



**HAL**  
open science

# THE FORMS OF RESPONSIBILITY OF THE EXECUTIVE

Ariane Vidal Naquet

► **To cite this version:**

Ariane Vidal Naquet. THE FORMS OF RESPONSIBILITY OF THE EXECUTIVE. Comparative Executive Power in Europe - Perspectives on Accountability from Law, History and Political Science, s.d. M. Morabito, G. Tusseau, routledge, 2023. hal-04545519

**HAL Id: hal-04545519**

**<https://hal.science/hal-04545519>**

Submitted on 14 Apr 2024

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

# THE FORMS OF RESPONSIBILITY OF THE EXECUTIVE

Ariane Vidal-Naquet

When one reads the different articles of this book, one can note how diverse forms of accountability are: there is not *one* type of accountability of the Executive, but types of *accountabilities*. In that regard, one should underline the variety of the names chosen in the articles: political accountability, legal responsibility, penal or criminal liability, civil liability, judicial liability, constitutional responsibility, electoral responsibility or media responsibility. Few articles however care to define what those different forms of responsibility mean, as if this were obvious, except for political accountability, which is defined precisely in a certain number of articles, though in a rather contradictory manner.<sup>1</sup> Unless one considers that those forms of responsibility have nothing in common and that the names that have been chosen are purely discretionary, it seems necessary to focus on the very concept of responsibility before looking at the different forms it may take.

Nevertheless, focusing on the very concept of responsibility is nothing but obvious, even though, and because, in this case, it may rely on different national monographs. None of the latter has precisely defined what ‘responsibility’ should mean, so that when reading them, no common generic concept emerges. In addition, terminology itself fluctuates. When the French only uses one word, English uses three to refer to a reality that seems close: responsibility, accountability, liability,<sup>2</sup> which opens a whole series of possible combinations and correspondences.<sup>3</sup> Only examining the word *responsabilité*, which only appeared in French in the 18th century,<sup>4</sup> etymology indicates that it means ‘accounting for’. However, it only partly accounts for the ‘conceptual substance’ of *responsabilité*, which is that of imputation.<sup>5</sup> Accounting for one’s acts means that one is considered to be the author: responsibility thus relies on a double movement of duty/compensation, a double dimension which is to be found in the moral as well as in the legal conception of *responsabilité*.<sup>6</sup>

From a legal point of view, responsibility refers to how the relation between the norms and the consequences of a breach of the latter is conceived and organised,<sup>7</sup> so that ‘there is a system of responsibility in any organised system’ without which the latter’s efficiency would be threatened.<sup>8</sup> More precisely, it may be understood as a legal system that organises the consequences of not complying with normative obligations, which calls for several precisions. First, in law, responsibility is essentially a system. A quick look at different law textbooks gives a very good idea of it: there is no real definition of what responsibility is, but rather a more or less articulated presentation of different responsibility systems.<sup>9</sup> Second, responsibility is a legal system, that is, it is provided for by the law, which allows to distinguish legal responsibility from moral, religious or social responsibility, for example. Such a precision is important insofar as some forms of responsibility, especially political accountability, were historically introduced in practice before being given a legal form in a

certain number of countries, giving birth to constitutional conventions in others, or even remaining as practices.<sup>10</sup>

Thirdly, responsibility implies ignorance of pre-existing normative obligations, which is more neutral than breach or fault.<sup>11</sup> Such a disassociation of the notions of fault and responsibility does not set aside the need for a violation of a rule of law, but avoids a certain number of contortions, especially in relation to the possibility to admit a responsible party without them being considered at fault.<sup>12</sup> Fourthly, responsibility, by organising the consequences of the ignorance of primary obligations, is linked to the ‘administration of sanctions’, thereby ensuring the efficiency of the legal order independently from its effective exercise.<sup>13</sup> That notion of sanction should not be reduced only to its coercive dimension. It has a broader constraining dimension and may then be understood as the birth of a new legal obligation, caused by the ignorance of the primary obligation, e.g., paying damages, or the resignation of a Government.<sup>14</sup>

Conceived as a legal system which organises the consequences of ignoring normative obligations, responsibility is based on the double movement imputation / compensation: accounting for one’s acts implies that one is considered as their author, which, from a legal point of view, amounts to organising at the same time the ‘imputability of’ and ‘responsibility for’ the breach of primary norms. This calls for several clarifications. The first is about the imputation movement which consists, in law, in attributing the ‘fatherhood’ of the act or acts or behaviour to a specific natural or legal person.<sup>15</sup> That operation, which consists in giving someone ‘credit’ for an act or omission, is a legal construction, if not a legal fiction. Indeed, it is not necessary that the person has actually failed to meet said obligation and is really at the origin of the acts in question.<sup>16</sup> Conversely, they could commit a certain number of breaches without necessarily being held liable for them. The second clarification is about ‘*redevabilité*’ (‘liability’), a neologism which is seldom used in France, but which is still to be found in some articles. It refers to accounting for one’s acts to someone,<sup>17</sup> which implies both some appreciation, some assessment, of the way the normative obligations have been executed or may not have been executed, and if needed, the administration of the sanction. It seems necessary here to distinguish ‘*redevabilité*’ from responsibility. Indeed, as several articles underline, responsibility has two meanings: in a strict sense, it is associated with legal sanction, what is called in English ‘responsibility’ and what the Swiss and Dutch articles call ‘responsibility-sanction’ while in a broad sense, responsibility is disassociated from legal sanction and refers to a wider phenomenon of ‘accountability’. In that sense, the concept of responsibility is like a general mechanism of ‘account rendering’ or ‘account presenting’, which is more or less formalised, more or less mandatory, more or less constraining. For the rest of this article, we have chosen a strict meaning of responsibility and thus to associate it with legal sanction, which will not prevent us from dealing with the issue of ‘accountability’ separately, which makes it difficult to find a corresponding word in French (account rendering or presenting),<sup>18</sup> and ‘liability’.<sup>19</sup>

