

FOREWORD

I am delighted to commend this important and stimulating book.

The accountability and legitimacy of the European Union is a huge subject. It touches on the lives of all our citizens. It goes to the heart of the governance of the 15 democracies that make up the EU today, and which will soon be joined, we hope, by many more.

But it is no secret that the accountability of the EU institutions, and their legitimacy in the eyes of the people they are created to serve, leaves a great deal to be desired. 'Brussels' is seen as remote and out of touch. The European Commission is seen as a vast bureaucracy, intervening in what Douglas Hurd called the 'nooks and crannies' of our national life. The European Parliament does valuable and important work—but it has hardly captured the public's imagination.

These impressions are unfair. But it is a fact that at present some people feel sullen and alienated from the EU, not just in Britain, but more widely. And it is dangerous, because it could eventually lead people to question their political obligation. If people feel that they have no say; that policy is being made over their heads; that the law is a scourge rather than a protection, they will eventually revolt. As Edmund Burke said: 'People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws.'

How to build affection for international institutions is not just a European conundrum. It is a problem for the United Nations, for the IMF, for the World Bank, for the World Trade Organization. People accept intellectually the need to pool sovereignty in Europe, as they accept the need for a World Trade Organization. But they feel little affection or loyalty towards the institutional structure created for the purpose. Critics preach endlessly about the need to create democratic legitimacy, as if leaders and élites were obstinately refusing to face the problem.

I hope the issues *are* now starting to be addressed. That, after all, is a major theme of the work of the Convention being chaired by Valéry Giscard d'Estaing. Working out how to fix these problems is, of course, much more of a challenge than identifying them in the first place. It is clear that we have to get away from the impenetrable jargon and lengthy discussions about labyrinthine institutional structures. We have to talk more about subjects

that *really* interest people, and less about the minutiae of comitology or qualified majority voting.

It is a paradox of our time that, while there are more nations in Europe than ever before, it is also more widely accepted than ever that in the modern world those nations need to pool their sovereignty if only in response to the process of globalization. That is why most of these states are already members of the European Union or hoping to join it. The problem is how to control and legitimize the structures created for this purpose. There is no European 'demos' nor, for reasons of language and culture, is there likely to be one. So if we want to increase democratic control we have to find better ways of connecting the national political institutions with the supranational ones.

This book suggests some ways in which that might be achieved, and I warmly welcome it.

*The Rt Hon Christopher Patten European Commissioner for External Relations
July 2002*

GENERAL EDITORS' PREFACE

Accountability and legitimacy are perennial concerns of the EU, and no more so than at present. The very future of the EU is being considered at the Laeken Convention, the conclusions of which will shape the discussions leading to the intergovernmental conference in 2004. Accountability and legitimacy feature prominently in these debates. The addition of this thought-provoking, interdisciplinary collection of essays to the series is, therefore, timely.

The editors have done an excellent job in bringing together contributions that relate to many of the major areas of the EU. Part I deals with accountability and legitimacy in relation to the institutions and decision-making structure of the EU. It is particularly helpful for this discussion to range over decision-making under the Second and Third Pillars, as well as under the Community Pillar. It is equally important that the analysis includes topics such as the judicial architecture and the European Central Bank, reflecting as it does the centrality of the Community Courts and the ECB to the operation of the EU as whole. The discussion in Part II shifts to issues of constitutionalism, and includes topical issues such as the delimitation of Community competences, the development of an EU Constitution, and the rule of law. The significance of the EU Charter of Rights, and the relationship between traditional rights and social and economic rights, is the subject of Part III. The penultimate section, Part IV, focuses upon issues of accountability and legitimacy as they arise in areas such as social policy, Economic and Monetary Union and the Commission's Governance White Paper. The last part of the book is devoted to the implications of enlargement, both in general terms and more specifically for free movement, the management of the Community's borders, and immigration.

This book will be of enduring interest to all those concerned with the continuing debate about accountability and legitimacy within the EU.

*Paul Craig
Gráinne de Búrca
November 2002*

PREFACE

This book examines from an interdisciplinary perspective the accountability and legitimacy deficit from which the European Union is now widely thought to suffer. It is based on the papers presented at a conference entitled 'Legitimacy and accountability in the European Union after Nice' organized by the Institute of European Law, University of Birmingham, in July 2001. There was not room in the conference programme to cover the theme from more than a limited number of angles, so several additional contributions were subsequently commissioned in an attempt to ensure that the book would be properly rounded.

