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Accountability in the EU's Multilevel System of Governance – Taking Political Science Seriously¹

1. INTRODUCTION

Accountability is one of the buzzwords dominating the debate on the European Union (EU), albeit to varying degree when we separate the literature along disciplinary lines. Political science literature, for example, has generously embraced this concept and applies it in assessing the existing or appropriate level of the EU's democratic legitimacy. Lawyers are, hardly surprising, a bit more sceptical in using this rather new and all too often sloppily used concept.² Instead, a large part of the legal academic community³ seems to stick to the traditional concept of representative democracy which is conceived of as the "main standard by which political organization and governance are legitimised [...], and within a democratic framework the citizen is the most important institution and actor".⁴ But since citizens are not able to carry out governmental decisions by themselves, contemporary forms of democracy require representative institutions which link the governing with the governed.⁵ Thus, law- and policy-making is mainly carried out by periodically elected parliaments which regularly decide by majority. The other two branches of state power, the executive and the judiciary, can legally act only within the limits set by the legislative which give the latter a primacy over the former. This hierarchical structure of representative democracy is supposed to ensure that all governmental decisions can be – at the end – attributed to popular sovereignty

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- 1 This article is based on a lecture prepared by the author for the NICLAS (New International Constitutional Law Approach) Summer School 2007, University of Vienna, Law Faculty, 9-21 July 2007.
 - 2 See e.g. E. Rumler-Korinek, "'Governance' und 'Accountability' – Reine Modeworte oder Schlüsselbegriffe einer Demokratie auf EU-Ebene", (2004) 12 *Journal für Rechtspolitik* 227.
 - 3 See most prominently the so-called Maastricht-Decision by the German Federal Constitutional Court (BVerfGE 89, 155); P. Kirchhof, 'Die rechtliche Struktur der Europäischen Union als Staatenverbund', in A.v. Bogdandy (ed), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundlagen* (Springer, Berlin/Heidelberg 2003) 893, 926; E. Rumler-Korinek, "'Governance' und 'Accountability' – Reine Modeworte oder Schlüsselbegriffe einer Demokratie auf EU-Ebene", (2004) 12 *Journal für Rechtspolitik* 227, 236 et seq.; R. Streinz, *Europarecht* (7th edn. C.F. Müller, Heidelberg 2005) 111 et seq.; ähnlich: H. Eberhard, C. Konrath, R. Trattnigg and S. Zleptnig, 'Governance – zur theoretischen und praktischen Verortung des Konzepts in Österreich', (2006) 14 *Journal für Rechtspolitik* 35.
 - 4 See J. P. Olsen, *Europe in Search of Political Order* (Oxford University Press, Oxford 2007) 7.
 - 5 See R. Zippelius, *Allgemeine Staatslehre (Politikwissenschaft)* (4th edn, C.H. Beck, München 1973) 82 et seq.

and (national) self-determination.⁶ While this is a respectable conception of democracy accepted by a decent body of academic literature, it may fail to grasp current political and legal developments taking place within the EU. The objective of the article is to argue that the concept of representative democracy is ill suited either to capture the distinct institutional arrangement of the EU or to improve its delicate democratic quality. It suggests that the concept of accountability, though problematic in itself, provides a more promising and refined approach to the legitimacy problem of the EU. Another aim of this paper is to win lawyers over to complement the analysis of "black-letter law" with its political and social context in order to get a comprehensive and richer understanding of the functioning of law.⁷

This article proceeds as follows: The second section of the article provides a short introduction into the accountability debate in the EU. In the third section, we will discuss the EU's democratic quality including the issue of the so-called democratic deficit. Fourthly, we will present the accountability debate within political science literature offering a comprehensive concept of accountability as it has been developed by Mark Bovens. Fifthly, for an empirical assessment of the various accountability relations we have selected three EU institutions, namely the Commission, the European Parliament (EP) and the Council.

2. ACCOUNTABILITY – AN ELUSIVE CONCEPT ON THE RISE

Like many other concepts in the social sciences, accountability has various meanings depending on the time and context it is used in and can thus be considered as analytically vague.⁸ However, this vagueness has proved to be no

6 The author is fully aware that all these notions are highly contested within political and legal theory and it would go beyond the scope of this paper to do justice to all the various meanings and implications of "representative democracy", "popular sovereignty" "self-determination". For an overview see e.g. A. Lijpart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven 1999); J. Blondel, *Comparative Government. An Introduction* (2nd edn, Prentice Hall, London 1995); R.A. Dahl, *Democracy and its Critics* (Yale University Press, New Haven 1989); for a link between legal systems and various conceptions of democracy see M.v. Hoecke, *The Structure of Legal Systems and Conceptions of Democracy*, (2007) 1 *The Vienna Online Journal on International Constitutional Law* 34.

7 See F. Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, London 1990) 1 et seq; also: U. Haltern, *Europarecht in Kontext* (Mohr Siebeck/UTB, Tübingen 2005); another pleas for transcending disciplinary boundaries made by lawyers can be found in G.d. Búrca, 'Rethinking Law in Neofunctionalist Theory', (2005) 12 *Journal of European Public Policy* 310, 314; W. Hoffmann-Riem, 'Governance im Gewährleistungsstaat – Vom Nutzen der Governance Perspektive für die Rechtswissenschaft' in G.F. Schuppert (ed), *Governance-Forschung. Vergewisserung über den Stand und Entwicklungslinien* (Nomos, Baden-Baden 2005) 195; G.F. Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplinen', G.F. Schuppert (ed), *Governance-Forschung. Vergewisserung über den Stand und Entwicklungslinien* (Nomos, Baden-Baden 2005) 371; C. Engel and A. Héritier (eds), *Linking Politics and Law* (Nomos, Baden-Baden 2003).

