Promoting Accountability in Multi-Level Governance: A Network Approach

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Abstract

This paper addresses problems of accountability in the system of multi-level governance, organized around networks, which obtains in the European Union. An ‘accountability deficit’ arises when gaps are left by the accountability machinery of the several levels of government, supranational and national. This paper suggests a new evaluative framework based on the concept of 'accountability network', questioning the hierarchical and pyramidal assumptions that presently underpin accountability theory in the EU context. Using case studies of the Community Courts and European Ombudsman, the paper suggests that ‘accountability networks’ may be emerging, composed of agencies specializing in a specific mode of accountability, which come together or coalesce in a relationship of mutual dependency, fortified by shared professional expertise and ethos. At present fragmentary and imperfect, these might ultimately be capable of providing effective machinery for accountability in network governance systems.

Keywords: governance, accountability, network, accountability network, European Union, Court of Justice, ombudsman

I. The Challenge of Network Governance

Whether or not the terms ‘governance’ and ‘network’ are synonymous, there is at least substantial overlap; Rhodes, for example, defines a socio-cybernetic system of governance as one composed of ‘self-organising networks’. ¹ However this may be, as network systems or systems of governance replace hierarchical and centred structures of government, the traditional control systems and machinery for accountability are undermined. Kickert asserts that these ‘networks of accountability’ are left largely to control themselves because ‘government does not have enough power to exert its will on other actors’. A vacuum left by the decline of hierarchy is filled by ‘self-responsibility’.²

In EU governance, these characteristics are immediately apparent. Even in the First or Community Pillar, where the more regular and institutional ‘Community method’ obtains,³ the task of the Commission involves networking. ⁴ Long chains of actors need to be co-ordinated. Composed in matters of policy-formation or rulemaking largely of national government representatives, the structure

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is typically extended for implementation purposes by the addition of regional and local actors. On many occasions too the networks include the private sector: corporate actors, interest group representatives, voluntary and civil society organisations. In the field of structural funding, used by Rhodes as a paradigm of 'governance', this type of network proliferates. In areas where 'new governance' methods (such as the 'Open Method of Co-ordination') are in use, the Commission's co-ordinating and harmonising functions are more striking still. Defined by the White Paper on European Governance (2001) as a way of encouraging co-operation, the exchange of best practice, and agreeing common targets and guidelines for Member States, OMC operates through 'soft law' without formal enforcement mechanisms; instead, it 'relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others'. This is Kickert's 'network of accountability', where accountability is largely left to participants in the network through 'report back' mechanisms and 'peer review', the only sanction lying in recommendations for improvement issued by the Commission.

To date three main strategies have been suggested to alleviate these problems, the first and most conventional being the replication of state structures at transnational level: as might be said, the transmutation of 'governance' into 'government'. This process is exemplified in the progression towards a European Constitution with federal tendencies. The tacit assumption must be that any 'accountability gaps' left by the transfer of functions from national to supra-national institutions would be filled by the creation of new institutions and a process of gradual integration, more particularly integration through law. But although an extensive literature was devoted to issues of sovereignty and legitimacy, accountability at first attracted less attention. Exceptionally, Lodge noted an accountability deficit, remarking on the 'extent to which the European Parliament had not won powers forfeited to national governments by national parliaments'. She blamed national governments for deliberately engineering 'a situation whereby the national parliaments were denied effective controls over national executives. This made it easier for national governments, working within the Council, to escape national as well as European parliamentary scrutiny and control'. Third Pillar procedures accentuated the problem, as did the stealthy transfer of European operations to EU agencies distant from their publics. In similar vein, Scott and Trubek later warned of the lack of machinery for effective control of the emerging practices of 'new governance'. Serious accountability gaps were developing.

The second strategy, of recourse to techniques of participatory decision-making, is here discounted. This paper focuses on ex post facto accountability. We recognise that accountability may encompass prior participation in policy-making, comprising also a standard-setting function, but emphatically reject the idea that these can provide an adequate substitute for ex post facto political and legal accountability. In addition to the danger that participants in policy-making may be sucked into the network and rendered complicit in decisions, Bignami highlights the weakness of EU rulemaking

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procedures, contrasting them unfavourably with the robust protections of American administrative law.

The third strategy involves reinforcement of network checks and balances. Regulatory theory is generally somewhat weak on accountability; indeed, regulators frequently conflate the two concepts, conceptualising accountability as a bipolar dialogue between regulators and regulated and showing a marked preference for negotiated methods of problem solving, which are not necessarily exercises in public accountability.16 In this respect Scott’s extended study of regulatory accountability is somewhat exceptional. Convinced of the potential for harnessing ‘dense networks of accountability within which public power is exercised… for the purpose of achieving effective accountability or control’, Scott identifies two alternative models. In his interdependence model, members of a network, who are ‘dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy’ form a ‘mutual accountability network’. 17 This autonomous self-responsibility may (as Kickert implies), be a substitute for the formal accountability to public law institutions eroded by network governance or (as Scott suggests), be supplemented by formal accountability to public law institutions.

Applied to EU multi-level governance, the interdependence model suggests that the supervisory powers vested in EU institutions (typically the Commission or the EU audit machinery)18 can shore up and fill gaps created by network governance or left by decreased accountability at national level – in our view, a dubious assumption. We agree that the presence of state agents in a network can operate as a control device to limit opportunistic behaviour by private parties and ensure respect for the public interest – a process, we would add, that could work in reverse. We cannot, however, accept such behavioural pressures as a substitute for accountability properly so called. Mutual accountability networks tend to be more concerned with policy input and long-term relationships than retrospective evaluation, rendering accountability difficult. There is a very real risk that they will degenerate into a complacent ‘old boy network’, their accountability function blunted by mutual interest. There are obvious problems of transparency, as Scott notes.19 It is therefore questionable whether a mutual accountability network can be shored up so as to add the requisite element of legitimacy to the accountability process.