Our aim was not to produce a textbook, but to compile a collection of authoritative yet accessible analyses of the general theme from a variety of perspectives. We did not ask contributors to range outside their specialisms, but to address a multidisciplinary audience from within their specialisms. These include political science, law, economics and geography. We hope the book will be of interest to anyone concerned with the future of Europe, from students and academics, whatever their discipline, to policy-makers, journalists and perhaps even the general reader. Because several of the chapters deal with legal topics, numbered footnotes have been used throughout rather than the Harvard referencing system, which can be hard to adapt to academic writing about the law. However, the book is not aimed exclusively—or even mainly—at lawyers. It does not therefore contain some of the standard furniture of law books, such as tables of cases and legislation.

We would like to express our thanks to the contributors for agreeing, in spite of their many other commitments, to address the overall theme of the book from their own particular perspectives. We would also like to thank Commissioner Patten for writing a foreword to the collection at a particularly busy time. We are grateful to Mohammad Idriss, Research Associate at the School of Law in Birmingham, and Nadene Bryan, Secretary to the Institute of European Law at Birmingham, for their help in getting the typescript ready for publication. Finally, we wish to acknowledge the support of those who sponsored the 2001 conference which constituted the prototype for the book: Martineau Johnson, solicitors; the Jean Monnet

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Introduction: The European Union's Accountability and Legitimacy Deficit

Anthony Arnall

The constitutional and political health of the European Union

The rejection by the Irish people of the Treaty of Nice in June 2001 underlined the extent to which the European Union has become disconnected from its citizens. Ireland seems, at least to an outsider, to be one of the Member States which has gained most from Union membership and all the main political parties supported ratification of the Treaty, yet nearly 54 per cent of those who took part in the referendum voted against it. The turnout was admittedly very low and the precise reasons for the outcome were difficult to establish.¹ Nonetheless, the result seemed symptomatic of a profound malaise. It does not just afflict the European Union: many domestic political institutions seem to have lost their capacity to mobilize and inspire; the WTO is increasingly contested. Be that as it may, it is a malaise to which the Union is particularly vulnerable because of a widespread feeling that it is insufficiently *accountable* and lacks *legitimacy*.

Accountability was identified by the Nolan Committee as one of seven principles applicable to all aspects of public life. That meant, according to the Committee, that 'Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is

¹ See B Laffan, 'The Nice Treaty: the Irish vote', <http://www.notre-europe.asso.fr/Quoideneuf.html>. Cf the National Declaration by Ireland and the Declaration of the European Council, both annexed to the Conclusions of the Seville European Council, 21 and 22 June 2002. The Taoiseach (Prime Minister of Ireland) announced at Seville that his Government intended to hold a second referendum on the Treaty in the autumn of 2002. The Irish electorate approved the Treaty on 19 October 2002.

appropriate to their office'.² Similarly, in the context of the EU the European Commission has singled out accountability as one of five principles underpinning good governance, observing: 'Roles in the legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level'.³ Neither of those statements really amounts to a definition, but each reflects what Mulgan calls the 'the original or core sense' of accountability, 'that associated with the process of being called "to account" to some authority for one's actions'.⁴

But the term may also be understood more broadly. Oliver comments: 'Accountability has been said to entail being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made'.⁵ She points out that accountability is 'closely related to responsibility, transparency, answerability and responsiveness, and these terms are often used interchangeably'.⁶ The term responsibility was used by the Committee of Independent Experts in the famous final paragraph of its first report, which led to the resignation of the European Commission in March 1999. The Committee observed:

The responsibility of individual Commissioners, or of the Commission as a body, cannot be a vague idea, a concept which in practice proves unrealistic. It must go hand in hand with an ongoing process designed to increase awareness of that responsibility. Each individual must feel accountable for the measures he or she manages.

The Committee described a sense of responsibility as 'essential', but found 'a growing reluctance among the members of the hierarchy to acknowledge

² First Report of the Committee on Standards in Public Life chaired by Lord Nolan (Cm 2850-I), 14.

³ European Governance: A White Paper, COM(2001)428, 25 July 2001. Cf the First Report of the Committee of Independent Experts on Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission (15 March 1999) para 9.3.3.

⁴ See R Mulgan, '“Accountability”: an ever-expanding concept' (2000) 78 *Public Administration* 555.

⁵ D Oliver, *Government in the United Kingdom* (1991) 22.

