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PRINCIPLES OF TRANSPARENCY AND ACCOUNTABILITY: MECHANISMS FOR SECURING OBLIGATIONS INCUMBENT TO PUBLIC BODIES

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Abstract in original language
The principles of transparency and accountability are closely interconnected and both of them related to the concept of 'rule of law'. From a broader perspective they are inherent to any legal system which is protecting the individual from the discretionary powers of the state's machinery. An important role in securing (public) obligations, safeguarding and further developing the principle of accountability is played by the 'fourth power' institutions promoters of a good administration, engaging new standards of conduct of ethical, institutional and also legal nature.

Key words in original language
Transparency, Accountability, Public institutions, Ombudsman, Court of Audit.

1. PRINCIPLES OF TRANSPARENCY AND ACCOUNTABILITY

The principles of transparency and accountability are closely interconnected and both of them are related to the concept of 'rule of law'.

"Transparency largely promotes the same and similar values as the principle of legality, that is, the requirement of a legal basis for government action. In its underlying values, transparency is closely related to legality; therefore it can fulfil a crucial role in law-making and policy making processes where the principle of legality is out of reach and does not make sense, for instance in the case of decision-making characterized by a high degree of informality, or where principle of legality does not prevent the existence of a broad discretion to act or not to act. The principle of transparency picks up where the principle of legality falls short" and it can be seen as a functional

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counterpart of the later.[2] Without transparency and information there can be no dialogue between citizens and government, and corruption and abuse of power can occur unchallenged. Curtin and Meijer in their analytical approach about 'Does transparency strengthen legitimacy' they reach the conclusion that principle of transparency is a key element of democratic institutions and can only be a starting point in building public understanding, participation and involvement, but in their opinion "naive assumptions about the relation between transparency and legitimacy can and should be avoided"[3] - "legitimacy being a mirror of public perception as to the rightness of authority."[4] Thus principle of transparency can be seen as a promoter of legality, a deterrent to corruption, and therefore as a support to an accountable governance. Public institutions do not exist for their own sake, but to serve people by maintaining law and order. Therefore public officials must be held accountable for their actions.

The principle of accountability is linked to the concept of 'rule of law' and if one is only interested in the strictly legal perspective, accountability does not add anything substantial to the 'rule of law'. The law defines who is accountable to whom and for what and seen this way accountable behaviour is simply lawful behaviour.

Government transparency, civic participation, and effective oversight by state actors (including judiciaries, legislatures, ombudsmen and audit institutions) and non-state actors (such as the media and civil society watchdogs) are important sources of pressure for better governance. Accountability is not conceivable without transparency and rules, they are interconnected since transparency in the public sector inevitably raises issues about the distribution of powers and resources in the attempt to fulfil public obligations. Their relationship is strongly argued to foster the political and public accountability which will contribute to a transparent government that accounts for what it does. Also it refers to the effectiveness with which the governed can exercise influence over their governors. The adjective 'public' is specifically related to the openness of the policy-making process. The account giving is done in public in the sense that it is open or at least accessible to citizens.

1.1 PRINCIPLE OF TRANSPARENCY

Definition and elements of the principle of transparency

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[2] S. van Bijsterveld , "A crucial link in shaping the new Social contract between the citizen and the EU", in *Transparency in EuropeII,* 2004

[3] D. Curtin and A. Meijer, "Does transparency strengthen legitimacy",in Information Polity 11, IOS Press, 2006

[4]Idem

"As a term of art, transparency could well win the prize for most increased usage of any word" and "has been used almost to the saturation point over the past decade.. becoming a pervasive cliché of modern governance."[5] "In perhaps its commonest usage, transparency denotes government according to fixed and published rules, on the basis of information and procedures that are accessible to the public, and within clearly demarcated fields of activity."[6] Tomkins[7] had developed a unified system of institutional arguments as an answer why principle of transparency is so important:

"The first reason is the administrative argument: this is that with greater transparency comes greater accuracy and objectivity in record keeping generally, and as regards personal files in particular. Secondly, there is a constitutional argument, which posits that greater transparency supports the legal and constitutional roles of national bodies in law-making or in administrative oversight. Thirdly there is the legal argument : namely reasons and openness in decision-making are essential if citizens and others are to be able to determine whether and if so on what grounds, they might have a right to some form of legal redress against an allegedly disproportionate or procedurally unfair decision. Fourthly there is the policy argument. This supposes that greater openness somehow leads inexorably to better decision-making – that mistakes will be fewer or smaller if decisions and the decision-making process are opened up to a greater public and media scrutiny, and that fraud will be hard to conceal. Finally, the popular or political argument has it that greater transparency enhances the ability of informed citizens meaningfully to participate in a democracy."[8]

Concepts such as right to information, public access to information, e-government, citizen participation, consultation of experts or citizens, the need to have reasoned decisions, open decision-making processes have all in their time been presented as crucial aspects of the principle of transparency. Some authors view principle of transparency as limited to one or two of these issues (i.e. access to information and open meetings), others take a broader approach and view for example the right to be heard before a decision is taken as an important part of the principle of transparency. It can be concluded that the principle of transparency is an umbrella concept which covers a variety of (not always particularly closely related) values.

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[5] C. Hood, "Transparency in historical perspective", in Transparency: the key to a better governance? by C. Hood and D. Heald , published for The British Academy by Oxford University Press, 2006, p.3

[6] Idem

[7] A. Tomkins, "Transparency and the emergence of European administrative law",in Yearbook of European Law ,1999-2000, Vol.19, Oxford University Press, 2000

[8] Idem

However, at the Community level the principle of transparency in the context of public administration is contended to rely on some basic elements as they were acknowledged by the European Ombudsman.[9]

"Transparency involves three elements:

the processes through which public bodies make decisions should be understandable and open;

the decisions themselves should be reasoned;

as far as possible, the information on which the decisions are based should be available to the public."

It can be argued that "transparency not only incorporates the rather passive right of every citizen to have access to information (if they activate that formal legal right) but also the much broader and more pro-active duty of the administration itself to ensure that information about its policy and actions is provided in an accessible fashion."[10] Therefore, the elements of principle of transparency can in addition refer to more structural aspects in the sense of maintaining transparent decision-making processes and judicial protection systems as well as the fact that legislation must itself be coherent and clear.[11] In this sense a transparent government should provide optimal public information about its actions through means such as publications, access to information and transparency in decision-making laws, procedural mechanisms to allow interest groups and individuals to express their concerns related to matters that directly affect them, and clear rules on restrictions.

Access to information as an element inherent to the principle of transparency does indeed imply that public authorities should be proactive in publishing certain kinds of information, in ways that can be easily understood by the intended audience.[12] In this sense, principle of transparency overlaps with certain requirements of accountability such as, for example, publication of annual reports, or of a State budget showing

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[9] European Ombudsman, "Transparency as a Fundamental Principle of the European Union", 2001 http://www.euro-ombudsman.eu.int/speeches/en/2001-06-19.htm

[10] D. Curtin and A. Meijer, 'Does transparency strengthen legitimacy', Information Polity 11, IOS Press, 2006

[11] M. Klijnstra, "Het transparantie toegespit.", 2000 in : D.Curtin and A. Meijer , "Five Myths of European Union Transparency: Deliberation through the Looking Glass?", Paper presented at Special Workshop Deliberative Democracy and Its Discontents, IVR World Congress in Legal Philosophy, Granada, 24-29 May 2005

[12] Code of Good Administrative Behaviour, Article 22, can be summarised as demanding from the official to provide the right to information in a clear and understandable manner; further provisions state that when he is not competent, he is supposed to state reasons for his rejection and direct the requester to the competent person , institution or body

plans and outcomes as regards spending, revenue and borrowing. Certain rules regarding the access to documents or keeping adequate records[13] should be written down for the sake of right to information, and non-compliance with any of them should constitutes an instance of maladministration and therefore should be complemented with rules imposing sanctions and redress.

In addition, principle of transparency presupposes that public authorities react promptly and positively to requests from members of the public for access to information and documents which have not been published.[14] The holders of public office should, in this view, give reasons for their decisions and restrict information only when the wider public interest clearly so demands. The main idea of access to information is that everyone, or at least every citizen, has the right to obtain official information and documents, subject to legally defined exceptions for the protection of various public interests and private interests.