8 See the classical account by Q. Skinner, 'Meaning and Understanding in the History of Ideas', (1969) 8 *History and Theory* 3.

hindrance for its attractiveness and its proliferate use. But contrary to other "essentially contested concepts"⁹, accountability has no obvious equivalent in other languages than in English.¹⁰ Etymologically, the term can be traced back to the Anglo-Norman times at the beginning of the second millennium and was related to accounting and bookkeeping. But, as Mark Bovens reminds us, accountability has undergone a gradual change in understanding from a mere bookkeeping function to a much broader function of public accountability. This development runs parallel to the reform of the public sector in the 1980s and 1990s, usually labelled as the New Public Management (NPM).¹¹ The basic idea of NPM is to reorganise the public sector along private sector parameters in order to improve its overall output and efficiency. These reforms have led to the creation of numerous autonomous organizations and administrative outsourcing, but they also have created numerous problems in terms of control and responsibility which are discussed under the umbrella term of accountability.¹²

The term accountability hit the EU's political vocabulary in the wake of the resignation of the Santer Commission in 1999.¹³ After this legitimacy crisis, the then new Commission President Romano Prodi declared that the new Commission's watchwords should have been "teamwork, transparency, efficiency and accountability".¹⁴ Two years later, the Commission issued its now famous White Paper on European Governance arguing that Good Governance is underpinned by five principles; namely openness, participation, accountability, effectiveness and coherence.¹⁵ Given the political background of the White Paper, especially its main objective to strike a balance between democracy and efficiency, accountability soon became the new catchword of the legitimacy debate.¹⁶ Although, or better: because of, the term accountability is widely used,

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- 9 The same holds true of concepts such as democracy, representation, governance etc which are all "essentially contested concepts", see W. B. Gallie, 'Essentially Contested Concepts', (1956) 56 *Proceedings of the Aristotelian Society* 167.
 - 10 See M. Dubnick, 'Clarifying accountability an – ethical theory framework', in C. Sampford and N. Preston (eds), *Public sector ethics* (Routledge, London/New York 1998), 68, 69 et seq; C. Harlow, *Accountability in the European Union* (Oxford University Press, Oxford 2002) 14 et seq.
 - 11 See M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 *European Law Journal* 447, 448 et seq.; C. Hood, 'A Public Management for All Seasons?', (1991) 69 *Public Administration* 3.
 - 12 See B.G. Peters, *The Two Futures of Governing. Decentering and Recentering Processes in Governing*, Political Sciences Series (Institute for Advanced Studies, Vienna 2008).
 - 13 See A. Benz, C. Harlow and Y. Papadopoulos, 'Introduction', (2007) 13 *European Law Journal* 441, 442 et seq.
 - 14 See <http://news.bbc.co.uk/2/hi/europe/396828.stm> (accessed on February 27, 2008); see also the speech given by R. Prodi before the European Parliament on 21 July 1999.
 - 15 See European Commission, *European Governance. A White Paper*, COM(2001) 428 final 10.
 - 16 For an extensive discussion of the White Paper on European Governance see C. Joerges, Yves Mény and J.H.H. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper 6/2001. It has to be mentioned that the EU-wide debate revolving around a possible increase of democracy and efficiency was not triggered by the White Paper alone but has to be seen in the wider context of the EU's constitutional debate which took place at that time. See also M. Tsakatika, 'Claims to Legitimacy:

its meaning is far from clear and its analytical value is rather weak. Hence, one can easily see that

"[a]ccountability is one of the golden concepts that no one can be against. It is increasingly used in political discourse and policy documents because it conveys an image of transparency and trustworthiness. However, its evocative powers make it also a very elusive concept because it can mean many different things to different people [...]."¹⁷

Given its popularity, it is somehow surprising that the EC and EU Treaties currently contain no relevant reference to accountability.¹⁸ This is even more so if we bear in mind that in Art 6(1) the EU explicitly endorses the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States", but makes no reference to accountability in this respect. However, in order to get an adequate understanding of the role and promises of accountability including its popularity among scholars and politicians alike, we have to take a step back and look at the broader debate of the EU's delicate legitimacy.

3. THE EU AND ITS QUEST FOR LEGITIMACY

Since the cumbersome ratification process of the Maastricht Treaty in the early 1990s, most observers are aware that the EU has – to put it mildly – a precarious status of legitimacy. This section will and cannot discuss this issue in its entirety, yet it argues that the mere insistence on the classic nation-state model of parliamentary democracy is not – as many lawyers are tempted to suggest – the adequate remedy for a perceived "democratic deficit". Two reasons are given: First, the plurality of the policy-making process and, second, the problems of parliamentary bodies to cope with the challenges in the EU's system of multi-level governance. Consequently, we argue that a broad understanding of accountability which includes not only parliaments but accepts also other forms of decision-making, control and responsibility are far better suited to deal with the complexity and heterogeneity of the EU.

(1) The EU policy-making and law-making process operates under different rules depending on the policy issue concerned.¹⁹ Historically, many important developments of the EU have been achieved by non-majoritarian institutions²⁰

The European Commission between Continuity and Change', (2005) 43 *Journal of Common Market Studies* 193.