⁶ *ibid.* Cf Mulgan (n 4 above) 558. The Committee of Independent Experts drew a distinction between 'accountability' and 'political responsibility' in its Second Report on Reform of the Commission (10 September 1999) para 7.14.1.

their responsibility'.⁷ Lord calls this sense of responsibility 'internal accountability'.⁸

There are a number of channels by which accountability in its extended meaning may be achieved.⁹ Some may be more appropriate than others in particular contexts. One channel is accountability to politicians, whose scrutiny will be politically motivated. Another is accountability to the general public. For those who are elected, this means accepting the verdict of the voters. But not all public bodies are elected and even those that are must be accountable between elections. This implies that ordinary people have access to the information they need to hold to account those to whom power and resources have been entrusted in the general good.¹⁰ It may also imply that institutional and decision-making structures should be kept as simple as possible. Otherwise, it may become hard to present issues comprehensibly and decision-makers may find themselves in 'the unhappy predicament of being submitted to unfocused and uninformed criticism by press and public opinion'.¹¹ A third form of accountability is legal accountability to the courts, an aspect of the rule of law. This channel may be used to require a public body 'to explain and justify its actions in legal terms in the courts and to make amends if found to have transgressed'.¹² Legal accountability typically entails the possible imposition of coercive remedies and sanctions. Oliver sums up by saying that accountability is about establishing a framework:

within which public bodies are forced to seek to promote the public interest and compelled to justify their actions on those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out not to have been well conceived; and to make amends if mistakes and errors of judgment have been made.

The concept of legitimacy is equally elusive. It is useful to distinguish between formal legitimacy and social legitimacy, a wider notion.¹³ The former is concerned with the extent to which all the applicable legal

⁷ n 3 above, para 9.4.25.

⁸ C Lord, *Democracy in the European Union* (1998) 80. See also Mulgan (n 4 above) 556.

⁹ See Oliver (n 5 above) 23–28. Cf Lord (n 8 above) ch 3. Additional or extended mechanisms of accountability are discussed in C Scott, 'Accountability in the regulatory state' (2000) 27 *Journal of Law and Society* 38.

¹⁰ cf the Second Report of the Committee of Independent Experts (n 6 above) para 7.6.3.

¹¹ Second Report of the Committee of Independent Experts, *ibid* para 7.14.3. Cf Lord (n 8 above) 94.

¹² Oliver (n 5 above) 26.

¹³ See JHH Weiler, *The Constitution of Europe* (1999) 77–86.

requirements were satisfied when the entity in question was set up, the latter with the extent to which the allocation and exercise of authority within it commands general acceptance. The formal legitimacy of the EU is unimpeachable: it is based on a series of treaties validly entered into by the High Contracting Parties, each of which they have ratified in accordance with their own constitutional requirements. Indeed, it may have been assumed until relatively recently that the formal legitimacy of the EU (and, before that, the European Community) was enough. But it is now almost universally recognized that formal legitimacy, while essential, is not sufficient. A healthy Union also requires social legitimacy if the fruits of its decision-making processes are to enjoy broad societal acceptance.

Because it is a more nebulous concept than formal legitimacy, social legitimacy is more difficult to acquire and retain. In its White Paper on European Governance, the Commission acknowledged that ‘many Europeans feel alienated from the Union’s work’. That feeling, it said, ‘reflects particular tensions and uncertainty about what the Union is and what it aspires to become, about its geographical boundaries, its political objectives and the way these powers are shared with the Member States’.¹⁴ It may well be unlikely that people will ever identify as closely with the Union as they do with more familiar domestic institutions that can draw on a developed sense of social cohesion and loyalty. Indeed, the Union is pledged to respect the national identities of its Member States¹⁵ and to respect their history, culture and traditions.¹⁶ But if the social cohesion of increasingly pluralistic States can be exaggerated, so Europe’s common cultural background and shared historical experiences should not be dismissed. In that context, the process of working together, within the framework of the EU Treaties, to address common problems may in time serve to reinforce the Union’s legitimacy by inculcating a sense of shared destiny and making people more willing to assent to the burdens the Union will sometimes need to impose on them.¹⁷ That outcome is unlikely to materialize if the Union is widely perceived as insufficiently accountable. To counter that perception, the Union needs to do more to involve the public in articulating its

¹⁴ n 3 above, 5. Cf G de Búrca, ‘The quest for legitimacy in the European Union’ (1996) 59 MLR 349.

¹⁵ See Art 6(3) TEU.

¹⁶ Preamble, TEU.