Most of the exceptions include a "harm test": that is to say, the exception applies if disclosure would undermine the protection of the interest concerned. Some exceptions are, in addition, subject to the possibility of an overriding public interest in disclosure. This is the case for the protection of: commercial interests; court proceedings and legal advice; and the purpose of inspections, investigations and audits. If an overriding public interest exists, then there is an "exception to the exception" and public access must be granted. There is, however, no possibility of an overriding public interest in disclosure as regards the exceptions for: public security; defence and military matters; international relations; financial, monetary or economic policy; and the protection of privacy and the integrity of the individual. A stronger version of the harm test applies to the exception which is intended to allow the institutions a so-called "space to think". The exception applies only if disclosure would seriously undermine the institution's decision-making process.[15]

Principle of transparency, therefore, does not imply that all official information and documents must be public. Instead it implies that the burden of proof is on the public authority that refuses a request for public access,[16] thus reversing the traditional presumption of confidentiality that

[13] Ibid, article 24 of Code of Good Administrative Behaviour

[14] Ibid, article 22

[15] European Ombudsman, "Transparency, Accountability, and Democracy in the EU", 2006 http://www.euro-ombudsman.eu.int/speeches/en/2006-10-17b.htm

[16] Idem

existed in many countries (the communist culture of secrecy).[17] In this line public authorities should be under the 'duty to give reasons', to explain and substantiate the justification of an administrative action or decision. The reasons consist of a reference to the implemented regulation, the relevant facts, the interests concerned and a report of on the weighing of these interests. This aspect has several important functions:

adds benefit to the quality of the decision;

informs and legitimates the decision in concreto - for the benefit of control by the (appeal) judge and the parties, and in abstracto - to prevent the appearance of bias or arbitrariness;

adds to the development of lawfulness;

may stimulate officials to be more rigorous in their analysis and ensure that they have properly examined the potentials flows in their arguments

Closely connected with the right to access to information runs the idea of open decision-making, as another immanent element of principle of transparency. This implies that meetings deciding on matters that will have a direct impact on the citizens should be open and public, so that citizens can follow them and listen to the arguments, and proposals on matters that concern citizens should be presented for public debate in advance of such meetings. Yet principle of transparency is often considered as not including a right of participation as such but rather more weakly as including the provision of some consultation mechanisms.[18] The fact that participation in some form can be considered an important part of transparency is not very surprising. Policy affects citizens, often in a rather direct fashion, and therefore it is important for them to have the possibility to participate in policymaking.[19]

For an overall assessment regarding the principle of transparency as developed by any legal system, it is relevant to look at the legislative framework on which principle of transparency is conceived. An analysis of diverse aspects such as the right to information, the public authorities that are complying with the requirements to act as open as possible, the exemptions from the rules of transparency, the procedures that are engaged

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[17] Natasa Pirc Musar, "The acces to public information and its development", in Transparency in Europe, Ministerie van Binnenlandse Zaken en Koningrelaties, 2004, pp.69-80

[18] D. Curtin and A. Meijer , "Five Myths of European Union Transparency: Deliberation through the Looking Glass?", Paper presented at Special Workshop Deliberative Democracy and Its Discontents, IVR World Congress in Legal Philosophy, Granada, 24-29 May 2005

[19] Idem.

in decision-making, the effectiveness of implementation of freedom of information laws and their flaws would give us a perspective of the way in which the various elements inherent to the principle of transparency are accommodated and dealt with by the national legal environments. These are multiple aspects that should foster the principle of transparency which in turn helps improve governance and reduce corruption, securing public obligations as assumed by those empowered to fulfil them.

1.2 PRINCIPLE OF ACCOUNTABILITY

a. Definitions, elements and mechanisms

Principle of accountability often serves as a conceptual umbrella and "has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics"[20] and the most concise description would be "the obligation to explain and justify conduct."[21] Accountability can be defined as a "social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other."[22] "This usually involves not just information about performance, but also the possibility of debate and judgment and the imposition of formal or informal sanctions in case of mal-performance. This is what one could call hard accountability. However, over the past decade accountability also has been used in a much softer sense, as an indication of good governance. In this soft sense it comes close to a willingness to act in a transparent, fair, and equitable way."[23]

The academic debates about principle of accountability raise questions about mainly three issues: Who is accountable? To whom? For what?. These are actually the elements on which the principle of accountability is framed on.