17 See M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 *European Law Journal* 447, 448.

18 Only Article 263 EC uses the term "accountable" within the context of the Committee of Regions which bears no relevance in our context.

19 See H. Wallace, 'An Institutional Anatomy and Five Policy Modes', in Helen Wallace, William Wallace and Mark A. Pollack (eds), *Policy-Making in the European Union* (5th edn, Oxford University Press, Oxford 2005) 49.

20 Non-majoritarian institutions are defined as "public institutions which, by design, are not directly accountable either to voters or to elected officials.", see G. Majone, *Regulating Europe*

such as the European Commission (e.g. liberalisation policy)²¹ and the European Court of Justice (direct effect, primacy of EC law or mutual recognition)²². This dominance of non-majoritarian institutions has led to an asymmetry of market-creating negative integration at the expense of market-correcting positive integration.²³ Moreover many important institutional developments over the last years have taken place below the level of Treaty law.²⁴ Some of these sub-constitutional developments are hardly new for students of European integration history. For instance, the so-called New Approach as well as comitology are rather old forms of "new" governance.²⁵ Similarly, European agencies are institutionally known since the mid 1970s but since the 1990s have significantly proliferated causing some authors to speak of an "agency fever" within the EU.²⁶ The most recent mode of governance is without doubt the so-called Open Method of Coordination which has raised many expectations since it was politically proclaimed by the European Council at the Lisbon summit in 2000.²⁷ All these institutional developments show that EU policy- and law-making have always

(Routledge, London/New York 1996), 285; C. Joerges, "Good Governance" im Europäischen Binnenmarkt: Über die Spannungen zwischen zwei rechtswissenschaftlichen Integrationskonzepten und deren Aufhebung', (2002) 37 *Europarecht* 17, 26 et seq.

- 21 See S.K. Schmidt, *Liberalisierung in Europa. Die Rolle der Europäischen Kommission* (Campus, Frankfurt/New York 1998) 115 et seq.
- 22 See J.H.H. Weiler, 'Transformation of Europe', (1991) 100 *The Yale Law Journal* 2403; S.K. Schmidt, 'Mutual Recognition as a New Mode of Governance', (2007) 14 *Journal of European Public Policy* 667;
- 23 See F.W. Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford University Press, Oxford 1999) 43 et seq; F.W. Scharpf, 'Legitimationskonzepte jenseits des Nationalstaats', in G.F. Schuppert, I. Pernice and U. Haltern (eds), *Europawissenschaft* (Nomos, Baden-Baden 2005) 705, 727 et seq.
- 24 See the classical account on informal governance by K. Middlemas, *Orchestrating Europe. The informal Politics of European Union 1973-1995* (Fontana Press, London 1995); see also G.d. Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in G.d. Búrca and P. Craig (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 1999) 55, 61 et seq.; J.H.H. Weiler, 'Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy', in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, Oxford/Portland, 1999) 339; I. Eiselt and P. Slominski, 'Sub-Constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements', (2006) 12 *European Law Journal* 209.
- 25 See C. Joerges, *Integration through de-legislation? An irritated heckler*, European Governance Papers No. 3/2007 (<http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf>) 9 et seq; similarly: C. Joerges, B. Braams and M. Everson, *Die Europäische Wende zu "Neuen Formen des Regierens" (New Modes of Governance) – Rechtsprobleme eines politischen Konzepts*, TranState Working Papers No. 55, Bremen 2007 16 et seq.
- 26 See T. Christensen and P. Laegreid, 'Agencification and Regulatory Reforms', Paper prepared for the SCANCOR/SOG workshop on "Autonomization of the state: From integrated administrative models to single purpose organizations", Stanford University, April 1-2, 2005; for a good overview see D. Geradin, R. Munoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar, Cheltenham 2005).
- 27 See e.g. I. Linsenmann and C. Meyer, 'Dritter Weg, Übergang oder Teststrecke? Theoretische Konzeption und Praxis der offenen Politikkoordination', (2002) 25 *Integration* 285; S. Regent, 'The Open Method of Coordination: A New Supranational Form of Governance?', (2003) 9 *European Law Journal* 190.

taken place in a more plural and complex way than simple references to the Community method²⁸ seem to suggest. Taking this institutional complexity into account, J.H.H. Weiler argues that the EU operates under three modes of governance, namely international (e.g. the macro-rule of primary law), supranational (e.g. secondary law) and infra-national (e.g. the "underworld" of comitology). Given this variety of policy-making it does not make much sense to look for the one model of democracy that adequately captures the entire governance system of the EU.²⁹ This argument is confirmed by Renaud Dehousse who shows that the institutional structure of the EU does not follow a single political logic but pursues two institutional avenues, namely the regulatory model and the parliamentary model. The former views the EU mainly as a special-purpose organization³⁰ which does not require a full-fledged democratic system. In contrast, the latter is more concerned with the level of the EU's democratic quality and is willing to confer more powers to parliaments (be they on the national or supranational level).³¹

(2) The mere focus on parliaments is not only problematic due to the plurality of the EU's policy-making process, but also because of two problems which are inherent to parliaments themselves. The first one addresses the lack of societal prerequisites and political substructures, and this is of particular importance when we talk about a possible upgrading of the EP. The second one is a more general problem and questions the capacity of parliaments as such to deal with complex policy-making across several political levels.