One should also specify what executive means, for, despite appearances, the answer is far from being obvious.<sup>20</sup> In reference to the Executive’s accountability, the articles have dealt

with the Head of State, the Government as a whole, and ministers. Some of them have added ministers without portfolios<sup>21</sup> and/or junior ministers and under-secretaries of state.<sup>22</sup> Some of them have raised the issue of whether to include advisors or even administrations working closely with the Executive, underlining how porous the boundaries between what belongs to the political and what pertains to the administrative are, how the two should be articulated, and, consequently, the distinction between the accountability of the political and that of the Administration.<sup>23</sup> Even more broadly, in Poland, the executive power is distributed among four branches – the President of the Republic, the Council of Ministers, and two independent agencies, i.e., the National Bank of Poland and the National Broadcasting Council of Poland. There is a reversal of perspective in the Dutch article which includes junior ministers in the executive power for the reason that they are politically accountable to the Parliament for their acts and omissions. In other words, accountability becomes an identifying criterion of the notion of executive power.

One should finally specify what ‘forms’ of responsibility means. Though the different articles underline the fact that there are several types –political, legal, penal, civil, judicial, constitutional, electoral, media– of responsibility, the suggested terms seem rather intuitive, uncertain and sometimes contradictory. For example, the possibility that the President of the Republic be held liable for high treason, which exists in a certain number of countries, is sometimes called criminal liability, sometimes political, judicial or constitutional responsibility. Numerous criteria may, indeed, be used to characterise the different forms of responsibility, without them always being clearly presented in the different articles. Some of them seem to favour a teleological criterion – that of the objective pursued. The latter is often used to distinguish, in France, for example, criminal liability, the aim of which is to punish, from civil liability, which aims to compensate, like administrative liability. Sometimes the forms of responsibility are identified depending on the applicable sanction, whether it is a criminal sanction for criminal liability, a financial one for civil and administrative liability, or even a political sanction for political accountability.<sup>24</sup> They may be identified based on the nature of the wrongdoing, or, more precisely, of the pre-existing obligation which has been breached. Thus, it is possible to read in some articles that the Executive may be held criminally liable for a criminal act and politically accountable for a political fault.<sup>25</sup> In other articles, it seems that it is rather the text which defines the breach which makes it possible to determine its nature. Thus, liability will be criminal if it is provided for in a text of criminal law and civil if it is a civil law text.<sup>26</sup> In other instances, the articles distinguish between the different forms of responsibility depending on the body before which it is revealed: it is jurisdictional if it is before a judge, parliamentary if it is before Parliament, presidential if it is before the President, popular if it is before the People, media if it is before the media, etc. Some other times, it is the nature of the court which seems determine the distinction: criminal liability before a criminal court, civil before a civil one, constitutional before a constitutional one, international before an international one. To that is added the possibility to differentiate depending on who is responsible: presidential responsibility, government responsibility, ministerial or even administrative responsibility, which is that of administrative bodies. The plurality of the available criteria explains the diversity of characterisations that may be chosen. For example, the overthrow of the Government may be characterised as

governmental responsibility (who is overthrown), criminal liability (why they are overthrown, teleological criterion which aims to punish), political accountability (why, given the act committed, they do not have the political confidence of Parliament) or parliamentary (which overthrows, the sanction being imposed by Parliament) or even constitutional (on what basis).

To those conceptual difficulties are added those which are linked to the diversity of approaches. There are numerous articles which insist on the national specificities, which are linked to political, cultural, legal, social, historical or even philosophical characteristics. The specific particularities and traditions of each country also have some influence on the understanding of the accountability of the executive and the chosen expressions, as the Dutch article underlines. From a constitutional point of view, the history of some countries seems to be quite eventful or even troubled, many constitutions being adopted, as in Portugal, Poland or France, while others have a stabler and more linear history, which is sometimes nonetheless widely tainted by practice. Beyond diversities, one should however note that all the studied systems are parliamentary regimes today, except Switzerland, the system of which has at the same time presidential and parliamentary features.<sup>27</sup> Whether they are considered positive or negative, minority or majority, rationalised or not, those systems all have one characteristic in common, that of the political accountability of the Executive to Parliament, or, more precisely, a specific form of political accountability of the Government to Parliament.<sup>28</sup> From the point of view of the traditional classification of political regimes, the parliamentary one is, indeed, defined by the possibility for Parliament to overthrow the Government. Thus, the issue of the political accountability of the Executive has been dealt with special attention in all the articles, while being placed within the different forms of accountability. Beyond this is the question of whether characterising a parliamentary system does not shape in a specific way the different forms of the Executive's responsibility, and, more particularly, the role that the political accountability of the Government may / must have, and the way of thinking the accountability of the executive.

The national specificities put forward in most articles do not exclude, however, some converging movements. Reading the different articles may give the impression that the forms of responsibility of the Executive are multiplied. The English article especially refers to a web of responsibilities, which may bring to mind a tightening of the constraints that weigh on the Executive, linked to the role it now has within democracies, and would allow to make it democracy-compatible, to quote the Dutch article.<sup>29</sup> Such a movement however is largely illusory. Indeed, from a theoretical point of view, the diversification of the forms of responsibility of the Executive in reality corresponds to a weakening of the very concept of responsibility and to a shift of responsibility out of the legal field. From a practical point of view, it is difficult to hold the Executive liable, and especially politically accountable, which reveals the emergence of a platonic, or even reversed, parliamentarianism.

## **THEORETICAL APPROACH: THE MORPHOLOGY OF THE EXECUTIVE**

The different articles all more or less insist on the diverse forms of the Executive's responsibility. One should note that the formalisation of responsibilities may belong to different normative levels. As it concerns the main political institutions, the Head of State, and Government especially, as well as the relations among the different powers, i.e., the Executive, the Legislative and the Judicial, the issue is often based on constitutional provisions. Insofar as, however, the Constitution is defined in a purely procedural, and not substantial, way, it can very well depend on another legal norm, such as an organic or ordinary law,<sup>30</sup> an international legal text,<sup>31</sup> or even custom if the latter is admitted in domestic law. Despite appearances, such diversification of the forms of the Executive's responsibility does not imply a tightening of the constraints that it has to bear. On the contrary, it corresponds to the weakening of the very concept of responsibility, or even to the de-judicialisation of the concept, which is in contrast with the concentration of the powers in the hands of the Executive.