Public institutions ('who?') are frequently required to account for their conduct in fulfilling public tasks ('what?') to various forums('to whom?') in a variety of ways. There are different sorts of forums and therefore also

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[20] Mulgan, 2003 as cited by M.Bovens , "Analysing and assessing public accountability", p.8

[21] M.Bovens, "Analysing and assessing public accountability",in European governance papers, no.C-06-01

[22] A. Meijer and M. Bovens ,"Public accountability in the information age", in E-Government. Workshop in conjunction with JURIX 2003, M. Palmirani, T. van Engers & M.A. Wimmer (eds.), International Federation for Information Processing, Laxenburg (Austria), 2003, pp. 16 – 28

[23] Idem.

different types of potential accountability mechanisms, and different sets of norms and expectations:[24]

Nevertheless, from a broader perspective, the various mechanisms of accountability are interwoven and it can be noticed that the state institutions provide forms of 'horizontal accountability' in contrast to 'vertical accountability' imposed on governments by voters through periodic elections. Horizontal accountability is more focused on the institutional organizations and it can be defined as the capacity of state's institutions to check abuses by other public agencies and branches of government. It involves different kinds of accountability: "administrative accountability reviews the expediency and procedural correctness of bureaucratic acts; financial and performance accountability subjects the use of public money by state officials to norms of austerity, efficiency, and propriety; legal accountability monitors the observance of legal rules and constitutional accountability evaluates whether legislative acts are in accordance with constitutional rules."[25]

However, next to courts, a whole series of quasi-legal forums, that exercise independent and external administrative and financial oversight and control, has been established in the past decades—some even speak of an ''audit explosion''. These new administrative forums vary from European, national, or local ombudsmen and audit agencies, to independent supervisory authorities, inspector generals, anti-fraud agencies, and chartered accountants. Also, the mandates of several national auditing agencies have been broadened to secure not only the probity and legality of public spending, but also its efficiency and effectiveness. These administrative forums exercise regular financial and administrative control, often on the basis of specific statutes and prescribed norms."[26]

b. The 'fourth power'

Although most of these public administrative forums report directly or indirectly to Parliament or to the minister, they often do not stand in a hierarchical relationship to the public officials, since most of them do not even have formal powers to coerce public servants or institutions into compliance. Bovens sees in most of these administrative accountability relations a form of 'diagonal accountability', that are meant to foster parliamentary control, but they are not part of the direct chain of principal-

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[24] M. Bovens, '"Analysing and assessing public accountability",in European governance papers, no.C-06-01

[25] A. Schedler , "Conceptualizing accountability", in Democratic accountability and good governance, Reader 7.17

[26] M. Bovens, '"Analysing and assessing public accountability",in European governance papers, no.C-06-01

agent relations.[27] "These controlling agencies are auxiliary forums of accountability that were instituted to help the political principals control the great variety of administrative agents, but gradually they have acquired a legitimacy of their own and they can act as independent accountees."[28]

This is the case of national Ombudsmen and the Courts of Audit. Departing from this point Addink underline the idea that these institutions in exercising their constitutional duties, they play their own role in the system of checks and balances. They combined the control function with that of 'lawmaking', which is actually peculiar to the classic powers - the legislature, the executive and the judiciary. For instance national Courts of Audit on the one side scrutinise national incomes and expenditure as well as the effectiveness of policies and on the other side advise retroactively or can make pressure at a ministerial level for an improper policy measure to be changed or improved. The Ombudsmen also examine, in retrospect, the conduct of administrative authorities and then issue reports and make recommendations in the matter.