As already said, for many authors, especially lawyers, democracy is mainly conceived in parliamentary terms. Since the parliamentary bodies are by no means fully-fledged legislators and not capable of exerting comprehensive control over the "executive", the EU – so the argument goes – suffers from a democratic deficit which is mainly equated with a "parliamentary deficit". Within this strand of argument we can further distinguish between those who argue that the legitimacy of the EU is predominantly based on national parliaments (sub-category one) and those who link it with the degree of involvement of the European Parliament (sub-category two). Probably the most prominent voice of the first sub-category, the German Federal Constitutional Court,³² argues in its famous Maastricht-decision that national parliaments are perceived as the crucial cornerstones of the democratic quality of the EU, and thus have to be strengthened – as it is foreseen by the Treaty of Lisbon – if one wants to improve democracy of the EU. As a corollary from this, shifting competences from the national to the supranational level has to be based on the will of the peoples of Europe who are again represented by their respective national parliament. This

28 For a definition of the Community method see e.g. the European Commission's White Paper on European Governance COM(2001) 428 final 8.

29 See J. H.H. Weiler, U. Haltern and F. Mayer, *European Democracy and its Critique. Five Uneasy Pieces*, EUI Working Paper RSC No. 95/11.

30 See H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, (Mohr, Tübingen 1972) 176 et seq.

31 See R. Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?', (1998) 35 *Common Market Law Review* 595.

32 See BVerfGE 89, 155 (182 et seq).

argument is still remarkably influential – albeit to a lesser extent than a couple of years ago – among German lawyers.³³ Others argue more in favour of strengthening the role of the EP and are convinced that the more it is upgraded the better it is for the overall democratic quality of the EU.³⁴ An interesting argument is offered by Dieter Grimm. Like proponents of the first sub-category, Grimm is against a fully-fledged European Parliament

and vigorously argues that member states provide the crucial reference point as far as democratic legitimacy is concerned. But his argument is slightly different than that of the German Federal Constitutional Court. He explicitly makes clear that "democracy ought not [...] to be equated with parliamentarism"³⁵. Since parliaments and general elections are by themselves no longer capable of expressing individual voters preferences, it is thus not sufficient to claim that the normative value of the EP stems from its direct election. This is even more true if we bear in mind that the EU and the EP lacks the pivotal structural elements of a sound democracy such as a proper European party system, Europeanised media, and a functioning public sphere. Additionally, the EP election regularly suffers from a poor voter turn-out and the fact that they are mainly second-order national elections.³⁶ In the words of Grimm,

"The democratic nature of a political system is attested not so much by the existence of elected parliaments, which is today guaranteed almost everywhere, as by the pluralism, internal representativity, freedom and capacity for compromise of intermediate area of parties, associations, citizens' movements and communication media. Where a parliament does not rest on such a structure, which guarantees constant interactions between people and State, democratic substance is lacking even if democratic forms are present."³⁷

Since all these necessary prerequisites cannot simply be created by a new Treaty – regardless if we call it Constitution, Constitutional Treaty or Reform Treaty – a fully-fledged parliamentarian model on the supranational level will probably worsen the democratic quality of the EU.³⁸ Grimm's argument may lead him back into the realm of the nation state and to national parliaments. But since Grimm put more emphasis on society instead of parliaments he thus opens up space for an American-styled pluralist or deliberative model of democracy. This perspective on democracy focused less on parliamentary representation but is more concerned with the question of how society can exercise influence on the process of policy-making.³⁹ That is not to say that elections, parliaments and

33 See recently H.-J. Papier, *Europas neue Nüchternheit: Der Vertrag von Lissabon*, Speech delivered at the Humboldt University, 21 February 2008, 5.

34 See e.g. J. Lodge, 'The European Parliament and the Authority-Democracy Crisis', (1994) 531 *Annals of the American Academy of Political and Social Sciences* 69.

35 See D. Grimm, 'Does Europe Need a Constitution', (1995) 1 *European Law Journal* 282, 293.

36 See K. Reif and H. Schmitt, 'Nine Second-Order National Elections: A Conceptual Framework or the Analysis of European Election Results', (1980) 8 *European Journal of Political Research* 3.

37 See D. Grimm, 'Does Europe Need a Constitution', (1995) 1 *European Law Journal* 282, 293.

38 See D. Grimm, 'Does Europe Need a Constitution', (1995) 1 *European Law Journal* 282, 296.

39 See J. Coultrap, 'From Parliamentarism to Pluralism. Models of Democracy and the European Union's "Democratic Deficit"', (1999) 11 *Journal of Theoretical Politics* 107, 108.

parties do not or even should not matter in this model of democracy. It only argues that societal preferences are not *primarily* mediated through parliaments. By contrast, pluralism is more concerned with sub-systemic influence, thus favouring an opportunity structure which enables individuals and groups of all sorts, especially minorities, to influence the policy making process. Parliaments are not regarded as capable of representing all these interests that exist within the EU.⁴⁰ This is particularly the case in the EU where majoritarian decision-making is – though legally possible – still the exception.⁴¹ Furthermore, pluralist or deliberative models of democracy fit neatly into the trilateral decision-making structure within the Community method and – even more so – with procedures involving other actors and fora such as comitology, EU Agencies or the Open Method of Coordination. As a result, institutional complexity, political, legal, social and cultural heterogeneity may better be captured by Madisonian conceptions of democracy emphasising checks and balances as well as a procedural approach of democracy based on principles such as openness, transparency, empowerment, fair procedures and dialogue.⁴²