### **The Diversity of the Responsibility of the Executive: Towards a Multiplication of the Forms of Responsibility?**

When reading the different articles, several forms of the responsibility of the Executive emerge, which contrasts with the traditional irresponsibility of the latter, especially that of the Head of State, which still applies in many states. That diversification of the forms of responsibility of the Executive reveals the emergence of 'new' forms of responsibility or, at least, of responsibilities which seem more 'modern' than others. It mechanically entails a marginalising of the political accountability of the executive, which is no more than a form of responsibility among others.

Among the traditional or oldest responsibilities, the criminal liability of the Executive, which is tackled in most articles, and provided for more or less precisely, comes first.<sup>32</sup> Essentially related to the ministers and, in some countries, the Head of State or even, in a more unprecedented way, some administrative agencies, as in Poland, it may be exercised in varied ways. In that respect, the Spanish article differentiates three different systems: the legislative system, in which the criminal liability of the Head of State may be involved by the Chambers,<sup>33</sup> the specialised judicial system, in which a Special Court only may decide that responsibility,<sup>34</sup> and the general judicial or ordinary system.<sup>35</sup>

Political accountability is also mentioned in all the articles, and most often belongs to a historical perspective of establishment of the parliamentary regime. It concerns the Government which, traditionally in a parliamentary regime, is accountable to Parliament because of the political irresponsibility of the Head of State (monarch or president) and / or ministers.<sup>36</sup> What is more surprising is that some articles mention the possibility of a political accountability of the Head of State, in Romania particularly, where the President of the Republic may be overthrown by Parliament,<sup>37</sup> or even some independent bodies, as in Poland, where the National Bank and the National Broadcasting Council are accountable to Parliament which may dismiss them. Several articles have also underlined that that

accountability may be exercised before Parliament, which characterises a monist parliamentary regime, or before Parliament and the Head of State, which characterises a dualist parliamentary regime, as in the 1935 Polish Constitution or the 1958 French Constitution.

The civil liability of the Executive is on the contrary only mentioned in very few articles.<sup>38</sup> Such liability is sometimes compared with a ‘compensation’ liability of the Executive, as in Poland,<sup>39</sup> which in other countries would resemble a sort of administrative accountability of the State, as in France or Spain.

Some articles also refer to some constitutional, or politico-constitutional or criminal-constitutional responsibility which may be incurred for breaching constitutional obligations, or, more precisely, provided for in the Constitution. That form of responsibility is quite old, since it was in the 1791 French Constitution, and it may be quite wide. In that respect, the Polish article underlines that it concerns the President of the Republic, the Prime Minister and the ministers, the President of the National Bank, the President of the Supreme Chamber of Control, the members of the National Broadcasting Council, any person to whom the Prime Minister has delegated power, as well as the Commander-in-Chief of the Armed Forces, who are all accountable for breaches of the Constitution, or even more broadly, of the law, committed while in office, before a Special Court.

Several articles note other, innovating, forms of responsibility, or more or less recently put forward: partisan responsibility, mediatic responsibility, popular responsibility, or electoral responsibility. Thus, the English article underlines the importance of the accountability of the Executive to the political parties, which may be called partisan responsibility, and notes that it may also imply the existence of specific sanctions, for example, the decrease in donations or support to a member of the Executive of another. More broadly, that partisan responsibility translates into the role of political parties in the choice of candidates for the elections or even their resignation, as exemplified by the resignation of M. Thatcher and T. Blair.

Other articles point to the existence of a ‘media’ responsibility before the media, and even more today, social networks. The article on the Netherlands insists from that perspective, on the difference between the ‘official accountability instances’, especially the Parliament, and the non-official ones, in particular the media, underlining the institutionalisation of press conferences following the Council of Ministers for some fifty years, or, more recently, the announcement of ministerial resignations before the media rather than before Parliament.<sup>40</sup> That media responsibility, which is also mentioned in the Polish and English articles, may be associated with specific sanctions, in particular, on social network via ‘public shaming’.<sup>41</sup>

There may be added an elective or electoral responsibility, mentioned in the Portuguese, Hungarian, English, Swiss<sup>42</sup> and Polish articles.<sup>43</sup> It results in the non-re-election of the Executive when it is elected, or in a majority not in favour of the Executive. The first scenario applies in cases when the President of the Republic is elected by direct universal suffrage and is not re-elected, which is underlined in the Polish, Portuguese and French

articles, but also, more broadly, cases in which the members of the Executive run for national or local elections, as mentioned in the Swiss article.<sup>44</sup> The second scenario refers to the election of a Parliament against the Executive, whether the newly elected Parliament marks a political alternative, and thus the formation of an alternative Government,<sup>45</sup> or cohabitation, that is, the non-confirmation of the presidential majority, especially in case of arrhythmia of presidential and legislative elections, as in Romania and France until the establishment of the five-year presidential term in 2000,<sup>46</sup> or in case of dissolution.

Finally, some articles underline the existence of a popular responsibility, which is broader than the electoral one, which results in the reaction of public opinion and civil society. The latter, which may be measured especially through opinion polls or social movements, is a form of continuous responsibility, and, as it is not limited to elections, is quite volatile. The use of instruments of direct democracy or, more broadly, elective democracy, could be included in that form of responsibility. Thus, the Swiss article notes that a referendum may allow the voters to question the measures the Executive wants and which have been passed by Parliament, thus replacing the implementation of political accountability, which is little incurred. The Polish article on the contrary underlines that those mechanisms have been seldom used to involve the accountability of the President or the Cabinet, but suggests that they may.