In Scott’s second, redundancy model, ‘overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them’. 20 Scott, instancing joint national and EU expenditure programmes in the area of structural funding, describes this as a ‘belt-and-braces’ or ‘failsafe’ model of accountability, in which two or more independent mechanisms, each capable of working on its own, are deployed to ensure the system does not fail. The requirement of joint funding helps to ensure that both domestic and EU audit institutions take an interest in expenditure programmes within Member States.21 Even leaving aside the chance of ‘simultaneous failure’ of both accountability systems,22 this model is problematic, in that gaps may be left, which are not covered by either.23 In short, coverage by national and supranational accountability machinery of multi-level decision-making processes is erratic and requires something stronger. We suggest that a fourth strategy, the ‘accountability network’ as defined below, might prove more effective.

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19 Scott, above note 17, pp. 57-58
20 ibid, 52
21 ibid, 53-54.
22 ibid, 60.
23 As in the ‘Santer affair’, below n. 54 and the Stichting Greenpeace case, below n. 48.
II. Analysing accountability

For Bovens, whose definition we adopt as a convenient framework for this paper, accountability consists of three main elements: (i) giving an account, in the attenuated sense of narration; (ii) questioning or debating the issues; and (iii) evaluation or passing judgment. The implication, accepted in this paper, is that accountability is primarily retrospective. Again in common with Bovens, we take accountability to be essentially a public procedure, sited in an open forum or at least accessible to citizens.

Bovens adds (iv) the possibility of sanction. Here we would inject a note of caution. It is in our view by no means clear that sanction is an essential element in accountability, though we accept that lawyers may be predisposed to think that it is. Sanction is very often illusory and may, rather than ‘thickening’ accountability, act as a deterrent by creating incentives to deny responsibility. We do not see this difficulty as overcome by stretching the term (as Bovens does) to embrace informal ‘sanctions’ of publicity or apology and negative consequences such as ‘disintegration of reputation or career’. More positively, we see reparation and effective redress as key factors in legitimation through accountability; the machinery should, in other words, operate so as ‘to put matters right if it should appear that errors have been made’. We would thus accept, e.g., recommendations for improvement issued by the Commission in OMC procedures as a form of accountability and, in our second case study of the European Ombudsman (EO), we argue that the office is properly classified as machinery for accountability.

Since ‘accountability network’ is a term used in several senses, it is important to establish the sense in which we use it. For Stone, a ‘mutual accountability’ network is composed of actors concerned with the planning and execution of any specific area of activity (environmental policy or delivery of policing and immigration services.) For Scott (as already indicated), an ‘extended accountability network’ is created when standard organs of accountability, such as a parliamentary committee entrusted with supervision of a given activity area like environment, or a regulator supervising provision of a public service, are grafted on to a ‘mutual accountability network’ formed by participants in a functional or policy network. By linking the two disparate concepts of ‘policy network’ and ‘accountability network’, the accountability process is largely internalised.

This is not the usage we adopt in this paper. We reserve the term ‘accountability network’ for (i) a network of agencies specialising in a specific method of accountability, such as investigation, adjudication or audit, which (ii) come together or coalesce in a relationship of mutual dependency, (iii) fortified by shared professional expertise and ethos. The two systems singled out for consideration in the next two sections - the judicial system, best known and best developed of EU accountability machinery and the European ombudsman network, which we see as coalescing into an accountability network – have these characteristics in common. But as we shall suggest in our conclusions, a further element is essential if an effective accountability network is to develop: (iv) a sense of a common purpose. This is less easily discerned.

24 Bovens, in this Issue, 0.
26 Scott, above n 17, 50
III. Courts as an Accountability Network

A. Legal Process and Accountability

Both lawyers and political scientists would subscribe to Mulgan’s assertion that an effective, independent judicial system is a ‘fundamental prerequisite for effective executive accountability’.28 ‘No society’, argues Judge Mancini, 29 can be considered truly democratic if its citizens are denied the possibility of vindicating their legal rights in judicial proceedings, whether against the oppressive acts of a powerful legislature – even a democratically elected one – or against the unlawful practices of an overweening administration. There would too be wide agreement round the view of courts as machinery for enforcement, and of judicial process as ‘thickening’ accountability by providing sanction, reparation and redress. Although the preferred terminology of lawyers remains that of the rule of law, 30 Oliver helps to equate the two notions, defining accountability as ‘a framework for the exercise of state power in a liberal-democratic system’, 31 a function ascribed by lawyers to the rule of law.

In the quest for public accountability, courts play a composite role, constituting machinery for accountability (an accountability forum) but contributing also to public accountability indirectly – e.g., by buttressing transparency. 32 In Ely’s influential American theory of constitutional review, the primary role of constitutional courts is ‘representation-reinforcement’, 33 courts shore up the institutions and processes of democracy, protect political rights, underpin machinery for citizen participation and guard the democratic process against ‘malfunctions’. A somewhat similar claim has been made for the European Court of Justice, on the basis of its doctrine of ‘institutional balance’ 34 and a ‘representation-reinforcing’ decision where the Treaties were read so as to open the doors of the court to the European Parliament. 35

Courts can also contribute to transparency. ‘The fact that citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their [the citizens’] initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system.’ 36 Whether the two Community Courts have lived up to these high expectations is doubtful. By holding the institutions strictly to the letter of the procedural law (as they have usually done) they provide the occasion for a change of heart but they have not, as urged by academic commentators, 37 agreed to characterise transparency as a ‘right’ of democratic citizenship, so transmuting into an accountability forum. 38 Occasionally courts have proved

28 R. Mulgan, Holding Power to Account, Accountability in Modern Democracies (Basingstoke: Palgrave Macmillan) 2003, 75-6
29 F. Mancini and D. Keeling, 'Democracy and the European Court of Justice' (1994) 57 MLR 175, 181.
obstructive, as in *Turco*, 39 where the Court of First Instance construed one of the statutory exceptions so expansively as to block public access to advice provided by the Council legal service on (ironically) the Commission proposal for the regulation on public access to documents. Notably, the European Ombudsman had reacted very differently. 40 It must, however, be recognised that freedom of information is a holy contested political issue in the EU. The regulatory package agreed only recently and with difficulty represents an uneasy trade off between Member States with very different traditions and EU institutions with widely differing interests. 41 The courts can be portrayed as acting in a 'representation-reinforcing' fashion by standing on the letter of the written law; by stepping in to correct perceived 'malfunctions', they would bring into question their own accountability as policy-makers.