Another problem of parliamentarism is its perceived incapacity to deal with complex problems due to a lack of sufficient expertise. As a consequence, the real loci of power can be found outside parliaments either in delegated and autonomous decision-making bodies (e.g. regulatory agencies) or in more informal interest groups and networks.⁴³ If this argument were true, any institutional upgrading of parliaments would only be a formal one that changed little, highlighting the fact that parliaments are all too often merely rubberstamping decisions made elsewhere. Just to avoid misunderstandings: A pluralist approach does not argue that parliaments should be abandoned or should play a diminished role in the EU's institutional arrangement. On the contrary, the role of parliaments and the quality of their input are vital for any political system. Furthermore, there are plenty of options to enhance the powers and strengthen its deliberative quality of the EP and national parliaments alike. However, it has to be acknowledged that strong and influential parliaments – especially in the context of the EU – are necessary but by no means sufficient actors for a normatively desirable polity but have to be complemented by other important public and private actors. Once we accept this, the problem arises how we can hold these additional actors to account.

40 See R. Dehousse, *The Legitimacy of European Governance: The Need for a Process-Based Approach*, (2001) Cahiers Européens de Science Po No. 1; for a fundamental critique of parliamentary democracy see D. Zolo, *Democracy and Complexity* (Basil Blackwell, Oxford 1992).

41 See M. Mattila, 'Contested Decisions: Empirical Analysis of Voting in the European Union Council of Ministers', (2004) 43 *European Journal of Political Research*, 29.

42 See R. Dehousse, *The Legitimacy of European Governance: The Need for a Process-Based Approach*, (2001) Cahiers Européens de Science Po No. 1 19 et seq.; G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', (1998) 4 *European Law Journal* 5 20 et seq.

43 See S.S. Andersen and T.R. Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-Parliamentary Governance', in S.S. Andersen and K.A. Eliassen (eds), *The European Union: How Democratic Is It?* (Sage, London 1996) 227, 239.

4. ACCOUNTABILITY: TOWARDS A COHERENT CONCEPT

Interestingly, the bulk of the constitutional debate has centred on the majoritarian aspects of the (Reform-) Treaty.⁴⁴ But taking the above discussed problems into account, we have to admit that parliaments are by no means the golden "institutional" bullet to do away with the often perceived⁴⁵ "democratic deficit" of the EU. Instead, we argue that accountability may be a probably more promising and adequate concept to deal with these issues.

But first we have to get a refined and sufficiently precise concept of accountability. John Elster reminds us that accountability is widely used synonymously with responsibility and answerability and has a triadic structure: an agent A is accountable *to* a principle B *for* an action X.⁴⁶ However, the act of holding someone accountable can mean a lot of different things. Hence it seems appropriate to work out the various forms of accountability relations as well as its functions and impact. Probably the best known aspect of accountability, both in law and political science, is democratic or political accountability. In the words of Michael Saward: an elected parliament of citizens' representatives is the "first line of accountability with respect to courts or other governmental agencies".⁴⁷ The crucial point in this argument is that democratic accountability revolves around general suffrage which allows the citizens to replace the most important holders of political office. But there are additional (more implicit) requirements of

44 Substantially, as both the EP and the national parliament have been upgraded through the new Treaty, the overall democratic quality of the EU is widely seen as being improved. See e.g. CEPS, EGMONT, the EPC and others (eds), *The Treaty of Lisbon: Implementing the Institutional Innovations* 14 (available on the internet: http://shop.ceps.eu/BookDetail.php?item_id=1554, accessed on 14 March 2008); for a more sceptical stance see the recent speech by the President of the German Federal Constitutional Court H.-J. Papier, *Europas neue Nüchternheit: Der Vertrag von Lissabon*, Speech delivered at the Humboldt University, 21 February 2008.

45 A discussion whether the EU suffers from a "real" "democratic deficit" would go beyond the scope of this paper. Just a personal side note: It goes without saying that there are numerous problems in terms of the EU's democratic quality. But we also have to bear in mind that many if not all modern democracies face similar problems. Or has Pierre Rosanvallon put it: "The so-called 'democratic deficit' in Europe is, in fact, only one symptom among others of an inner transformation in the democracies. Independently of the building of Europe, life and structures of democracy are being revolutionised. One might even say that, in large part, the idea of a European 'democratic deficit' is the consequence of, and not the reason for, this phenomenon.", see Pierre Rosanvallon, *The Structures of Democracy and the Future of Europe*, Paper presented at the Momentum Conference on "Democratic Forms and the Future of Europe", Copenhagen November 2002.

46 Jon Elster, 'Accountability in Athenian Politics', in Adam Przeworski, Susan C. Stokes and Bernard Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press, Cambridge 1999), 255 et seq.