The multiplicity of those forms of responsibility raises interesting issues as to how they are articulated, especially since there are many combinations: are they exclusive, complementary, substitutional or even cumulative? It also raises the issue of seats of power: to whom is the Executive accountable? Being traditionally exercised before judges (criminal and civil liability) and before Parliament (political accountability) it is today exercised before the media, the People and the civil society,<sup>47</sup> which reveals a relocation of the seats of the accountability of the Executive.<sup>48</sup> Yet, that ‘web’ of responsibilities, to quote the English article, is far from coinciding with a tightening of the responsibility of the Executive.

### **The Weakening of the Executive’s Accountability: Towards a De-Juridification of the Executive’s Responsibility?**

The increasing number of forms of responsibility revealed by the different articles raises a certain number of questions: first because it shows how difficult it is to distinguish among the different forms of responsibility of the Executive, and therefore of building a typology, and above all because it shows, if not the appearance of ‘Canada dry responsibilities’, to quote a well-known formula, at least a shift of responsibility out of the legal field.

The different forms of responsibility reveal, first, the difficulties or even the artifices of typology. Categories appear to be quite porous in reality: the accountability of the Head of State for breach of the Constitution, for example, provided for in many countries, is sometimes characterised as penal, sometimes political-penal, or judicial or constitutional responsibility,<sup>49</sup> or even political responsibility, depending on whether the stress is laid on the



nature of the breach, the text that provides for it, the text which establishes the responsibility, or the body before which it is involved. In France for example, an instance which may be transposed to other countries, the responsibility as provided for in Article 68C may be characterised as penal because it has a penal meaning,<sup>50</sup> but also as constitutional as it is provided for in the Constitution, political as it results in the loss of political power, and may also be characterised as parliamentary as it is mainly incurred before Parliament.

Typology is also fragile because it contains categories which are all-encompassing or even cross-disciplinary. So-called constitutional responsibility, a phrase which is used in several articles, seems to refer to any responsibility mentioned in the constitutional text, so that one could claim that the political accountability of the Prime Minister to Parliament is also a constitutional obligation, that of governing with the support of the Majority. It is the same for political accountability which, in a certain number of articles, is understood in a particularly all-encompassing way, as referring to any loss of political power, whether it is linked to a legal sanction, an election, the influence of the media... Eventually, the diversification of the forms of the responsibility of the Executive does not avoid some impressionism, even though it gives the impression that the constraints weighing on the Executive are reinforced.

Mainly, it urges to come back to the very concept of legal responsibility understood as a legal system which organises the sanction of breaches of pre-existing obligations. That system is first weakened by the singularity of the responsibility regimes provided for in the case of the Executive, which illustrates how difficult it is to transpose common law regimes. The example is obvious for the so-called criminal liability of the Executive. In almost all the articles, the criminal liability of the Executive, when it is provided for, goes with different privileges: of jurisdiction for the Head of State, for example in France, Portugal, Poland, and even for ministers in some countries; procedural privileges, especially in relation to the claim or the indictment, which may be more or less open;<sup>51</sup> privileges as to the breaches that may be committed,<sup>52</sup> or even to the sanctions that may be imposed... which shows the singularity of the responsibility of the Executive, including the criminal one.

Moreover, the multiplication of the forms of responsibility shows the shift of the issue out of the legal field. Paradoxically, and despite its name, the political accountability of the Government to Parliament belongs to legal responsibility, despite the precautions taken by several authors. That is so when the law, often, but not necessarily, at the constitutional level, provides for the obligation for the Government to be supported, positively or negatively, by a majority in the lower chamber, or even in the upper chamber, without which it may be sanctioned, collectively and / or individually.<sup>53</sup> However, the characterisation is much more debatable for the other forms of responsibility than the partisan, popular, media, or even elective forms of responsibility, which do not provide for any breach nor legal sanctions, that is, provided for in the law: a political party withdrawing its support of the Government, a negative answer to a referendum initiated by the Executive, or the non-re-election of the incumbent President do not legally sanction breaches of pre-existing obligations and therefore do not belong to the legal concept of responsibility.<sup>54</sup> Those precisions may appear punctilious and belonging to some rather sectarian positivism or even prescriptivism. They nonetheless allow to distinguish what belongs to the legal form what does not,<sup>55</sup> at the risk of

showing a form of powerlessness or even defeat of the law. Those new forms of responsibility indeed reveal a shift of the mechanisms of responsibility out of the field of the law – towards the political, the social, the moral which consequently entails a de-juridification of the responsibility of the Executive.

That conceptual shift seems, in some ways, to be the consequence of the difficulty there is to involve the responsibility of the Executive in practice. From that point of view, indeed, almost all the articles insist on the dysfunctions which especially impact the political responsibility of the Executive: that responsibility is seldom, or even never involved, so that it becomes almost platonic. It even seems to rely, in some countries, on reversed logics.

## **PRACTICAL APPROACH: METAMORPHOSIS OF POLITICAL RESPONSIBILITY**

Understood strictly as the possibility to overthrow the Government before Parliament, political accountability seems to be the prerogative of the parliamentary regime of which it is the traditional defining criterion. As underlined in most articles, it was first established by practice before being codified in a certain number of constitutions<sup>56</sup> and then made concrete through a whole range of legal mechanisms, which does not prevent it from persisting in some countries as practice.<sup>57</sup> However, the articles all converge to underline the malfunctions which affect political accountability, whether in its use or meaning. The instrument of political accountability today seems less and less used in Parliament, which may be interpreted as a sign of de-parliamentarianism of parliamentary regimes. Furthermore, the instrument of political accountability does not give any indication as to the seat of power, or not anymore, which reveals a break in the link that is traditionally made between accountability and power, or even a reversal of logic.