For Shapiro, the duty to explain and give reasons underlies all review by courts. In the EU, Article 253 makes this a foundational Treaty obligation, serving, according to the Court of Justice, three distinct purposes: the opportunity for parties to defend their rights; for the Court to exercise its supervisory functions; and 'to Member-states and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty'. 42 Reasons enable court and decision-maker to engage in a 'synoptic dialogue': the decision-maker has to supply evidence and sufficiently good reasons to persuade a more or less sceptical judge that the decision-making process, and ultimately the decision, is rational. 43 Accountability can be heightened by application of the proportionality test standard in EC law, whereby administrative decisions must demonstrably be: (i) suitable to achieve the administrative objective; (ii) necessary for the achievement of the administrative objective; and (iii) proportionate in the burden imposed on individuals. 44

**B. Judicial Networking**

If, as Lord suggests, 45 an effective legal accountability system must provide for 'any citizen on a basis of equality' to access the court 'with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account', access becomes a pivotal issue. The complex division of responsibility among the European courts is reflected in the access (standing) rules, which are not homogenous but variable in national legal systems. To add to the problems, Article 230 limits direct access to the two Community Courts to those who have a 'direct and individual interest' and the Court of Justice has, in the face of constant academic criticism, 46 resisted opening up the Community legal process to individuals. This opens dangerous gaps in legal accountability. In *Stichting Greenpeace*, 47 protestors sought, with the aid of Greenpeace, to challenge the building of a power station in the Azores, a Spanish project rendered possible only by Commission funding. By holding the action inadmissible, the Court of First Instance blocked the path to Commission accountability, leaving open only possible recourse against Spain in the Spanish courts. It is too virtually impossible to test the validity of a Community regulation in the Community

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40 See *Special Report to the Council in complaint 1542/2000(PB)/(SM)*. The EO closed the matter in light of the proceedings in *Turco*: see *Decision on complaint 1542/2000 (PB) (SM) IJH against the Council*.
Courts without a long diversion around the national legal systems. In *Unión de Pequenos*, Advocate General Jacobs advised the Court of Justice to tackle this effective denial of judicial protection by changing its standing rules, arguing that: the long delays and heavy cost involved in the dual process; the fact that Community institutions would not be before national courts; disparity in national standing rules; all pointed in this direction. Declining, the Court of Justice asserted that it was for ‘Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection’; any incursion on their terrain would be ‘unacceptable’ – a recipe for ‘network comity’ often as not ignored!  

Every court operating within the territory can, in the widest sense, be described as a Community Court and potential actor in a judicial network, though not every court operates as a public accountability forum. Civil courts, handling disputes between private parties, are best characterised as machinery for dispute-resolution, though they may act as an accountability forum when handling state liability cases. Criminal courts, most closely linked with sanction, target citizens rather than state officials, though we should not discount the current trend to lift jurisdictional barriers and immunities and subject public actors to criminal penalties as in the recent *Berlusconi* cases. In *Cresson*, the Court of Justice entered the long-running saga of corruption and maladministration in President Santer's Commission with a ruling that Madame Cresson had acted in breach of her obligations as a European Commissioner. Whether this ruling supplied the requisite element of sanction is questionable, since the finding of breach was said in all the circumstances to constitute a sufficient penalty and no further sanction was imposed.

Well-developed networks of criminal and civil courts with considerable Commission backing exist in the European Union, covering three separate fields of activity: the Brussels Convention negotiated under TEC Article 220, which deals with recognition of jurisdiction and judgments; a Single Market initiative for consumer protection, resulting in a Commission proposal, adopted by the Council in May 2001, to set up a European Judicial Network (EJN) ‘to facilitate the life of people facing cross-border litigation’; and a stream of activity involving criminal process after the Treaty of European Union formally inaugurated cooperation in Justice and Home Affairs (JHA). The Commission’s Grotius programme (now replaced) funded training programmes, exchanges, studies and research in the national and European courts with a budget reaching EUR 3,750,000 by 2005. A network of civil judicial authorities became operational in 1998 with a sophisticated website, operated by the Commission, which provides information on, and links to, judicial systems in Member States. A dedicated server and information network aims to supply judicial authorities with information necessary for sound judicial cooperation; to identify best practice; and to resolve problems of judicial cooperation. Alongside the EJN, Eurojust, a transnational agency describing itself as ‘the first permanent network of judicial authorities to be established anywhere in the world’, hosts meetings between investigators and prosecutors where good practice and ideas for self-improvement are exchanged. These activities have gained in intensity since Enlargement and can be expected to intensify further in the light of recent debates over the adequacy of the Bulgarian and

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52 Case C-432/04 *Commission v Edith Cresson* (Judgement of 11 July 2006).
55 Eurojust, the European Union’s Judicial Cooperation Unit at: [http://www.eurojust.eu.int](http://www.eurojust.eu.int).
Rumanian justice systems. 56 But these are Stone's 'networks of mutual accountability', composed of actors concerned with the planning and efficient execution of criminal and civil justice policies, tangential to our theme.

In conformity with Mulgan, who describes judicial review as 'in some respects the most powerful form of external review of executive action', 57 we would reserve the term 'judicial accountability network' for those courts with jurisdiction to engage in judicial review of executive or legislative action - in practice, usually administrative or constitutional courts. It is not always appreciated how greatly the twenty-five national legal orders vary in this respect. Some systems possess specialised administrative jurisdictions, modelled on the prestigious French Conseil d'Etat; some have separate constitutional courts; there may here be no single, authoritative line of appellate authority; others, notably the United Kingdom, have a single hierarchy of civil courts to which the state is subject. Judicial career arrangements, gender and age of judges, recruitment, appointment and accountability are equally variable; as Bell puts it, judges in different jurisdictions 'look different and behave differently'. 58 These variants all affect the possibilities of judicial networking.