¹⁷ See JHH Weiler, ‘Does Europe need a constitution? Reflections on demos, telos and the German Maastricht decision’ (1995) 1 ELJ 219; J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe need a constitution?”’ (1995) 1 ELJ 303; Lord (n 8 above) ch 4.

underlying values and formulating its substantive policies. But enhancing what is sometimes called the Union's 'input legitimacy' in this way must not be allowed to jeopardize its 'output legitimacy', that is, its capacity to achieve its objectives. The balance can be a difficult one to strike.¹⁸

In the first of the five parts into which this book is divided, the Union's institutions and decision-making processes are considered. What mechanisms should the Union employ to determine when and how to exercise its powers? How open should its decision-making be? What is the right relationship between accountability and making sure the Union is equipped to carry out its tasks effectively? To what extent should the uniformity which the European Community traditionally sought now give way to greater flexibility? How should the Union's two Courts and the European Central Bank be structured? The subject of Part II is 'Constitutionalism and the future of Europe'. Would giving the Union a formal constitution help make it more accountable and legitimate? What is the best way of allocating powers between the Union and its Member States? How can respect for democracy and the rule of law in the Union best be ensured? Part III looks at the protection of fundamental rights and social rights in the Union and Part IV at the 'new governance' agenda, which is concerned with finding new ways of reconciling competing policy priorities. Part V is concerned with the challenge of enlargement and the movement of people in the Union of the 21st century. The questions addressed in each part of the book are difficult ones on which people, however reasonable and well-informed, may differ. If the Union is to be truly accountable and legitimate, they must feel that they have had an opportunity to participate in the process of finding the answers, even if they do not always agree with them.

The origins of the Union's accountability and legitimacy deficit

What are the origins of the Union's current accountability and legitimacy deficit? The answer lies, at least in part, in the changed climate in which the Union now operates. Today's Europe bears little resemblance to the Europe of the 1950s which gave birth to the Union's precursor, the European

¹⁸ cf K Lenaerts and A Verhoeven, 'Institutional balance as a guarantee for democracy in EU governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (2002) 35, 49.

Community. There are obvious political differences. Then, the Second World War was fresh in people's memories and the Cold War made a new conflagration seem a real possibility. The need to avoid further conflict between the countries of Europe that remained outside the Soviet sphere of influence, and to enable their economies to compete with that of the United States, had an obvious resonance. Moreover, the pre-war spirit of deference to those in authority had not yet broken down, so that grand schemes devised by politicians and civil servants could be put into effect without worrying too much about the reaction of ordinary people.¹⁹ It is also true to say that, of the three original Communities, the Coal and Steel Community and the Atomic Energy Community were rather technical and limited in scope. The Treaty establishing the European Economic Community (as it was originally called) was much more ambitious, but even its authors may not have foreseen quite how vigorously it would develop.

That backdrop is apparent in the system put in place by the EEC Treaty. A central role in shaping and policing the common market was to be played by the appointed Commission. Although there was to be an Assembly (not then called the European Parliament), it would not initially be directly elected and its role would be purely advisory and supervisory. Notwithstanding the scope of the legislative powers conferred on the Council, that institution was not required to meet in public or to reveal how its members had voted, even after the anticipated transition to qualified majority voting. Acts adopted by the institutions were only to a limited extent subject to judicial review at the suit of private parties, who were apparently to have no right to challenge important categories of Community act, however adverse their effects and however doubtful their legality. By contrast, the Member States, the Council and the Commission (though not, significantly, the Assembly) would have unlimited standing to challenge all Community acts.

Twenty-first century Europe is quite different. The Union is on the verge of an unprecedented enlargement which will bring in many of the countries of central and eastern Europe. The prospect of healing the continent's post-war division would have been unthinkable to the authors of the original Community Treaties. The enlargement process offers the Union an historic opportunity, but is at the same time fraught with danger because of the immature political and legal institutions of many of the candidate States and their relatively underdeveloped economies. If the Union is to be account-

¹⁹ See P Craig, 'The nature of the Community: integration, democracy, and legitimacy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1999) 1, 5–7.

able to the citizens of those States and retain legitimacy in their eyes, it will have to show that it can help them achieve Western levels of prosperity and respond to their particular concerns.

Meanwhile, in Western Europe memories of the Second World War and even of the Cold War have faded. Developments in science and technology have, as elsewhere, transformed the economic, political and social landscape. Many of the Union's citizens now enjoy unprecedented prosperity. People have become less willing to accept passively government by unaccountable élites. Public institutions and those who hold public office have become subject to an increasing level of critical scrutiny. People have become more litigious. The implications of these changes for the process of European integration began to emerge during the Maastricht ratification process. Ordinary people had started to pay more attention to the European Community with the growth of qualified majority voting and the advent of the single market programme in the 1980s. However, that programme, though ambitious, was limited by the scope of the Treaty to which it was designed at long last to give effect. The Treaty on European Union signed at Maastricht in February 1992, with its arrangements for economic and monetary union and its creation of a European Union subsuming the existing Communities into a new entity with a much broader substantive ambit, represented a quantum leap, but it was a leap with which many ordinary people were uncomfortable.