### **The Receding Political Accountability of the Executive: Towards a De-Parliamentarisation of Political Regimes?**

There are many articles which underline the clear weakening, if not the complete disappearance, of political responsibility, at least in its most radical form, i.e., sanction, that is, the overthrow of the Government. Reading the articles gives the impression of a cycle of political responsibility, which appeared in practice but which is disappearing in practice, and which, then, could almost seem as a historical contingency.<sup>58</sup>

Several articles insist on the practice of political accountability, to underline that the overthrow of the Government is seldom implemented, in Nordic countries,<sup>59</sup> in Hungary,<sup>60</sup> in Poland,<sup>61</sup> in the United Kingdom, in France, in Germany,<sup>62</sup> or even in a mixed regime like Switzerland's.<sup>63</sup> There may be four reasons for it. First, overthrowing the Government may seem to be a disproportionate measure,<sup>64</sup> especially when there are alternative mechanisms to hold ministers to account individually; it may seem inappropriate in some cases, especially when it is difficult to attribute responsibility as for example in minority governments;<sup>65</sup> third,

it may seem useless in a partisan logic of support of the Government Majority; finally, it is a risky weapon insofar as overthrowing the Government may trigger dissolution as a retaliatory measure.

The quasi-disappearance of political accountability implies the revival of other forms of responsibility that were thought to have died or new forms of responsibility. Thus, criminal responsibility is revived and seems to be serving, in some countries, as a substitute for political responsibility. Thus, the French article underlines the movement of criminalisation of political responsibility – as is illustrated by the accusations in the COVID case – as the Italian and, in a softer way, the Danish articles do.<sup>66</sup> Criminal liability thus compensates for the weaknesses of political accountability, in a particular pendulum movement, since, historically, it served as a substitute for political accountability before the latter became autonomous, as underlined in several articles.<sup>67</sup> The quasi-disappearance of political accountability also results in the enhancement of the new forms of responsibility mentioned earlier – media, partisan, popular, elective. The circle seems to be vicious: the weakening of political accountability, because of partisan concerns, results in new mechanisms of responsibility which, in return, marginalise political accountability. For the legal discourse, the logic is the same: enhancing, in the different articles, those new forms of responsibility is a way of putting things into perspective or even reducing the weakening of political accountability, or even its disappearance.

The disappearance of political responsibility raises two types of question. First, may it be interpreted as a sign of ‘de-parliamentarisation’ of political regimes? That word may be understood in two slightly different ways. In a first sense, it refers to the loss of characterisation of parliamentary regimes:<sup>68</sup> the disappearance of the overthrow of the Government would in practice mean the disappearance of the parliamentary regime, except if one considers that it may be replaced by other less brutal mechanisms of responsibility (especially assessment) which again shows how important accountability has become to the detriment of responsibility strictly speaking.<sup>69</sup> In a second meaning, de-parliamentarisation refers not to an issue of classification of legal regimes and identification of the parliamentary regime but to a question of seat of power. De-parliamentarisation means that it is no longer Parliament which holds power to account. As is revealed in the appearance of new forms of responsibility, accountability does not occur in Parliament but outside the parliamentary limits, before the People, and the media especially.

Second, one could wonder about the compatibility of the two traditional pillars of a parliamentary regime, i.e., the overthrow of the Government and dissolution. Several articles underline that overthrowing Government is less used when it can be counterbalanced by using the right of dissolution,<sup>70</sup> so that the two tools seem to hinder one another. One will note that resorting to the dissolution of Parliament by the Executive power amounts to mobilising the suffrage power and therefore triggering the electoral responsibility of the Executive. In other words, the implementation of the so-called political responsibility of the Executive (overthrow of Parliament by the Government) is extended or even supplanted by the triggering of its electoral accountability (approval or disapproval by the People). Legal

responsibility is thus being complemented by political accountability. The combined use of the two traditional pillars of the parliamentary regime, the motion of no confidence and the right of dissolution, then reveals the balance between the legal and electoral responsibility of the Executive.

### **Distortion of Political Accountability: Towards Reversed Parliamentarianism?**

Many articles defend the idea that there is some correspondence between power and responsibility: whoever has the power must be held responsible. That logic could also be reversed: whoever is accountable must have the power. Paradoxically, historical evolution shows that reversal of logic in quite a few countries: a powerful or even all-powerful Head of State, a Government which becomes accountable to Parliament, which progressively leads to a transfer of the power of the first to the second and the marginalisation of the former. Historically speaking, the ‘governmentalising’ of responsibility as a mechanism of imputation has therefore led to the ‘governmentalising’ of the power and legal competences. Nevertheless, the logic of a powerful Government accountable to Parliament, which is characteristic of a parliamentary regime, may be countered in two situations, which reveal the distortion of political accountability.

The first situation is that of the de-linking of power and accountability. This could be illustrated with two examples. The first is when the responsibility of the Government co-exists with the ‘presidentialising’ of power. That assumption may be found surprising since, traditionally, the ‘governmentalising’ of responsibility goes with the weakening of the Head of State. Many articles have underlined the historical weakening of the powers of the Head of State. However, that logic is countered in systems which grant the Head of State their own important competences as well as a strong democratic legitimacy, thanks to their election by direct universal suffrage. Comparing the French and Romanian situations is quite enlightening in that respect. The Romanian article insists on the specificity of the political accountability of the President of the Republic, who is accountable in three ways: to Parliament, to the People and to the Judiciary. The French article insists on the separation of the power, on the one hand, and the accountability, on the other, of the Head of State: whereas the President of the Republic, who has strong democratic legitimacy, determines, and almost conducts the policy of the Nation, he cannot be dismissed by Parliament, and is therefore not politically accountable to it.<sup>71</sup>

The second example of the disconnection of power and responsibility, which is dealt with more discreetly in the articles, is about the relations between the Government and its administrative circle and therefore between the political and the administrative. There are several trends. In the first one, the governmentalising of power and accountability tends to include administrative heads. Thus, in the United Kingdom, the Government is accountable for the acts of the Administration and it is therefore the Government, and especially the Prime Minister, who is accountable to Parliament, as underlined in the English article, which thus entails a politicisation of accountability. Other articles underline the reverse tendency, to

the administratising of accountability: the Administration is accountable in the stead of politicians, as suggested in the Dutch article. Lastly, in other countries, there is strict separation between the governmental sphere and the administrative one, so that it is difficult for Parliament to hold the Government politically accountable for wrongdoings committed by the Administration, as shown in the Swedish article. Such a form of ‘de-reponsibilising’ may be analysed as a strategy implemented by the Executive to escape accountability, by ‘delegating’ decision-making and ‘diluting’ decision-making routes.