The Court of Justice and Court of First Instance have competence 'within their respective jurisdictions' to 'review the legality' of the acts and omissions of the Community institutions and, where the Council so provides, agencies and other entities. Because the EU possesses only limited competences, both courts can also review the validity of secondary legislation. The Treaty of European Union, which set in place the 'Third Pillar', left a significant gap in legal accountability, only partly filled at Amsterdam, when the Council deliberately curtailed the jurisdiction of the Court of Justice in the JHA Title. 59 (Predictions that the Court would move to fill the glaring hole 60 receive some support from Pupino, 61 where the Court of Justice, ruling that Member States are obliged to interpret national legislation in line with a JHA Council framework decision, applied an established First Pillar obligation to the JHA, exposing the fiction that the Court never intervenes in matters of national procedural law.

It is not open to national courts to pronounce on the validity of Community acts 62 but it falls to them to hold national bodies accountable in respect of their conduct of EU affairs. The fragmentary nature of the available information makes it hard to divine how successfully they do this. There are notable examples, such as the Maastricht decision of the German Constitutional Court, 63 which contains a significant warning to the federal powers against 'hollowing out' national sovereignty; or the same Court's later European arrest warrant decision, which imposed substantial procedural restraints on the federal German legislature. But there is variance between national legal orders, which differ not only with respect to procedure, remedies and principles of judicial review but also with respect to its intensity and effectiveness. Not only does the way in which judges approach their tasks vary but also the way they are perceived: 'it is not just structures but political context (historical and contemporary) that ultimately determines the level of judicialisation in any country.' 65 This helps to explain why some national

57 Mulgan, above note 27, 75.
59 TEC Art. 35 authorises preliminary rulings only where Member States have opted in and subject to the proviso of Art 35(5). For Title IV, see TEC Art 68.
61 Case C-105/03 Pupino [2005] ECR I-5285.
62 TEC Art. 234, as interpreted by the ECJ in Case 31/85 Foto-Frost (Firma) v Hauptzollamt Lübeck-Ost [1987] ECR 4199.
64 Bundesverfassungsgericht, Decision BvR 2226/04 (18 July 2005).
jurisdictions and some courts (the German Constitutional Court providing the prime example) have emerged as stronger players than others.

Formally, the system of Community courts is held together by the preliminary reference procedure of Article 234, which provides that any national 'court or tribunal' may pose questions concerning the interpretation of EC law to the ECJ in the course of litigation, while those courts whose decision is final must refer. It is for the national court to apply the ruling to the facts of the case before it. As drafted, Article 234 seems to envisage a 'flat', non-hierarchical and co-operative judicial network, placing the national courts in a position of technical equality, with the Court of Justice enjoying a consultative function *inter pares*; it does not authorise the Court to over-rule or hear appeals from decisions of national courts.

The view famously articulated by Rasmussen is, however, that the Court of Justice from the outset viewed itself as a constitutional court. The language and nature of the discourse, involving at its highest level issues of primacy, supremacy and power relationships amongst the legal orders, does suggest a hierarchical structure, with the Court of Justice determined to stand at the apex. Judge Lenaerts recently staked out just such a position. He told the US Supreme Court that the Court of Justice had devised its own position as 'umpire of the lines drawn by the Constitution', drawing the inference from disparate Treaty provisions that the judicial system rested 'on the Court having the last word within that system.'

One view of Article 234 proceedings is of a dialogue or discourse, in which national courts, consensually bound into the network by their participation in the process, play a role as important as the Court of Justice. Thus Dehousse talks of a mutually supportive network of 'responsible partners', or 'form of judicial partnership in which governmental intrusion is resented.' In these accounts, the primacy rule is read as an empowerment of national courts, supplying the network with 'common purpose': the recognition and enforcement of EC law at national level.

The companionate model gains support from Judge Mancini's early account of the 'unlimited patience' shown by the Court of Justice towards national judges when making preliminary references, where necessary reformulating their questions and 'coaching them in the elements of Community law' supports. By following 'this courteously didactic method', the Luxembourg judges 'won the confidence of their colleagues.' Simultaneously, the Court's first public relations policy was set in place by President Robert Lecourt; since 1965, the Court has hosted meetings of superior national judges, sponsored judicial conferences and educational visits, and paid regular visits to national jurisdictions. Judges and Advocates General regularly lecture to the national judiciary on EC law with the declared objective of promoting mutual knowledge and trust between national judges and the Court of Justice, and guaranteeing smooth co-operation between the levels. A judicial culture was under construction. Informal, professional relationships were calculated to appeal to judges as part of a professional community of lawyers. Amongst national judges were surely many sympathetic to the European enterprise and happy to number themselves among the 'tight epistemic community' that surrounds the prestigious Court of Justice.

The notion of 'club government', familiar to students of public administration, is pertinent.

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But Alter in a careful empirical study dismisses as 'misleading myth' the idea of widespread consensus behind the supremacy of European law: 'the silent majority of the national legal community was neither convinced nor supportive of European legal supremacy.'\(^{75}\) The primacy doctrine proved Janus-faced: it empowered national courts against national institutions but reduced their standing vis-à-vis the Court of Justice. 'Common purpose' unravelled with the realisation that, in the event of clash between legal orders, EC law must prevail. Reference procedure undercut national legal hierarchies and constitutions.\(^{76}\) National courts, concerned for the internal integrity of the national legal order, began to manifest resistance, obliging the Court of Justice to draw on the 'fidelity clause' of TEC Article 10 (which calls on the Member States 'to take all appropriate measures' to ensure fulfilment of obligations arising out of the Treaty) to underscore their obligations.\(^{77}\)