47 Michael Saward, *The Terms of Democracy* (Polity Press, Cambridge, 1998), 106; similarly R.A. Dahl, *Democracy and its critics* (Yale University Press, New Haven 1989), 234 et seq.; a different view argues that elections should not be conceived to ensure accountability but as an opportunity to choose a "good type" of political leader, for this argument see J.D. Fearson, 'Electoral Accountability and the Control of Politicians: Selecting Good Types versus Poor Performance', in A. Przeworski, S.C. Stokes and B. Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press, Cambridge 1999), 55.

democratic accountability such as an effective political competition⁴⁸, responsiveness, representation⁴⁹ and deliberation⁵⁰ – all ambiguous concepts in themselves. However, democratic accountability which is rather synonymous with representative democracy and has severe shortcomings, especially if it is – as shown above – applied to the EU. It has a tendency to overemphasize the importance of parliamentary bodies while underrating numerous other public bodies such as courts, central banks or regulatory agencies. True, these bodies are formally linked to parliamentary nomination and control but they operate de-facto largely autonomously from parliamentary scrutiny.⁵¹ Moreover, traditional democratic accountability deals only with public bodies thus ignoring all forms of private corporate actors and non-governmental organizations which also play a pivotal role in contemporary policy-making. Hence, we need a broader and more inclusive concept which allows us to capture and include those loci of power into accountability which operate outside of it, and often beyond the oversight of parliamentary bodies. For instance, according to Jonathan G.S. Koppel, accountability comprises five dimensions, namely transparency, liability, controllability, responsibility and responsiveness.⁵² While these dimensions avoid the narrow focus of parliaments and democratic accountability, they are too broad and thus analytically weak. But Koppel's approach highlights the important insight that accountability usually comes with adjectives and thus has to be evaluated in its specific context.⁵³

In the following we will present a comprehensive concept developed by Mark Bovens, who defines accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."⁵⁴ As we will see, the main advantage of this definition is that it is not grounded on the constitutional and political vocabulary of the nation-state and it avoids the all too narrow concept of representative democracy which enables us to apply it to the EU. Additionally, it includes individuals as well as organizations and regards obligations as either formal or informal which

48 See A. Føllesdal and S. Hix, 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik', (2006) 44 *Journal of Common Market Studies* 533.

49 See J. Pollak, *Repräsentation ohne Demokratie. Kollidierende Systeme der Repräsentation in der Europäischen Union* (Springer, Wien/New York 2007).

50 More generally and comprehensively: R.A. Dahl, *On Democracy* (Yale University Press, New Haven, 1998).

51 For a theoretical discussion within the language of principle-agent-theory see D.R. Kiewiet/M.D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriation Process* (Chicago University Press, Chhicago 1991). With regard to the EU see M.A. Pollack, 'Delegation, Agency, and Agenda Setting in the European Community', (1997) 51 *International Organization* 99, 108 et seq.

52 See J.G.S. Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"', *Public Administration Review* (2005) 65, 94, 96 et seq.

53 For a similar view regarding democracy see D. Collier and S. Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research', (1997) 49 *World Politics* 430.

54 M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 *European Law Journal* 447, 450.

makes the whole concept particularly attractive for interdisciplinary analysis. It has to be pointed out that Boven's concept conceives of accountability as retrospective. However, this does not mean that accountability may affect the behaviour of actor before they are held accountable – as they anticipate future evaluation and adjust their behaviour accordingly. Thus ex post accountability can be an important input for ex ante policy making. In particular, Boven asks four different questions:⁵⁵

- (1) *To Whom* is account to be rendered?
- (2) *Who* should render account
- (3) *About what* is account to be rendered?
- (4) *Why* the actor feels compelled to render account (different levels of obligation)

To Whom is account to be rendered deals with the different fora actors are confronted with. Five of them are mentioned, namely political, legal, administrative, professional and social accountability.⁵⁶ *Who* should be accountable? Organisations as well as individual actors. *About what* is dealing with all sorts of conduct ranging from policy outcomes, financial aspects, adherence to procedural standards etc. With regard to the nature of accountability, Bovens emphasises that the obligation can derive either from a specific legal requirement (vertical accountability) or from (informal) social or peer pressure (horizontal accountability).

5. ACCOUNTABILITY IN THE MULTI-LEVEL-SYSTEM OF THE EU

In the following we will focus on three main EU institutions (Commission, Parliament and Council) in order to illustrate not only Boven's concept but also to show the plurality of (possible) accountability relations within the EU. Given the plurality of actors and fora it would go beyond the scope of this paper to provide a comprehensive and detailed mapping of all possible accountability relations.

To begin with, the Commission lacks democratic accountability. However, apart that it is nominated by democratically elected governments and approved by the EP, even the Commission is not completely devoid of democratic accountability. This aspect will be further strengthened by Art 9D (7) Treaty of Lisbon which foresees that the nomination of the Commission is coupled with the EP elections. The EP is also entitled to force the Commission to resign.⁵⁷ Apart

55 M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 *European Law Journal* 447, 454 et seq.

56 For a similar approach see C. Lord, *Democracy in the European Union* (Sheffield University Press, Sheffield 1998).

57 It has to be noted that the EP can only censure the Commission as a whole which has never been put into practice. However, in 1999 the then Santer Commission resigned in the face of a motion based on fraud and nepotisms concerning single Commissioners. Realising that the EP is willing to use its control power the next Commission under Romano Prodi was more sensitive to the requests of the EP and promised to force individual Commissioners if the EP proves