The second distortion of political accountability is an inversion: it is not the Government which is accountable to Parliament (most often to the lower house), but Parliament which is accountable to the Government.<sup>72</sup> That reversal of logic, that reversed parliamentarianism is quite well highlighted by the Hungarian, English and French articles. It essentially results from the fact that parliamentarians are politically and legally dependent on the Government – politically, for in most of the studied countries, the Prime Minister / Head of the Government is also elected to the lower house, but is, above all, the leader of the Majority in Parliament, that is, the leader of the political party which gives the Government its majority; legally, since parliamentarians are exposed to the right of dissolution, which precisely belongs to the Prime Minister in most of the examined countries. The English article specifies that this leads to an ‘elective dictatorship’, as the Prime Minister has a majority in Parliament, which is accountable to them. France perfectly confirms that reversal of logic, but it is captured by the President of the Republic instead of the Prime Minister. The President has the right to dissolve the National Assembly, and he is the leader of the Majority in Parliament except in case of cohabitation. In France, the reversal is also asymmetrical: the National Assembly is accountable not to the Prime Minister but to the President of the Republic, who is not accountable to Parliament, whereas the Government is, which accentuates the imbalances of the Fifth Republic. As underlined in the Hungarian article, that reversal of logic raises ‘many questions especially as to the protection of constitutional parliamentarianism’. That expression not only refers to the parliamentarian regime as a legal technique of distributing power but also, and more fundamentally, to a certain conception of Parliament as a seat of power, a conception that is widely mistreated by the establishment of reversed parliamentarianism and the quasi disappearance of the accountability of the Government.

Those practical dysfunctions explain, in their turn, theoretical shifts, the valuation of other, extra-legal forms of responsibility, to compensate for the marginalisation of political accountability in particular. Thus are illustrated the relations between the law, practice of the law, and the discourse on the law. Faced with the metamorphoses of political responsibility, discourse on the law can only acknowledge the emergence of new forms of responsibility (electoral, partisan and media responsibility) and even call for a return of others which may have been thought to be dead, as several articles do: moral responsibility, responsibility before God, before History, before natural justice.<sup>73</sup> It may however, when describing practice, characterising evolutions, or noting contradictions, incite to change the law. Admittedly, that discrepancy between theory and practice may be seen as a sign of the powerlessness of positive law, or, even more, of the legal norm, as was underlined, more or

less explicitly, in some articles. It can also be seen as a call for imagination, an invitation to modify the legal norms about the responsibility of the Executive in order to better take into account the reality of power, which today is concentrated in its hands.

---

<sup>1</sup> For example, in the chapter on Belgium, relying on works by Denis Baranger, defines political responsibility as that which aims at 'ensure the persisting identity of political will between the governed, or his representative, and the ruler', which implies at the same time that political accountability does not necessarily entail a sanction and that is it not limited to the parliamentary house. In the English article, political accountability refers to the accountability of the Executive to Parliament. In the Romanian article, political accountability is that which is at stake before voters or Parliament. In the Nordic article, political accountability in a broad sense is that which is at stake before the media, the interested people and, eventually (even in an indirect way) before voters. On how difficult it is to define political responsibility, see E. Millard, 'La signification juridique de la Responsabilité politique', in *Gouvernants, quelle responsabilité?*, ed. P. Ségur (Paris: L'Harmattan, 2000), pp. 81-100.

<sup>2</sup> The relative 'poverty' of the French language may be interpreted either as a sign of conceptual dryness, one word not allowing to correctly apprehend the nuances of the concept of responsibility, or, on the contrary, as a sign of its power, which makes it possible to underline how general the concept is.

<sup>3</sup> Does the French conception of *responsabilité* refer to 'responsibility' only, to one or the other of the other notions, or even to none of them?

<sup>4</sup> O. Descamp, 'La responsabilité dans le Code civil', *Histoire de la justice* 1, no. 19 (2009): pp. 291-310.

<sup>5</sup> In that sense, see J. Ricot, 'Remarques philosophiques sur la responsabilité', *Revue général de droit* 33, no. 2 (2003): pp. 293-303, which relies especially on P. Ricoeur's works.

<sup>6</sup> J. Ricot, 'Remarques philosophiques sur la responsabilité'.

<sup>7</sup> D. Alland and S. Rials, eds., *Dictionnaire de la culture juridique* (Paris: PUF, 2003), p. 1341, which notes that as such it may be classified as a secondary norm, since it aims at 'establishing the consequences of breaching primary obligations'.

<sup>8</sup> D. Alland and S. Rials, *Dictionnaire de la culture juridique*.

<sup>9</sup> One may note that the different branches of the law do not focus on the same elements: imputation and guilt structure liability in criminal law, while civil law is organised around tortious liability, administrative law around the fault / faultless distinction and constitutional law around presidential and ministerial liability.

<sup>10</sup> Though that point will not be debated here, it raises the issue of whether there is legal liability when the latter results from simple practice, even when it is called a Constitutional convention.

<sup>11</sup> Though it is traditionally linked to liability in civil law, under Article 1382, the notion of fault is nonetheless excluded, or withheld, in administrative law. It however keeps a link between fault and sanction. See E. Millard, 'La signification juridique de la Responsabilité politique'.

<sup>12</sup> J. Ricot, 'Remarques philosophiques sur la responsabilité', p. 295.

<sup>13</sup> D. Alland and S. Rials, *Dictionnaire de la culture juridique*.