Perhaps relationships are cyclical: at some points companionate, at others adversarial. Certainly, the battle over primacy seems on the point of resurgence just when the network is being asked to absorb ten new legal orders.\(^{78}\) This may help to explain the remarkable case of Köbler,\(^{79}\) where the Court of Justice decreed that Member States incur liability to compensate an individual who suffers loss or injury flowing from a 'manifestly incorrect' judicial ruling on EC law. Whatever its logical force, the decision does not suggest a network of 'responsible partners' - very much the reverse! Judicial comity is hardly assisted by rendering network members legally liable at the behest of a member of the network, which is - or so we suppose - subject to no such liability. Casting national courts as conscripts rather than willing collaborators, the judgment underscores the claim of the Court of Justice to hierarchical superiority in the new Enlargement network. There is too danger to the wider network that, in holding Member State governments liable for judicial errors, judicial independence will be threatened, undercutting the vision of a 'judicial partnership in which governmental intrusion is resented'.\(^{80}\)

Behind the scenes, there is much soft networking. The Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACS) was initiated in 1963, during an informal visit by the Belgian to the Italian Council of State. As they joined, the supreme administrative jurisdictions of each Member State were added. Statutes officially adopted in 2000 transformed a 'family reunion of personally acquainted delegates' into a 'professional association with a formal legal framework.' Although it receives EU financial support, the ACS operates from the Belgian Council of State, with the German Federal Administrative Court currently holding the presidency; it is trying to deepen relations with the Court of Justice - at present merely a member represented on the Executive Board. Objectives are primarily educational: the ACS promotes exchange of views and experience on matters concerning the jurisprudence and functioning of its members in the performance of their duties, more particularly with regard to EC law. By 1968, so much common ground had been identified that regular colloquiums were initiated (there have now been nineteen) on matters of common interest.

Significantly, interest has shifted from comparative studies of different national approaches to 'specific questions of Community law'.\(^{81}\) Article 234 proceedings have twice been the subject of study and problems of delay are presently under discussion with the Court of Justice. Immigration procedures, increasingly absorbing the time and resources of national courts, were the focus of ACS studies in a

\(^{75}\) Alter, above note 66, 24-5.


\(^{77}\) The most sustained, but by no means the only, resistance came from the powerful German Constitutional Court in the *Solange I* and *II* cases: (1974) 37 BverfGE 271; (1986) 73 BverfGE 339. On Italy, see L. Daniele, 'Après l'arrêt Granital: Droit communautaire et droit national dans la jurisprudence récente de la cour constitutionnelle' (1992) 28 Cahiers de droit européen 1; A. Bondi, *Le Corte di Cassazione and the Proper Implementation of Community Law* (1996) 21 EL Rev 485; and on Spain, E. Garcia de Enterría, 'The Extension of the Jurisdiction of National Administrative Courts currently holding the presidency, it is trying to deepen relations with the Court of Justice - at present merely a member represented on the Executive Board. Objectives are primarily educational: the ACS promotes exchange of views and experience on matters concerning the jurisprudence and functioning of its members in the performance of their duties, more particularly with regard to EC law. By 1968, so much common ground had been identified that regular colloquiums were initiated (there have now been nineteen) on matters of common interest.

\(^{80}\) Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, Newsletter 2001 available at: www.juradmin.eu

\(^{81}\) Case C-224/01 *Köbler v Republic of Austria* [2003] ELR I-10239.

P. Wattel, 'Köbler, Cifit and Welth Grove: We Can't Go on Meeting Like This' (2004) 41 CML Rev 177.
2005 seminar aimed to ‘compare the solutions adopted or planned by the Association’s members.’ And ACS is collaborating with a French initiative to make an overall study of administrative justice in Europe. Perhaps a reversion to earlier interests, this could come to form the basis for a harmonisation.

‘The real core’ of ACS activity is, however, its information network. It maintains two vital databases: with the Court of Justice, a record of national administrative decisions involving EC law (DEC-NAT), and Jurist, its own database of Article 234 references and other interesting cases involving EC law. In addition, there is a regular Newsletter and a recently established interactive Forum, designed to promote exchanges between members. Currently, improvements to this network are under consideration. As we shall see in the next section, electronic links of this kind have a real potential for grounding accountability networks.

Set up in 1972, the Conference of European Constitutional Courts (CECC), exists to promote the exchange of information on the working methods and constitutional case law of members, with the exchange of opinions on ‘institutional, structural and operational issues as regards public-law and constitutional jurisdiction’. CECC now numbers 34 European constitutional courts and similar institutions, including courts in most Member States. CECC meets triennially. Its website, created by the Belgian Court of Arbitration, affords electronic access to national reports plus reports from the Court of Human Rights and Court of Justice. Perusal of its website suggests, however, that networking is so far less well developed. This may be why at the 2004 conference held in Bled in conjunction with the Council of Europe’s advisory commission on constitutional affairs (the Venice Commission on Democracy Through Law), members laid great emphasis on ‘continuous communication between the Courts, the intensification of a truly efficient network of data exchange.’

Unlike the EJN, defined above as a policy or mutual accountability network, the ASC and CECC fit more clearly inside our ideal-type. Made up of courts specialising in administrative and constitutional review, both networks have come together at the volition of their members. Shared professional interests, expertise and ethos hold them together; they are not inspired or organised by the Court of Justice or Commission nor are they directly linked to Member State ministries. Neither network is hierarchical, as they might be if dominated by the Court of Justice. Whether members subscribe to common accountability objectives is, however, questionable. Certainly, the ACS brings Member State judges together regularly to discuss matters of common concern. The move away from comparative judicial review studies to, currently, the proper administration and implementation of EC law could be read, however, as a divergence from the primary role of national administrative courts: to hold national institutions accountable.