from that, actions of the Commission and – under certain circumstances – of individual Commissioners are legally accountable to courts (ECJ and CFI), administrative bodies (e.g. Ombudsman, Court of Auditors and OLAF), professional peers (e.g. independent experts) as well as various interest groups and other stakeholders. Additionally, within the context of comitology the Commission is *de iure* also controlled by the Council (or to be more precise: member states' administrations). However, empirical studies show that consensus – largely based on the anticipation of member states' actions by the Commission – dominates the interaction between the Commission and the member states and that open conflict between them is very rare.⁵⁸ Conversely, the European Parliament is directly elected but – as already mentioned – lacks important societal prerequisites and regularly suffers from unsatisfying election campaigns and a disappointingly low voter turn-out leading to a somewhat mixed record in terms of democratic accountability. If it comes to the "living constitution" the EP has – at least in the realm of Community Law – continuously increased its power (e.g. budget; legislative and control rights) and can now be considered as an important actor within the institutional arrangement of the EU.⁵⁹ Its acts are legally reviewed by the European Courts as well as administratively controlled by Court of Auditors, OLAF and – albeit to a very limited extent⁶⁰ – by the Ombudsman. The Council enjoys considerable democratic accountability – at least if you hold the position that democracy in the EU is primarily derived from the member states. Apart from the fact that the Council – like other EU institutions – is subject to extensive and administrative accountability we can also identify some developments which have improved its social accountability in recent years. Individual members can *de iure* be held accountable by their national parliaments. Some member states even bestow their parliaments with strong formal information rights and, as it is the case in Austria, with the possibility to adopt opinions that bind the Austrian government in all negotiation and voting on EU level. However, empirical studies show that strong formal rights do not play that role lawyers typically might expect.⁶¹ The phenomenon of so-called party government shows that whereas on the one hand government parties are unwilling to use these rights, opposition parties, on the

allegations of corruptions and the like, see S. Hix, *The Political System of the European Union* (2nd edn, Palgrave Macmillan, Houndmills 2005) 60 et seq.

58 See M.A. Pollack, 'Delegation, Agency, and Agenda Setting in the European Community', (1997) 51 *International Organization* 99, 115.

59 See A. Maurer, 'Das Europäische Parlament in der Gesetzgebung', in A. Maurer and D. Nickel (eds), *Das Europäische Parlament. Supranationalität, Repräsentation und Legitimation* (Nomos, Baden-Baden 2005) 93; A. Maurer and W. Wessels, *Das Europäische Parlament nach Amsterdam und Nizza: Akteur, Arena oder Alibi?* (Nomos, Baden-Baden 2003).

60 See A. Peters, 'The European Ombudsman and the European Constitution', (2005) 42 *Common Market Law Review* 697, 715.

61 A similar argument with regard to the German Bundestag is made by K. Auel, 'Europeanisation of the German Bundestag. Institutional Reforms and Informal Adaption', (2006) 15 *German Politics* 249.

other hand, are often not capable to.⁶² Since all three institutions are obliged under Regulation 1049/2001 to allow the general public access to their documents the social accountability has significantly increased over the last years – at least in legal terms.⁶³ But as a recent review of the pertinent case law shows that hopes of a more open and transparent EU "have been seriously damaged by the Court of First Instance".⁶⁴ Apart from the possibility as well as difficulties to get at certain documents, the Commission recently began to publish an ever increasing number of documents as well as to create new databases such as the one on comitology⁶⁵ providing citizens with the opportunity to gain as much information as they want.

To complete our picture one also has to include other institutions such as the European Court of Justice, the Court of First Instance, the Central Bank, the Court of Auditors, the European Ombudsman, the Economic and Social Committee, the Committee of Regions, the European agencies and so forth. We also have to take into account the various regulatory bodies on the national level which are not only expected to implement EU politics but which are increasingly integrated into a common European administrative space.⁶⁶ Generally speaking, political science reminds us that we should not treat (EU) institutions as unified actors but to acknowledge the relevance of their various sub-units as well as the individual actors. But this view is probably not widely accepted among lawyers who usually focus on the formally entitled institution, only thus ignoring internal sub-units and informal activities.⁶⁷ Such an approach ignores not only the reality of day-to-day decision-making in the EU, but also fails to include important actors into the accountability structures. For instance, empirical studies suggest that around 70% of all Council texts are already agreed to in working groups, another 10-15% in Coreper or a similar high-level committee and only 10-15%

62 See J. Pollak and P. Slominski, 'Influencing EU Politics? The Case of the Austrian Parliament', (2003) 41 *Journal of Common Market Studies* 707, 712 et seq; see also J. O'Brennan and T. Raunio (eds), *National Parliaments within the Enlarged European Union* (Routledge, London 2007); K. Auel and A. Benz (eds), *The Europeanisation of National Parliamentary Democracy* (Routledge, London 2007).

63 For recent statistics see the Council Annual Report on Access to Documents 2006 (<http://www.consilium.europa.eu/uedocs/cmsUpload/ENacces2006int.pdf>) (accessed on 12 March 2008).

64 See J. Heliskoski and P. Leino, 'Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents', (2006) 43 *Common Market Law Review* 735, 778; more generally: D.M. Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout*?', (2000) 37 *Common Market Law Review* 7.

65 See <http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en> (accessed on 12 March 2008). See also the now closed CONECCS database concerning the variety of advisory groups of the Commission. Currently, a new register for interest representation is envisaged for spring 2008 (see also below the "transparency initiative" of the Commission).

66 See H.C.H Hofmann and A.H. Türk (eds), *EU Administrative Governance* (Edward Elgar, Cheltenham 2006); with regard to Telecommunications Policy see C. Franzius, 'Strukturmodelle des europäischen Telekommunikationsrechts. Ein neuer Rechtsrahmen für die Informationsgesellschaft', (2002) 37 *Europarecht* 660, 679 et seq.

