Chapter 10

Pushing the EU to Democratic Accountability

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An early view of the EU was of a technical and regulatory regime legitimated on output criteria (Majone, 1994) or, as Vivien Schmidt has put it, an area of 'policy without politics'. This analysis, if once correct, is no longer accurate and Majone, formerly a major proponent of the idea, now admits as much (Majone, 1998, 2005, 2007). The true problem is that the politics of the EU remain the secretive politics of international relations and diplomacy and have not yet adequately transmuted into the relatively open and transparent politics of representative democracy, though this was confirmed as a goal for European governance in the Maastricht Treaty (Curtin & Meiers, 1997; Curtin, 2005). Secondly, with the enormous expansion of EU competences into areas of 'high visibility politics', a technocracy is no longer acceptable. To put this differently, technocratic outputs are no longer (if they ever were) sufficient to legitimate the European enterprise and the legitimacy of the EU cannot rest purely on output measurements (Follesdal & Hix, 2005). That there is today a widely perceived democratic deficit is registered on virtually every occasion for ratification of Treaty amendments with negative popular
votes in referendums (Svennson, 1994; Qvortrup, 2006). That the French and Dutch 'No!' to the European Constitution was followed up with a further 'No!' to the Lisbon Treaty by Ireland, the only Member State to hold a referendum, can only confirm that a serious gap is opening up between the leaders and the led.

The history of the EU provides much support for Mair's thesis (Mair, 2005) that the European enterprise has always been about politics; about the construction of a sheltered political sphere in which political games can be played and important policy-making take place outside the constraints imposed by representative democracy. Take the way in which the outlines of the single market were virtually completed before democratic institutions were developed, the Community method had emerged or the doctrine of 'institutional balance' (Lenaerts & Verhoeven, 2002) been refined by the Court of Justice. In similar fashion, the engines of police and immigration cooperation were the behind-the-scenes conventions and cooperation agreements signed at Trevi and Dublin. These backroom arrangements allowed for the rapid concretisation of the Third Pillar, where all the institutional floor and key policies were rapidly constructed before any machinery for accountability could be set in place (Guild, 1996; Balzacq et al, 2006).

But if Mair's analysis is correct, then it is the task of political scientists and public lawyers to construct new constraints. As Martin Shapiro (2001) once observed, administrative law is a constant game of 'catch up', in which the rulers evade the rendering of account to the governed (Committee of Experts, 1999). This is the spirit in which I, as an administrative lawyer, approached the opportunity to work with the Connex accountability network.

I would prefer to speak in terms of opportunity rather than of lessons learned. Although there is (and has always been) much contact between lawyers and the political sciences, there are also many gaps. In the EU
context, European study centres and institutes around the Community have offered opportunities for cooperation and joint work. Good interdisciplinary work has also taken place at the EUI, where the development of the 'new school' of EU legal scholarship was 'thickened' by the founding of a legal journal, the *European Law Journal* specifically devoted to inter-disciplinary studies. The EUI is also one of a growing number of venues which, on both sides of the Atlantic, afford the opportunity for European and American scholars to work together on globalisation and its problems, studies in which the EU forms a unit and potential building-block. What CONNEX has added is a number of new forums in which inter-disciplinary work could take place and contacts between scholars from different disciplines and Member State institutions begun, forming a basis (so I hope) for much future work.

Although public lawyers have started to talk in terms of accountability, their allegiance is really to the rule of law - as every significant judgment from the ECJ attests! Courts are not seen by lawyers so much as accountability forums but as temples of the rule of law in which judges (whose political neutrality is overrated and virtual exemption from accountability conveniently ignored) are the high priests. A number of obstacles to inter-disciplinary understanding exist. Political scientists see accountability primarily in terms of 'democratic accountability' to electorates and 'political accountability' to representative institutions, though if pressed they would agree that an 'effective, independent judicial system is a fundamental prerequisite for effective executive accountability' (Mulgan, 2003, 76). Lawyers are likely to discount or politely ignore political machinery as sporadic, ineffective and secondary to the legal responsibility of political actors to courts. Outdated views of law and the legal order fuel misunderstandings; classical legal theory, to which political scientists frequently subscribe, is hierarchical in character and has until recently lacked tools to deal with legal pluralism (MacCormick, 1999, 2004; Snyder, 2002). Lawyers have moved on. Political scientists, on the other hand, show little
interest in a re-ordering of legal norms in terms of contemporary jurisprudence. This is an area for future research, with international lawyers drawn into the network (Wessels, forthcoming) as in the Amsterdam workshop in January 2008.

The lesson I personally draw from the CONNEX experience is, however, the need to break away from the conceptualisation of the EU in terms of 'levels': a three-tiered construction composed of transnational, national and sub-national levels, the bottom level receiving minimal attention. At national level, policy-making and accountability are seen to be the responsibility of national institutions in the framework of a national constitution and political system. At transnational levels, a democratic deficit is generally acknowledged in which an inter-institutional political power struggle rages while the European Parliament struggles to fill the less visible accountability gap (Lodge, 1996). The ECJ, on which the duty rests of holding Community institutions accountable, has generally shown more interest in the accountability of Member States (Shapiro, 1999). A better balance needs to be struck.

Democracy at national or ground floor level cannot be used to validate the top tier unless it is itself truly democratic and, as powers are less than carefully transferred to the EU, democracy and accountability deficits are developing at national levels. This is a particular danger for political systems (such as the United Kingdom and Netherlands) where accountability plays a significant role in legitimating government or where, as in Sweden, Finland and the Netherlands, open government is a constitutional right. If accountability is to be achieved in the EU, we need to replace the model of levels with a network concept of accountability that can match and outstrip the apparatus of network governance (Scott, 2000; Harlow & Rawlings, 2006). The rapid proliferation of European agencies, and hiving off of policy responsibility to transnational and international networks of agencies
(Gerardin, Munoz and Petit, 2006), renders a new theoretical approach the more necessary. It is, indeed, yet a further example of Mair's thesis.

More empirical work is clearly necessary but lawyers are often not well-placed to do this on their own. Here too CONNEX affords opportunity. The CONNEX experience may provide new linkages for inter-disciplinary empirical work (Vos 2007) on legal actors and accountability forums, such as the European ombudsmen network and courts.

Lawyers could also contribute to work on the increasing tendency to bypass accountability and control by resort to 'soft law' (Trubek & Trubek, 2006) and 'soft governance' mechanisms (Scott & Trubek, 2002). At the theoretical level, the management of plural legal systems and the under-used concept of subsidiarity (Bermann, 1994; Estella, 2002) both deserve our attention. In the context of the new Reform Treaty, further work on national parliaments and new work on audit is necessary. New Council agencies, such as Europol and Eurojust, and expanding networks of the EU administration, such as OLAF, also demand attention in the context of accountability.²

Notes

¹ In the context of the Connex project, this journal has hosted a Special Issue made up of papers from a CONNEX workshop. European Law Journal of July 2007 on “Accountability in EU multi-level governance” edited by Arthur Benz, Carol Harlow and Yannis Papadopoulos

² I would like to end this short presentation by expressing my gratitude to the Commission for its foresight in funding and helping to coordinate the CONNEX network and to all those who, like Beate Kohler-Koch, Deirdre Curtin and workshop organisers, who have made it work. It has been for me personally a valuable and enriching experience, which has greatly expanded my horizons. With my thanks, I would express my hope that the Mannheim Final Conference will not be an end but a staging post to new and more ambitious research.
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