IV. Ombudsmen as an Accountability Network

A. Ombudsman Process and Accountability

On the tenth anniversary of his office, in 2005, the European Ombudsman (EO) conveniently outlined the basics of a pan-European understanding of what an ombudsman should be and do:  

- Personal dimension of the office, with a publicly-recognised office-holder
- Independence
- Free and easy access for the citizen

82 ACS Newsletter 2005.
83 ibid.
84 Available at http://www.confcoconsteu.org/
85 CECC, The position of Constitutional Courts following integration into the European Union available at http://www.uvi.si/eng/media/accreditations/constitutional-courts-conference/
87 N. Diamandouros, speech to fifth seminar of the national ombudsmen of the EU member states, 12 September 2005.
• Primary focus on the handling of complaints, whilst having the power to recommend not only redress for individuals but also broader changes to laws and administrative practices
• Use of proactive means, such as own-initiative inquiries and providing officials with guidance on how to improve relations with the public
• Effectiveness based on moral authority, cogency of reasoning and ability to persuade public opinion, rather than power to issue binding decisions
• Broad review function that can encompass legal rules and principles, the principles of good administration, and human rights

Thus visualised, the ombudsman technique is a paradigm of Bovens’ ‘thin’ concept of accountability, being closely engaged in ‘account giving’, ‘questioning’ and ‘passing judgement’, while lacking ‘sanction’. An institutional design feature that enables procedures and criteria of accessibility to be more flexible, this may however be considered a strength. One way of looking at the contribution of ombudsmen to accountability is through the lens of alternative dispute resolution (ADR). As compared with courts, the EO rightly stresses the value of a complaints service that is not only free at the point of delivery but also free from strict standing rules and relatively swift. Likewise, whereas legal process is indelibly associated with the concept of a zero-sum game, promoting ‘positive-sum outcomes that benefit both the complainant and public authority’ is very much part of the ombudsman’s job. Yet it is the ability to self-start – in the case of the EO, the so-called ‘own initiative inquiry’ – which so clearly distinguishes the technique.

Highlighting the need for a rounded and interactive approach, one that further stresses the inspectorial function or parallel with audit, the authors have long used the terms ‘fire-watching’ and ‘fire-fighting’ to describe the role of ombudsman. In similar vein, reflecting the classical Nordic tradition that originally informed the Office, a leading commentator was soon ascribing to the EO a dual function: the first, very relevant for present purposes, of helping to make the EU more accountable by ‘providing an independent critical appraisal of the quality of administration by Community institutions and bodies and a stimulus towards improvement’; the second that of court substitute. Pride of place goes here to the EO’s European Code of Good Administrative Behaviour. An active role in standard-setting, invocation of the code as a set of benchmark tests for maladministration in individual cases, and public advocacy for moving on from ‘soft law’ to a binding codification, is all on offer.

Against the backdrop of increasing reliance on independent agencies etc., in EU governance and the evident fragility of classic forms of political accountability in this system, the EO’s contribution to accountability can be seen as helping to reconcile executive delegation with parliamentary democracy. Operating as a parallel system for redress of grievance more oriented to collective or explicitly ‘political’ issues; and, via presentation of his annual report, as (thin) machinery for the EO’s own accountability, the Petitions Committee of the European Parliament is seen offering only limited support. A special premium has been placed on the need for ‘co-operation’ between the EO and

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91 Originating in the Own Initiative Inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV).
those bodies and institutions, pre-eminently the Commission and Council, which it is his task to hold accountable.  

The EO Office is in fact a modest entity, with much to be modest about. In accordance with the mandate to combat ‘maladministration’, and so ‘enhance relations’ between citizens and the EU level of governance as contemplated in the Maastricht Treaty, it has so far dealt with more than 20,000 complaints. Yet the great majority of these – some 70% - prove inadmissible, mostly because they are against national, regional and local administrations in the Member States, over which the EO – investigating Community bodies – has no jurisdiction. Not that the EO could hope to do a great deal more, armed as he currently is with a budget of only EUR 8m and some sixty staff. For our purposes the jurisdictional limitation has special resonance, since the EO has been pressed from the outset to promote an accountability network. Given the evident mismatch between the formal reach of the Office and the common experience of citizens of implementation of Community law by domestic authorities, the EO would otherwise be lacking in credibility. The Office regularly claims credit for advising complainants how to go elsewhere: most often, to another (domestic) ombudsman.

The first EO, Jacob Soderman, displayed a cautious attitude, no doubt explained in part by concern to win acceptance for the Office in the Brussels jungle. However, his well-known contribution to the cause of transparency, typically in advance of the ECJ, illustrates the potential of an ombudsman in the role of ‘repeat player’. An own initiative inquiry; followed by a special report on access to documents; expansion of transparency requirements into secretive areas of Council activity via individual complaints; plus various interventions in the public discussion of a critical and/or agenda-setting kind; it all adds up. Nor should the infamous Parga case, which involved allegations of bias in Commission enforcement proceedings, go unremarked. Demonstrating the need for continuous vigilance and the important place for ombudsmen as an accountability forum, it saw the EO reserve his toughest language for the potentially corrupting deployment of staff.

The arrival in 2003 of the second EO, Nikiforos Diamandouros, marks a step-change. Today, a more pluralistic conception of the ombudsman role is apparent, one to which the foundational Nordic tradition is still a major contributor, but which further reflects a more general re-orientation in ‘the Ombudsman world’, associated especially with human rights concerns. There is too in the contemporary workings of the Office the sense of a changing ethos associated with the great expansion of the Union eastwards.

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95 For consideration by the authors of EO internal practice and procedure, see C. Harlow and R. Rawlings, ‘Accountability and law enforcement: the centralised EU infringement procedure’ (2006) 31 ELR 447.
97 Figures that include substantially increased resources in the light of enlargement: see for details, AR 2005, 164-165.
98 During 2005, the EO directed some 950 complainants to a domestic ombudsman and transferred some 90 cases (AR 2005, 121).
100 Special Report and Decision by the European Ombudsman following the Own-Initiative Inquiry into Public Access to Documents held by Community Institutions and Bodies (December 1997).
101 As in the ‘Statewatch cases’: Complaints Nos. 1053, 1056, 1057/25.11.96/STATEWATCH/UK/IJH against the Council.
103 As in the debate on ‘the future of Europe’: see J. Soderman, the Functioning of the Institutions, CONV 505/03 CONTRIB 206.
104 Decision on complaint 1288/99/OV against the Commission.
EO activities likewise show a new sense of vigour. Elements include a drive for increased visibility (more targeted information and multiple visits); unequivocal recognition of the fact that maladministration encompasses unlawfulness but is not confined to it; and a commitment to more own initiative inquiries.  