In fulfilling their role they "dedicate themselves to aspects of lawfulness, effectiveness, as well as other aspects of properness" and their advice is aimed at promoting good administration.[29] Therefore their role is of an advisory nature and the results of performing this role- the reports and recommendations- have in their turn direct effect on the lawmaking process deployed by the other institutions. Performing this role as well as their constitutional duties these two types of institutions wield an important power which can be distinguished substantively from the other three powers. Further on, Addink concludes that in the view of the classic theory of Montesquieu that refers to 'distribution' rather then separation of powers, these institutions have become "the cornerstone in the edifice of checks and balances" and thus they form the 'fourth power'.[30] This constitutional innovation is undoubtedly of extreme importance for the principle of accountability since it is contended that the evolution and the growing influence of such institutions as Court of Audit and Ombudsman express "a solution inspired by the demands of practice, which counteract the danger of concentration of power."[31]

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[27] Idem.

[28] Idem.

[29] G.H.Addink, "The Ombudsman as the fourth power. On the foundations of Ombudsman Law from a comparative perspective", Utrecht University, 2004

[30] Prof. Addink acknowledges that the concept of 'fourth power' was propagated by R. Crince Le Roy since 1969

[31] Van der Pot / Donner, "Handboek Staatrecht", 2001, p.536 cited in G.H.Addink, The Ombudsman as the fourth power. On the foundations of Ombudsman Law from a comparative perspective, Utrecht University, 2004

The legitimacy of such institutions and hence their capacity to be net providers of legitimacy to the overall system of governance through the accountability mechanisms they deploy, depends on fulfilling their functions in a way that is demonstrably impartial and non-partisan. In this sense, relevant is to analyze the extent of their powers vis-à-vis other authorities, their criteria used for assessment, and the compliance with their recommendations/advices. For the examination of their powers it is useful to look at the nature and the extent of the competences under which the national Audit Courts and the Ombudsmen are authorised to render an opinion, to a certain degree these determining the relation between them and the authorities that are subjected to their control.[32]

The grounds on the basis of which these institutions assess the administrative conducts in fulfilling the public tasks are important too, since the criteria used for such assessments are exerted in rendering their opinions. As already discussed in the above section, their opinions are given not just to secure an efficient 'checks and balances' system, but also in a view to promote good administration. Here I would like to make some preliminary remarks regarding the criteria developed and used by the Courts Of Audit and the Ombudsmen.

In the first case, Bovens noticed that the role of Court of Audit in fostering the accountability mechanisms, and thus the principles of good governance, became more prominent once with the development of the performance audit . He remarks that the most important transformation has been the shift from traditional financial control to what the British have called 'value for money auditing'.

"This is indeed a genuine shift from accounting to accountability. Value for money auditing is not concerned so much with the legality and procedural correctness of public spending, but foremost with its efficiency and effectiveness. The numerical, quantifiable criteria of financial accounting are substituted for much more output oriented, qualitative performance indicators. Thus, good governance is not measured only in terms of compliance with prescribed financial rules and procedures, but also in terms of actual performance. The attention has shifted from inputs and throughputs to outputs and, most importantly, outcomes."

In the case of the Ombudsman the major realm of his activity and concern is to ensure the promotion of good administration and the avoidance of maladministration. Maladministration, is the main criteria used for the assessment of an administrative conduct complained about, and is defined as an open-ended concept describing a situation where a public body fails to act in accordance with a rule or principle that is binding on it. Maladministration extends beyond legality and also encompasses the

[32] G.H.Addink, op. cit .

assumption that, in their daily dealings with the public, public administrations need to observe norms and rules of behaviour designed to ensure that citizens (and, more generally, users) are properly treated and enjoy their rights fully. Put otherwise, while illegality it is a narrow criteria for assessment and necessarily implies maladministration, maladministration does not automatically entail illegality and therefore it is a broader criteria. The difference is essential: the opinions/ recommendations rendered on the basis of maladministration criteria draw attention to the administrative irregularities, omissions, sequential mistakes that, although lawfully, they have to be improved or removed in the interest of citizens. Thus the recommendations are aimed to promote and to develop legislation governing good administration.

Regarding the last aspect of compliance with the recommendations/ advices made by the Courts of Audit and Ombudsmen, the relevant issue is whether the content of their opinions is adopted by administrative authorities and if not whether there is an effective mechanism to enforce them, this last issue depending to a great extent by their relation with the national parliaments. It has to be mentioned that the Courts of Audit as well the Ombudsmen, can only issue non-binding recommendations/opinions to the institutions of the state falling within their remit and therefore their effectiveness depends by the quality of their work in connection with the their power to persuade public authorities.