The degree of public unease became clear during the exceptionally difficult ratification process which the Treaty underwent. It was rejected by the people of Denmark in a referendum less than six months after it was signed and later secured only a narrow majority in a referendum held in France. It was the subject of legal challenges in the national courts of the United Kingdom,²⁰ Germany²¹ and Denmark.²² Although those challenges were unsuccessful and the Danish people were persuaded to vote in favour of the Treaty in a second referendum in May 1993, it had become apparent that there were widespread public misgivings about the nature of the Union and an unwillingness to entrust the continued governance of Europe to the élites by whom it had hitherto been dominated.

²⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg* [1993] 3 CMLR 101.

²¹ *Brunner v European Union Treaty* [1994] 1 CMLR 57.

²² *Carlsen and Others v Prime Minister Rasmussen* [1999] 3 CMLR 854.

The quest for accountability and legitimacy

The lesson took time to sink in. The failure of the European Commission, which took office in 1995 under the Presidency of Jacques Santer, to recognize the change in climate contributed to its collective resignation in 1999 amid allegations of fraud, mismanagement and nepotism. But the Commission is now engaged in a process of internal reform and in its White Paper on European Governance²³ it made a number of recommendations on how to enhance democracy in Europe and increase the legitimacy of the Union's institutions. The Member States, too, are taking steps to make the Union more accountable and to improve its legitimacy. At Amsterdam, the Treaty on European Union was amended so that it now declares²⁴ that the Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law...' A procedure was introduced for suspending the Treaty rights of Member States found to be in 'serious and persistent breach' of any of those principles.²⁵ Moreover, the position of the European Parliament under a legislative procedure introduced at Maastricht was improved, so that, where the procedure applies, it is now a genuine co-legislator with the Council.²⁶ At the Cologne European Council in June 1999, the protection of fundamental rights was identified as an 'indispensable prerequisite' to the Union's legitimacy. Accordingly, the decision was taken to establish a charter of fundamental rights 'in order to make their overriding importance and relevance more visible to the Union's citizens'. The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice in December 2000.²⁷

The Treaty of Nice itself, signed in February 2001, was designed essentially to make various institutional changes considered necessary in view of the forthcoming enlargement of the Union. However, in a Declaration on the Future of the Union, the Member States called for 'a deeper and wider debate' on four questions in particular:

- (a) how to establish and monitor a more precise delimitation of powers between the European Union and the Member States;

²³ n 3 above.

²⁴ Art 6(1).

²⁵ See Art 7 TEU; Art 309 EC; Art 204 EAEC.

²⁶ See Art 251 EC.

²⁷ [2000] OJ C364/20.

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- (b) the status of the Charter of Fundamental Rights;
 - (c) simplifying the Treaties to make them clearer and easier to understand;
and
 - (d) the role of national parliaments.

The Member States recognized ‘the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States’. They agreed to convene a new intergovernmental conference (IGC) in 2004 in order to agree the necessary changes to the Treaties.

At its meeting in Laeken in December 2001, the European Council took the process forward by issuing a further declaration on the future of the Union. The Laeken Declaration sketched out a series of additional questions prompted by those identified at Nice, each of them touching the accountability and legitimacy of the Union. The innovative step was taken of establishing a Convention with the task of paving the way for the 2004 IGC by considering the key issues raised by the future development of the Union. Modelled on the body which drew up the Union’s Charter of Fundamental Rights, the Convention was to be chaired by a former French President assisted by two Vice-Chairmen. It would also comprise one representative of each Head of State or Government, two members of each national parliament, 16 members of the European Parliament and two representatives of the Commission. Candidate countries would be represented in the same way as current Member States, although they would not be entitled to block any consensus which might emerge among the latter. Others, such as the European Ombudsman and representatives of the Economic and Social Committee and the Committee of the Regions, would be invited to attend as observers. The Convention’s final document, to be produced in 2003, would provide a starting point for discussions at the IGC, where the final decisions would be taken.

The Nice and Laeken Declarations put the future of the Union and its accountability and legitimacy at the top of the political agenda. However, it seems doubtful whether, as the Union embarks on the most ambitious process of enlargement it has ever undertaken, it will be possible to settle these matters definitively in 2004. As a result, the debate is likely to preoccupy everyone with an interest in the Union’s constitutional and political health for many years to come.