With reference to Bovens’ criteria of ‘account giving’ and ‘passing judgment’ a more robust and intensive style of review is in evidence: for example, greater questioning of interpretations by the Commission’s legal service; and elaboration of an administrative duty of ‘due diligence’ in the operation of (Article 226) infringement procedure. A bold attack on the Council, on the basis of a stretched interpretation of Treaty provisions, for its habit of lawmaking in secret, also stands out. And high on the list is widening and deepening of an accountability network. For Professor Diamandouros, a political scientist, ‘co-operation among Ombudsmen is the way forward.’

B. Ombudsmen Networking

Putting in place the foundations of an accountability network was one of Jacob Soderman’s early objectives, the first concrete step being the creation in 1996 of a system of liaison officers linking the EO and national ombudsmen. As well as redirecting complainants or transferring cases, the aims naturally included promoting the flow of information about Community law and its implementation. Today, however, a fresh discourse is on offer: ‘European ombudsmanship’, the European ‘family of ombudsmen’, and even ‘ombudsmanship as part of the European legal and political tradition’. Likewise, with a view ‘to establishing a clearer public identity for our co-operation’, the preferred term of art is now ‘The European Network of Ombudsmen’ (ENO).

Comparative public administration has witnessed serial bouts of ‘ombudsmania’, not least in the expanding landmass of the EU. The establishment of ombudsmen is rightly seen as a significant step in the transition from communist rule to democracy. Many of the Member States that previously lacked ombudsman have also caught the fever. A strong development of regional ombudsmen in various Member States, and subsequent inclusion in the EO’s network, is especially noteworthy, given the many internal responsibilities for implementation of EC policies at the sub-national level. Whereas Mr. Söderman’s original liaison network was an intimate affair, with national ombudsmen in only 7 out of 12 Member States, ENO currently boasts some 90 agencies in 30 countries.

The form and style of the network displays several key features. One concerns the existence of an ‘ombudsman world’. In a striking reversal of so much in the contemporary development of transnational or global administrative law, the ‘regional’ or European dimension is here being superimposed on a highly developed form of networking on the international plane. Closer to home, there is a considerable history of ombudsman development and education and training under the aegis of the Council of Europe. Nor should such networking activity be visualised simply in terms of bipolar relationships between the EO and ombudsmen in individual Member States: the British and Irish Ombudsman Association (BIOA), for instance, is the model of a ‘sub-regional’ network. This

107 See especially Decision on complaint 1273/2004/G against the Commission.
108 See especially Special Report following the draft recommendation to the European Commission in complaint 289/2005/(WP)/GG.
109 Special Report following the draft recommendation to the Council in complaint 2395/2003/GG.
111 AR 1996, 92-93.
114 Italy, with no national ombudsman or functional equivalent, is today the exception.
116 Plaudits go to the International Ombudsman Institute (IOI), which in true pioneering spirit has operated to promote, foster and validate the ombudsman technique around the globe.
117 Committee of Ministers’ Recommendation No. R (85) 13 on the institution of the ombudsman.
point has resonance in the case of the ‘new democracies’ in the EU and in existing and potential ‘candidate countries’. Ombudsman networking activity, sponsored under such major initiatives as the EU’s Stability Pact and the joint EU and OECD Sigma programme, is particularly intense in and among the countries of South- Eastern Europe, commonly focused on protection of minorities.  

Secondly, as with courts, very considerable diversity exists within ‘the family of ombudsmen’. Even inside a single state, let alone across the EU, substantial differences in terms of functions, powers and orientations between public sector ombudsmen, may well occur. The idea of ENO affording a uniform and universal service thus remains something of a chimera. The EO, however, is actively promoting an agreed statement, or skeletal ‘codification’, of the ombudsman role inside the network.  

The third and related feature is the voluntary and flexible character of the co-operation, in what is a paradigm of a self-organising network. There is no equivalent of Article 234 reference procedure or legal ‘glue’ for ENO, nor does the EO have at his disposal anything resembling the legal doctrine of ‘effective remedy’ with which to frame and structure ombudsman practice and procedure in Member States. The ‘dialogue’ in this way differs qualitatively from that within the judicial community, reflecting an altogether lesser form of pan-European arrangement. If the EO is to be characterised as primus inter pares, the primacy is not - or not yet - that sought by the ECJ.  

This point needs underlining given the EO’s contributions to the ‘Constitutional Convention’, in which Mr Söderman urged explicit recognition of a multi-layered system of extra-judicial remedies, centred round an obligation on the respective complaints-handlers to co-operate ‘in a spirit of trust while maintaining their independence’. Bound up with significant extensions to the EO’s own role and jurisdiction, the network should be formalised, with domestic ombudsmen empowered to transfer any case involving fundamental rights under EC law. Echoing the practice of certain ombudsman systems, the EO should also have a direct right of access to the ECJ in such cases. Not surprisingly, these lofty ambitions failed to win favour, the implicit demand that each Member State be obliged to ensure effective and appropriate machinery for ADR jarring both with respect for national constitutional traditions and with the subsidiarity principle.  

Two aspects of the network’s contribution deserve special mention. One is its nurturing and standard-setting function for the many ‘young’ ombudsman systems in the new democracies, so building up machinery of accountability. The EO’s Code has been translated into many languages and several Ombudsmen have used it as a resource to enhance the quality of public administration in their own countries. The second concerns the EO’s user-friendly website, illustrating the quest for a pan-European complaints service. Currently under consideration is a shared point of access or electronic ‘one stop shop’ for directing citizens to the appropriate ombudsman, be it at EU, national or regional level. Meanwhile, around the network, rapid exchanges of information, shared analysis of problems and dissemination of best practice are founded on increasingly sophisticated use of IT.  