67 See A.v. Bogdandy, J. Bast and F. Arndt, 'Handlungsformen im Unionsrecht. Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel', (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 77, 133 et seq.

reach the ministerial level.⁶⁸ In terms of accountability it would be problematic if we conceptually and systematically ignore these important activities of organizational sub-units. Similarly, other high level special Council Committees (e.g. Special Committee on Agriculture, Art 133 Committee, Political and Security Committee)⁶⁹ and the Council Secretariat⁷⁰ play a significant part in the decision-making process which goes far beyond a mere preparatory function. Given the workload formal decision-makers are dealing with, they show a tendency to rubber-stamp decisions which are actually made by their preparatory bodies.⁷¹ The same holds true, by and large, for other institutions such as the European Parliament⁷² or the European Commission. One could even go one step further and include the role and influence of *outside* experts, advisory groups, think tanks, lobbies and civil society groups for the EU's day-to-day decision-making process. From an accountability point of view the inclusion of these actors is ambiguous. On the one hand it increases the input-dimension of the policy-process by including a plurality of views and interests which may also lead to a more balanced, efficient and accepted policy output. On the other hand, the involvement of societal actors has a tendency to informalise the decision-making process thus creating additional difficulties to hold these actors accountable.⁷³ Currently, the Commission establishes a so-called "transparency initiative" which invites lobbyists to subscribe to a public register and a common code of conduct.⁷⁴

68 See H. Wallace, 'An Institutional Anatomy and Five Policy Modes', in Helen Wallace, William Wallace and Mark A. Pollack (eds), *Policy-Making in the European Union* (5th edn, Oxford University Press, Oxford 2005) 49, 58.

69 See J. Lewis, 'The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure', (2000) 7 *Journal of European Public Policy* 261, 275; A. Niemann, 'Between Communicative Action and Strategic Action: the Article 133 Committee and the Negotiations on WTO Basic Telecommunications Services Agreement', (2004) 11 *Journal of European Public Policy* 379.

70 See T. Christiansen, 'Intra-institutional Politics and Inter-Institutional Relations in the EU: Towards Coherent Governance?', (2001) 8 *Journal of European Public Policy* 747; D. Beach, 'The Unseen Hand in Treaty Reform Negotiations: The Role and Influence of the Council Secretariat', (2004) 11 *Journal of European Public Policy* 408; H. Wallace, 'The Council: An Institutional Chameleon?', (2002) 15 *Governance* 325.

71 As the British Coreper Deputy Sir William Nicoll recalls "In practice [...] from about 1987 [...] COREPER I workload from the 1992 Programme was so onerous that it largely entrusted preparation of the [Budget] Council to the lower-powered Budget Committee", quoted in J. Lewis, 'The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure', (2000) 7 *Journal of European Public Policy* 261, 278.

72 See C. Neuhold and P. Settembri, 'The Role of European Parliament Committees in the EU Policy-Making Process', in T. Christiansen and T. Larsson (eds), *The Role of Committees in the Policy-Making Process of the European Union* (Edward Elgar, Cheltenham 2007) 152.

73 See I. Michalowitz, *Lobbying in der EU* (WUV/UTB, Wien 2007) 188; T. Larsson and J. Mark, 'The Commission's Relations with Expert Advisory Groups', in T. Christiansen and T. Larsson (eds), *The Role of Committees in the Policy-Making Process of the European Union* (Edward Elgar, Cheltenham 2007) 64.

74 See the Commission website on the "Transparency Initiative": http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm (accessed on 12 March 2008); for a quick overview see also the Commission's MEMO/07/110, 21 March 2007; for a general discussion see D.

6. CONCLUSION

The last two sections discussed a concept developed by Mark Bovens which allowed us not only to put the finger on but also to map various accountability relations within the EU both theoretically and empirically. Unfortunately, even a meticulous mapping exercise tells us little of whether a given web of accountability increases or enhances the democratic quality of EU policy-making. Hence, any normative evaluation of accountability throws us back to the question of which concept of democracy we are willing to apply to the EU. If we stick to the traditional parliamentary model, we will probably remain unconvinced by the numerous references that a certain actor is accountable to another actor who is herself neither democratically elected nor operates at arm's length from voters or parliaments. But if we advocate a more pluralist or deliberative version of democracy, we are not only better equipped intellectually to understand the plurality of EU decision-making but also be able to improve various accountability regimes disregarding whether they are linked to parliamentary bodies or whether they are formally or informally institutionalised. This may be a particular challenge to lawyers who tend to overemphasise the importance and relevance of parliaments and – though understandable from a traditional disciplinary point of view – usually ignore informal arrangements or soft instruments. However, an ever increasing number of legal scholars have recently shown some interest in the findings of other disciplines and begun to explore new and unfamiliar academic territory.⁷⁵ If this trend continues, we may expect not only a fruitful exchange across disciplinary boundaries but also a new and realistic understanding of the normative foundation of the EU.

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Obradovic and J.M. Alonso Vizcaino, 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations', (2006) 43 *Common Market Law Review* 1049. Within this "transparency initiative the Commission has also extensively reviewed the already mentioned Regulation 1049/2001 and will submit a proposal for its amendment in spring 2008.

75 See e.g. G.d. Búrca and J. Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Oxford/Portland 2006); L. Senden, *Soft Law in European Community Law* (Hart, Oxford/Portland 2004); E.C. Fisher, 'The European Union in the age of Accountability', (2004) 24 *Oxford Journal of Legal Studies* 495; I. Maher, 'Economic Governance: Hybridity, Accountability and Control', (2007) 13 *Columbia Journal of European Law* 679.