05 *Sweden and Turco v Council* [2008] ECR I-4723, ECLI:EU:C:2008:374.

¹¹ Case C-280/11 *Access Info Europe v Council*, ECLI:EU:C:2013:671.

¹² European Ombudsman, 'Press release no. 9/2015', 28 May 2015, available at <http://www.ombudsman.europa.eu/en/press/release.faces/en/59975/html.bookmark>.

¹³ See COM (2015) 216 final, 19 May 2015, available at <http://tinyurl.com/z7b6xcv>.

did go so far as to annex to its letter a lengthy explanation and justification of the triologue procedure.¹⁴

At a routine administrative level, the patient is somewhat healthier. The managerial ethos of the present-day Commission has proceduralized administration in ways that sometimes help to reinforce transparency and accountability. Policy development is signalled in road maps that are published and easily accessible; new regulation is routinely supported by published impact assessments that can be challenged and evaluated; consultation in which the general public is encouraged to participate is a routine practice, though we cannot really know how influential it is.¹⁵ The Transparency Initiative¹⁶ brought procedures to help expose lobbying and lobbyists, and procedures were already in place to open up Commission relationships with civil society. Even if one questions the effectiveness of these innovations and regards them to a certain extent as window-dressing,¹⁷ they are stepping stones in the direction of accountability through public participation. Again, the personnel, procedures, agendas and minutes of committees are, if not perfectly accessible, at least more easily accessed¹⁸ and the Commission has recognised the need in principle for 'clear lines of accountability' in the governance of EU agencies with 'coherent rules' for evaluation of their performance. In line with 'modern principles of better regulation', agencies – like the Commission – should 'consult properly with and provide feedback to stakeholders and organis[e] their business in such a way that transparency is assured and that performance can be effectively monitored by institutions and stakeholders alike'.¹⁹ Further proceduralization of this type could be in the pipeline; under the aegis of the European Parliament and the European Ombudsman, an Administrative Procedures Act with binding effect at Union level is currently under consideration.²⁰

Praiseworthy though these changes may be, they are micro-changes, which do not reflect any willingness to cede real institutional power or true accountability. At the macro-level, there is little indication that the institutions are interested in abandoning or accounting for their prerogatives. Governments never do; that is the purpose of constitutions – and many would say it is the purpose too of trans-national governance. Most obviously, in the area of financial regulation and supervision, where the decision-making has long attracted criticism on the ground of lack of transparency and accountability,²¹ the recent wave of economic crises has facilitated a serious slide back to

¹⁴ The documents are available on The European Ombudsman website at www.ombudsman.europa.eu

¹⁵ But see C. Quittkat, 'The European Commission's Online Consultations' (2011) 49 *Journal of Common Market Studies* 653-674.

¹⁶ See 'Green Paper: European Transparency Initiative', 3 May 2006, COM (2006) 194 final, available at <http://tinyurl.com/hnf577b>; 'Follow-up to the Green Paper "European Transparency Initiative" (SEC(2007) 360)', 21 March 2007, COM (2007) 127 final, available at <http://tinyurl.com/hg9lyto>

¹⁷ B. Kohler-Koch, 'Civil Society and EU democracy: "Astroturf" Representation' (2010) 17 *Journal of European Public Policy* 100-116.

¹⁸ The actual accessibility of committees was tested by G. Brandsma, D. Curtin and A. Meijer, 'How Transparent are EU "Comitology" Committees in Practice?' (2008) 14 *European Law Journal* 819-838.

¹⁹ European Commission, 'The operating framework for the European regulatory agencies' COM (2002) 718 final, available at <http://tinyurl.com/hzkjuzr>.

²⁰ See the ReNEUAL Model Rules, available on the website of ReNEUAL (the Research Network on EU Administrative Law), at <http://www.reneual.eu/>.

²¹ N. Moloney, 'Innovation and risk in EC financial market regulation: new instruments of financial market intervention and the Committee of European Securities Regulators' (2007) 32 *European Law Review*, 627-663.

unaccountable governance in the EU. To quote an earlier Editorial in this Journal,²² authority leached from national and regional institutions has been re-allocated to:

institutions whose legitimacy is indirectly democratic (to be pedantic, whose 'chain' of democratic legitimacy is long, with many links) while the competencies and authority of both the European Parliament and of national parliaments (with the rather more formal than substantive exception of some national parliaments...) have largely stalled.

A clutch of new EU agencies, the European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA), established to regulate the important insurance, securities and banking industries, has for the first time been endowed with a measure of real regulatory power such as is possessed by true regulatory agencies in the far more restrictive constitutional framework of the United States of America.²³ This is in any event an area of limited legal accountability, where courts are inclined to defer to economic expertise. Faced with the dubiously legal delegation of an impressive raft of discretionary powers in risky areas of economic activity, the Court of Justice has unsurprisingly been only too glad to defer.²⁴ Thus the effect of the economic crisis has been to accentuate a slide towards authoritarian government that can only provoke new questions about European constitutional legitimacy.