Finally, the potential exists for joint inquiries, building on instances of informal sharing of information in particular cases. A first step has been taken with a ‘parallel inquiry’ in close cooperation with the EO’s Spanish counterpart into how public library systems might be affected by a new Community directive. Ten members of the network responded to the EO’s request for information on ways of implementing Community law, against which the Commission’s decision to bring infringement proceedings against

118 See for details, www.stabilitypact.org/wt1/040607-ombudsman.asp
119 R. Lawson, General report to the fifth seminar of the National Ombudsmen of EU Member States (The Hague: European Ombudsman) 2005.
120 More particularly, through ENO’s bi-annual seminars: AR 2005, pp 118-121.
121 J. Söderman, Proposals for Treaty Changes, CONV 221/02 CONTRIB 206. The proposed system would have incorporated parliamentary petitions.
122 It was further envisaged, as a stopgap, that the EO would investigate such cases for maladministration in the application of EC law more generally if there was no local complaints machinery with competence in the matter.
123 N. Diamandouros, ‘Reflections’, above n.106.
124 Ibid.
125 As through the network’s Ombudsman Daily News: see AR 2005, pp 121-122.
Spain could be measured. This might be a further way to fill the gap in areas of 'shared' EU and national administration. 'To shed light on exactly who is responsible for what and, if appropriate, use our powers to ensure that the full range of legally possible solutions is adequately and duly examined' would be the very model of an accountability network approach in such matters.

V. Conclusions

Earlier in this paper, reference was made to three main strategies for promoting accountability in transnational or multi-level governance systems. The first was the replication of state structures at transnational level; the second, recourse to techniques of participatory decision-making; the third, reinforcement of network checks and balances with additional accountability machinery (Scott's interdependence and redundancy models.) Focusing on courts and ombudsmen, this paper has examined a fourth: the construction of accountability networks.

What purposes do accountability networks serve? And how can they help to bridge accountability gaps? From an internal viewpoint, their primary function is one of institutional cohesion. They bring together agencies specialising in accountability with shared professional expertise and ethos, providing at the most rudimentary opportunities for members of the network to meet and make contact. In time, a network may develop a 'collective identity', empowering the network and allowing it to engage in self-promotion or defend itself collectively against attack. This was very much the function of the judicial network in its early days, when Member States, unaccustomed to the idea of EC law as overriding the domestic legal system, might have turned against their courts. Accountability networks also possess important educational functions. Disseminating information amongst members, promoting best practice and subjecting practices and procedures to scrutiny by peers, in much the same fashion as does 'OMC'. Enlargement, adding new, and sometimes weak or undeveloped, members to the networks, renders education particularly necessary at the present time. This need is strongly met in the ombudsman network. The ombudsman is well ahead in technological terms, with a well laid out website, user-friendly alike to network members and their clientele, which could in time develop into a 'one stop shop' for citizens' complaints. This marks the network's external function as an access point for citizens.

National courts do, as indicated, serve as a gateway to legal accountability. They do not, however, provide a 'one stop shop' and their technology is far less advanced. And, although the working relationship between the Court of Justice and national courts is older and its members share professional expertise and ethos, there are ways in which the network does not conform to our ideal-type. Yes, judges network and collaboration and interchange seem on the increase, albeit slowly. In the ACS, we can see the germ of an accountability network in terms of our strict definition. This informal network contrasts with the formal judicial arrangements for the implementation of Community law as conceptualised by the Court of Justice. Created voluntarily by its members, its members specialise in accountability and are involved in holding national governments accountable; the Court of Justice, which fulfils the same function for the Community institutions, is an ordinary member represented on the Council.

Earlier we suggested that common purpose is necessary for the effective functioning of an accountability network. This we see as the primary reason why the ombudsman network seems, somewhat to our surprise, further advanced towards an accountability network than the better-known circle of Community Courts. A striking feature of the former is the extent to which developments are happening on the initiative of those who deal in accountability and not at the instigation of Commission, Council, or indeed the central governments of Member States. There is a strong sense already of a self-organising and self-generating network of investigative officials, fortified by shared professional expertise and ethos, who have come together to execute the common purpose of fostering and encouraging good administration, and of holding administrators throughout the EU

126 Decision of the EO on joint complaints 3452/2004/JMA against the Commission).
127 N. Diamandouros, speech to fifth seminar of the national ombudsmen, above n. 87.
accountable for acts of maladministration. Experiments have begun with a ‘parallel inquiry’, the logical conclusion of which would be a power to undertake joint investigations, favouring more effective outcomes. This degree of cohesion assumes, however, that the network is able to agree upon a common purpose.

Unlike the evolving ombudsman network, the judicial network is not based on ‘non-hierarchical method[s] of mediating conflict’. It is not a ‘flat hierarchy’ involving recognition of ‘co-ordinately valid legal systems’. That ideal is undercut by both the primacy doctrine and the Court of Justice’s ambition to occupy the place of supreme constitutional court. Clearly this places national courts in an ambiguous position, charged as they are with maintaining the integrity of the national legal order, while at the same time upholding the primacy of EC law. The judicial pyramid generates internal tensions, creating doubt over commitment to a common purpose. The network can combine against Member States but the Community institutions are not treated in like fashion, since they are not accountable in national courts. This is in one sense, the challenge of multilevel governance and the multiple loyalties it engenders. An alternative reading of the situation is as a network malfunction impeding the development of a true accountability network capable of meeting the challenge of network governance.

Fisher has expressed doubt whether accountability and accountability processes can operate outside the context of a liberal-democratic government system. We are cautiously optimistic. We see the development of network governance as inviting a response in the shape of accountability networks. We do not proffer accountability networks as the ‘ultimate accountability principle’ nor, indeed, as more than a partial answer to the acknowledged problems of accountability associated with the rise of multi-level governance in Europe. What we do suggest is that the hierarchical and pyramidal assumptions presently underpinning accountability theory in the EU context warrant re-examination.

The present EO, in a reference to ‘the increasing intensity of co-operation among administrations at all levels of the European Union’, has spoken of the need for this to be ‘matched by co-operation among ombudsmen’. This is another way of articulating our thesis.

131 Diamandouros, above n. 87.