<sup>14</sup> D. Alland and S. Rials, *Dictionnaire de la culture juridique*.

<sup>15</sup> Leonard Besselink's chapter on the Netherlands underlines that from a legal point of view responsibility is, by nature, the legal attribution of a certain action of omission to a specific person.

<sup>16</sup> On that point, the chapter on the Netherlands makes the difference between the factual and the legal meanings of responsibility, the latter not being affected by the causal relation of facts.

<sup>17</sup> É. Gagnon and F. Saillant, 'Sources et figures de la responsabilité aujourd'hui', *Éthique publique* 6, no. 1 (2004), online on 20 January 2016.

<sup>18</sup> Paul Daily's chapter on the United Kingdom explains 'accountability' as 'giving an account'.

<sup>19</sup> That difference seems fairly close to that suggested in Besselink's chapter on the Netherlands, which differentiates between being responsible or bearing responsibility (*verantwoordelijkheid dragen*), accounting or being accountable for (*verantwoording afleggen*), and sanction-liability (*verantwoordelijkheid sanctioneren*)

<sup>20</sup> Thus, the chapters on the Netherlands and the U.K. underline how difficult it is to define the notion of executive. In addition, in some countries, like the Netherlands, the difference between the executive and legislative powers is not quite clear-cut, which justifies the fact that the very word 'executive power' disappeared in the 1983 Constitution.

<sup>21</sup> María Ruiz Dorado's chapter on Spain underlines how difficult it is, in that respect, to interpret the Constitution and the laws.

<sup>22</sup> 'Spain' and 'The Netherlands', in this publication.

<sup>23</sup> See in particular the chapters concerning the Netherlands, the U.K. and the Nordic countries.

<sup>24</sup> See Antoine Pantelis' chapter on Greece, which defines the form of responsibility based on the nature of the sanction.

---

<sup>25</sup> See 'Poland', in this publication.

<sup>26</sup> See 'Spain', in this publication, especially on the criminal liability of the ministers as provided for in the 1969 Constitution.

<sup>27</sup> Thierry Tanquerel's chapter on Switzerland underlines that it is closer to a presidential system, as the Chambers cannot overthrow the Federal Council and the latter cannot table a motion of confidence or dissolve Parliament.

<sup>28</sup> The notion of political accountability may be understood in a broad or strict sense, as underlined in some articles. In a broad sense, it implies the loss of the political power, a conception that the French article has chosen. In the strict sense, political accountability refers to the mechanisms that allow Parliament to overthrow the Government, which is characteristic of a parliamentary regime. That conception, which is to be found in a certain number of articles, has been chosen here.

<sup>29</sup> As the article indicates, that 'democracy compatibility' implies reconsidering the very notion of democracy.

<sup>30</sup> Thus, Elena Simina Tanasescu's chapter on Romania underlines that, as to the criminal liability of the President of the Republic, high treason and the deliberate violation of the Constitution are stated in an ordinary law (265/1976).

<sup>31</sup> As illustrated by the status of the International Criminal Court, which is mentioned in several articles, which may lead to some constitutional amendments, as in France for example.

<sup>32</sup> Several articles underline the lack of accurateness of texts as to breaches that may trigger the responsibility of the Executive, and even the corresponding sanctions. The issue is especially raised in Tanasescu's chapter on Romania, in which the Constitution does not define the crimes of high treason (Article 96) or the serious breaches of the Constitution (Article 95) that may trigger the liability of the President of the Republic.

<sup>33</sup> For the criminal liability of the Government for example in the 1837, 1869 and 1876 Constitutions or today in Greece, the Greek article condemning such mixed styles.

<sup>34</sup> See the 1931 Spanish Constitution.

<sup>35</sup> A system which was adopted in the 1812 Spanish Constitution, drawing upon the 1791 and 1978 (with some nuances) French Constitutions.

<sup>36</sup> One will however note that the individual accountability of the ministers is excluded in some countries, for example Romania. In the Netherlands, the collective responsibility of the Government may not be involved by the Upper Chamber, which can only push ministers to resign individually.

<sup>37</sup> In Romania, the Parliament may suspend the President of the Republic with a simple majority and ask the people to confirm or disconfirm its decision. That procedure was used three times, the president being confirmed twice, the rapporteur considering whether to call that procedure a recall or not.

<sup>38</sup> Tanquerel's chapter on Switzerland underlines that there is no specificity of the civil liability of the executive power and that it will therefore not be dealt with. Pantelis' chapter on Greece notes that civil liability is not really interesting for constitutional experts. The French article indicates that it does not raise any specific issue.

<sup>39</sup> The 1921 Polish Constitution very generally mentions the civil liability of the Executive as does the 1997 one (Article 77 which provides for a right to compensation for any damage caused by wrongful acts committed by the Executive, including inactions and omissions when adopting secondary legislation).

<sup>40</sup> As the article underlines, 'This is a remarkable symptom of the media form and nature of the process of political responsibility and accountability'.

<sup>41</sup> Underlined in the chapter, 'The United Kingdom' in this publication.

<sup>42</sup> Given the specificities of the Swiss system and the impossibility to overthrow the Federal Council, that accountability to voters is treated as political accountability: strictly speaking, the political accountability of the Federal Council translates into the risk, which is low though not excluded, of not being re-elected and that of being pushed to resign while in office due to a personal fault that entails complete loss of political support

<sup>43</sup> In that respect, Krzysztof Wojtyczek's chapter on Poland underlines the important role that the press plays in that elective responsibility, the role played by Parliament's control, which illustrates that parliamentary responsibility and elective responsibility complement each other, and finally the role of NGOs and think tanks.

<sup>44</sup> However, Tanquerel's chapter on Switzerland indicates that that form of political accountability to voters, which is often applied to ministers who run for local or national elections, completely disappeared in the 20th century, as the Federal Councillors do not run for any popular election when they have been elected to the Government.