Synthesis:

Principle of transparency is the new counterpart of the principle of legality, therefore it is one of the principles underpinning the rule of law. The principle of transparency means that :

a. the administrative processes by which decisions are made should be clear and understandable,

b. the decisions themselves should be reasoned,

c. the information on which reasons are based should be available to the public,

d. meetings deciding on matters that will have a direct impact on the citizens should be open and public, ensuring that the interests of those affected are not overlooked.

The above discussed framework enables us to understand that “the principle of transparency becomes meaningful in a social relationship between actors which discuss (expected) performance and (plan to) evaluate performance according to certain criteria. To control the different steps in the policy making process and the way different actors act, transparency is a necessary

condition and a first step. It is but a first step within a much broader architecture of accountability."[33]

The principle of accountability through its inherent mechanisms is one of steering wheels in the broader system of 'checks and balance' process fostering the legitimacy of the public administration and so enhancing the democracy of a particular state. It is structured around three elements that can be expressed by questioning who is accountable to whom and for what? In finding the answer, one must observe the public administrative authorities that will be held accountable to various forums for their conduct in fulfilling the public tasks.

Seen this way accountable behaviour is simply lawful behaviour. An important role in safeguarding public obligations is played by the 'fourth power' institutions .It seems that on the one side while the constitutional accountability acknowledges a decrease in efficiency and importance, due to the problem posed by the delegation of responsibilities and tasks to a variety of new forms of independent administrative agencies, on the other side the 'fourth power' institutions become (more or less) better guardians and promoters of a good administration, engaging new standards of conduct of ethical, institutional and also legal nature.

Literature:

- G.H.Addink, "The Ombudsman as the fourth power. On the foundations of Ombudsman Law from a comparative perspective", Utrecht University, 2004.

- S. van Bijsterveld, "A crucial link in shaping the new Social contract between the citizen and the EU", in Transparency in Europe II, 2004.

- M.Bovens, "Analysing and assessing public accountability",in European governance papers, no.C-06-01.

- D. Curtin and A. Meijer, "Does transparency strengthen legitimacy",in Information Polity 11, IOS Press, 2006.

- D. Curtin and A. Meijer , "Five Myths of European Union Transparency: Deliberation through the Looking Glass?", Paper presented at Special

[33] Deirdre Curtin and Albert Meijer , "Five Myths of European Union Transparency: Deliberation through the Looking Glass?", Paper presented at Special Workshop Deliberative Democracy and Its Discontents, IVR World Congress in Legal Philosophy, Granada, 24-29 May 2005

Workshop Deliberative Democracy and Its Discontents, IVR World Congress in Legal Philosophy, Granada, 24-29 May 2005.

- C. Hood, "Transparency in historical perspective‖ , in Transparency: the key to a better governance?" by C. Hood and D. Heald , published for The British Academy by Oxford University Press, 2006, p.3.

- M. Klijnstra, "Het transparantie toegespit.", 2000 in : D.Curtin and A. Meijer , "Five Myths of European Union Transparency: Deliberation through the Looking Glass?".

- A. Meijer and M. Bovens,"Public accountability in the information age", in E-Government. Workshop in conjunction with JURIX 2003, M. Palmirani, T. van Engers & M.A. Wimmer (eds.), International Federation for Information Processing, Laxenburg (Austria), 2003, pp. 16 – 28.

- N. P. Musar, "The acces to public information and its development", in "Transparency in Europe", Ministerie van Binnenlandse Zaken en Koningrelaties, 2004, pp.69-80.

- Van der Pot / Donner, "Handboek Staatrecht", 2001, p.536 cited in G.H.Addink, "The Ombudsman as the fourth power. On the foundations of Ombudsman Law from a comparative perspective", Utrecht University, 2004.

- A.Schedler, "Conceptualizing accountability", in "Democratic accountability and good governance", Reader Good Governance p7.17, Utrecht University 2007.

- A. Tomkins, Transparency and the emergence of European administrative law‖ ,in Yearbook of European Law, 1999-2000, Vol.19, Oxford University Press, 2000.

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