The European Central Bank, probably the most powerful of these independent financial agencies, is not noted for transparency. The European Ombudsman website lists five complaints regarding the European Central Bank, though only one, which concerns the Bank's refusal to release to a journalist a letter from its then President Jean Claude Trichet to the Irish Finance Minister concerning the Greek crisis, is as yet reported. Notwithstanding her ruling that the European Central Bank had been entitled in 2010 to withhold the letter, the Ombudsman tried four years later to negotiate a friendly settlement. The Council of the European Central Bank failed to react. Ms O'Reilly expressed herself unconvinced by their explanations and regretted that the Bank had 'wasted an opportunity to apply the principle that, in a democracy, transparency should be the rule and secrecy the exception'.²⁵ In a strictly limited sense, a pedant might call this a victory for accountability, as the European Central Bank was at least forced to give reasons for its refusal to disclose; in the wider and more generous sense of the term used by Ms O'Reilly, however, it was not.

Largely conducted in an atmosphere of deep secrecy, the recent US-EU negotiations for the Transatlantic Trade and Investment Partnership (TTIP) have provoked a similar struggle; both the European Ombudsman and the European Parliament have had to fight for transparency and the latter has struggled to maintain its prerogatives. Only after lengthy negotiations did the European Parliament achieve the right for its trade committee to access the full negotiating texts and then only to view them in dedicated reading rooms. The public has had to resort to political demonstrations. But the European Ombudsman once again intervened via the medium of an own

²² A. Menéndez, 'Editorial: A European Union in Constitutional Mutation?' (2014) 20 *European Law Journal* 127-141.

²³ A comparison made many years ago by G. Majone, 'Europe's "Democracy Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5-28.

²⁴ Case C-270/12, *UK v Council and Parliament* [2014] ECR I-18, ECLI:EU:C:2014:18; Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, ECLI:EU:C:2015:400; Case C-370/12, *Pringle v. Government of Ireland* ECLI:EU:C:2012:756.

²⁵ European Ombudsman, 'Press Release no 7/2014 concerning Inv 1703/2012/CK', 7 March 2014, available at <http://tinyurl.com/z9ddokk>.

initiative, holding a public consultation with a view, as she said, to creating a forum for public participation and upholding the democratic right to transparency and public participation. To put this differently the European Ombudsman acted as 'public advocate', using her investigatory procedure as a conduit for public opinion and passing the views expressed with some of her own ideas to the Commission.²⁶ While praising the Commission for its 'real efforts' to make the TTIP negotiations more transparent, Ms O'Reilly insisted that much more needed to be done. She called on the Commission to establish 'a comprehensive list of public and non-public TTIP documents' and for 'greater proactivity concerning the publication of documents, including agendas and minutes of meetings with lobbyists'; furthermore, she called on the EU executive authorities 'to tell the US that it had to justify any American request to not disclose a document'.²⁷ A dog that can bite but only in the context of micro-management.

Why do our rulers seek so often to side-step the democratic processes to which the Treaties commit them? The ardent protestation of Declaration 17 attached to the Maastricht Treaty that 'Transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration' was inserted by the Treaty-makers. So too was the direction in Article 11(2) of the TEU inserted at Lisbon that the institutions 'shall maintain an open, transparent and regular dialogue with representative associations and civil society'. Yet manifestly the spirit of these injunctions is not being respected. Why again, in a glasshouse age, are the EU institutions so hostile to 'government in the sunshine'? Why, in the age of popular democracy, does the Council cling so avidly to its model of lawmaking as non-participatory diplomatic negotiation? The standard political response, that Council members are directly responsible to their electorates, is fairy-tale rather than fiction.²⁸ To reiterate, these are not idle questions and the fate of the Union may depend on the answers.

²⁶ European Ombudsman, Inv OI/10/2014/RA; all related documents to this 'own initiative' of the European Ombudsman can be found at <http://www.ombudsman.europa.eu/en/cases/initiatives.faces>, under the heading 10/2014/RA.

²⁷ Euractiv, 'TTIP papers published as EU Ombudsman demands more transparency', 7 January 2015, available at <http://www.euractiv.com/section/trade-society/news/ttip-papers-published-as-eu-ombudsman-demands-more-transparency/>.

²⁸ See to the same effect, N. Walker, 'Justice in and of the European Union' in D Kochenov et al (eds.), *Europe's Justice Deficit?* (Hart, 2015), 247-58.