<sup>45</sup> Peter Kruzsliz's chapter on Hungary thus notes that 'the Prime Minister is accountable to voters only through elections in the lower chamber.' Underlining that the ultimate sanction is either the non-re-election of the President, or a general election, it indicates that between 1989 and 2011 all the general elections resulted in the defeat of the ruling majority.

<sup>46</sup> Even though the synchronising of the parliamentary and presidential elections does not avoid cohabitation.

---

<sup>47</sup> Thus Daly's chapter on the U.K. reveals, in the third part, the broadening of political responsibility: 'the myriad ways in which the Executive is accountable, not just to Parliament and the courts, but to an increasingly broad range of actors in traditional and social media, civil society and political parties'.

<sup>48</sup> Which refers to the 'de-monopolisation' of the Executive's accountability to Parliament.

<sup>49</sup> Wojtyczek's chapter on Poland underlines how close penal and constitutional responsibilities are, noting that constitutional breaches are defined in a vaguer way than in criminal law, and that sanctions are more vexatious than punitive, but that the procedure is exactly the same as in criminal liability.

<sup>50</sup> Even though it is not provided for in the Penal Code.

<sup>51</sup> For example, in Romania or the Netherlands.

<sup>52</sup> For example, in Spain, Article 102 limits the criminal liability of the Members of the Government before the Supreme Court to some crimes only, the other crimes pertaining to the jurisdiction of ordinary courts.

<sup>53</sup> That obligation may however be expressed in more or less clear and precise words.

<sup>54</sup> Which is underlined in the chapter, 'The United Kingdom' in this publication.

<sup>55</sup> For example, Chloë Geynet-Bussauze and Priscilla Jensei-Monge's chapter on France, which chooses a broad conception of political accountability understood as a loss of the political power, specifies that that of the President of the Republic in particular is involved when resorting to a referendum. There remains that no legal rule provides that a president must resign after a negative answer to a referendum and that it only belongs to practice: some have resigned, others have not. Should one conclude that some presidents are politically accountable, and others not and thus note how variable political accountability which depends on practices is?

<sup>56</sup> Wojtyczek's chapter on Poland underlines that the 1791 Constitution was the first to codify political accountability.

<sup>57</sup> On that point Besselink's article on the Netherlands reveals that that old practice and its mechanisms have not been codified yet so that a whole series of events may be interpreted as acts of disapproval by Parliament and the Government.

<sup>58</sup> Not using a legal mechanism does not imply that it is obsolete.

<sup>59</sup> See in particular practice in Scandinavian countries: no motion of no confidence was adopted before June 2021; there have been only two in Norway (1928 and 1963); and three in Denmark (1909, 1947, 1975). Such a seldom use of the motion of no confidence does not prevent, in practice, individual resignations.

<sup>60</sup> It is the same in Hungary, the article indicating that despite the reinforced role of the Prime Minister, the existing mechanisms of accountability have not evolved and make it, in practice, difficult to involve the responsibility of the latter, which makes it impossible to study practice. It concludes consequently that the Prime Minister is only accountable to voters through the elections to the National Assembly.

<sup>61</sup> Wojtyczek's chapter on Poland notes that since the 1997 Constitution came into force no collective or individual motion of no confidence has succeeded, except in 2007 when Parliament tabled a motion against some twenty ministers who were immediately dismissed by the President at the request of the Prime Minister and were reappointed as soon as the examination of the motion of no confidence was interrupted.

<sup>62</sup> See the chapters concerning the different countries in this publication.

<sup>63</sup> In Switzerland, as it is not possible to overthrow the Federal Council, the only sanction is the non-re-election of its members, which never happens 'One must again come back to practice as to re-election. It is not absent: that constitutional weapon does exist and may be used. It is very rare, though, which weakens the strength of the political sanction accountability of the Members of the Federal Council. The latter know that, except very specific political circumstances or serious infringements on their part, they can quite serenely choose the date when they decide to leave the Government.'

<sup>64</sup> As underlined in 'Poland', in this publication.

<sup>65</sup> As underlined in, 'The Netherlands', in this publication.

<sup>66</sup> In Denmark, the High Court was referred by Parliament twice: in 1995, which triggered the resignation of the Government, and a second time in 1995.

<sup>67</sup> Criminal liability may have been used to serve as a substitute for political accountability and imposed that the Government be supported by the Chamber(s), for example in Romania under the 1864 and 1866 Constitutions, in Norway, in France or still today in Greece. Conversely, Besselink's article on the Netherlands indicates that even if criminal liability was introduced in the 1840 Constitution, and specified in a law in 1855, it was never used nor was it replaced by political responsibility.

<sup>68</sup> Even though from a theoretical point of view the characterisation of a parliamentary regime depends on the existence of a legal mechanism, not on its practice.

<sup>69</sup> That shift nonetheless implies that the definition of a parliamentary regime must be revised, as it would not be characterised by the possibility to overthrow the Government but, for example, the simple control or accountability of the latter.

<sup>70</sup> The situation is different in the countries where dissolution is not possible, as in Norway, which leads the political parties in Parliament to 'find agreements to avoid ministerial crises that could harm the governability of



---

the country or to avoid that the public's trust in political institutions crumble. Until now, the general feeling seems to have been that that element of the system works rather well'.

<sup>71</sup> That difference explains why the article insists on the revaluation of other forms of responsibility (for example that provided for in Article 68 of the Constitution which is traditionally called criminal liability but which may also be constitutional or political responsibility, as the French article suggests) as well as on electoral and media responsibilities.

<sup>72</sup> One may try to 'juridicise' that reversal of logic as follows: if responsibility in the legal sense is defined as the sanction of a breach of a primary rule, then the lower house is legally accountable to the Government which may sanction it by dissolving it when it does not support it, the primary rule being that the lower house must support the Government, which is the reversal of the parliamentary rule according to which the Government must get the confidence of the lower house.

<sup>73</sup> In that sense see, 'Greece' and 'Poland', in this publication.