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► To cite this version:

Audrey Bachert-Peretti. “ Responsibility, Accountability and Legitimacy of Executives: What Role for the People? ”. Marcel Morabito; Guillaume Tusseau. Regional Accountability and Executive Power in Europe, Routledge, pp.188-198, 2024, 978-1-0032-8155-9. hal-04747382

HAL Id: hal-04747382

<https://hal.science/hal-04747382v1>

Submitted on 15 Feb 2025

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The Limited Democratic Character of European Executives

Responsibility, Accountability and Legitimacy of Executives: What Role for the People?

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If the term democracy has many definitions, it can simply be understood as a regime in which the people control their destiny¹. As pure democracy, in which the citizens convene together to decide all public matters, is not prevalent in our contemporary era and besides the question of its possibility, the democratic character of political regimes can be assessed regarding the degree to which the people are able to have a say in the public decision-making process. This ability can be achieved through two main categories of mechanisms: ones that enable the citizens to choose regularly their leaders; ones that enable them to influence their decisions. It is not to deny that the term the people can be quite evasive², however it will be understood here as the community of individuals with political rights, that is to say, the electoral body or the citizenry. Therefore, it will be assumed that the more citizens intervene and the more effectively they do so, the more democratic the system will be.

For decades now, it has been a common place to underline that Executives have become the dominant governing force in our contemporary polities³, despite the difficulty to define precisely, on a theoretical level, the concept of “Executive”⁴. Without further enquiries and for the sole purposes of this paper, it can be understood as encompassing three main components, besides their contingent labels and respective significance in various national settings: the Head of State; the Government and its leader; and the administrative services – which shall not be neglected in our times of still-pervasive Welfare State, notwithstanding its criticisms in different national contexts. Because of their fundamental role in the modern State, the democratic quality of these Executives will have a direct impact on the democratic quality of our political systems.

One way to assess the democratic dimension of these Executives is to wonder how consequential the people can be in controlling their composition and decisions. For this evaluation, it is then possible to investigate the several points of citizens intervention during the Executives’ life. By observing the institutional design and the ordinary functioning of countries within the REGALIEN project⁵, it can be noted that the people participate only limitedly in the choice of the members of the Executives (I), while they have some devices to influence the decisions made, even if they are largely partial and indirect (II). In this regard, the democratic dimension of our European representative systems is not inexistant but should not be overstated.

I. Selecting the Executive

¹ On democracy as autonomy, see H. KELSEN, *La démocratie. Sa nature. Sa valeur*, Paris, Recueil Sirey, 1932.

² B. DAUGERON, “Les électeurs sont-ils le peuple? Peuple, citoyens, électeurs en droit constitutionnel: essai de distinction théorique” in C. BOUTAYEB (ed.), *La Constitution, l’Europe et le droit. Mélanges en l’honneur de Jean-Claude Maslet*, Paris, Publications de la Sorbonne, 2013, p. 163.

³ See e.g., P. ROSANVALLON, *Le bon gouvernement*, Paris, Seuil, 2015; S. ROSE-ACKERMAN, *Democracy and Executive Power*, New Haven, Yale University Press, 2021; N. ROUSSELIER, *La force de gouverner. Le pouvoir exécutif en France, XIV-XXIe siècles*, Paris, Gallimard, 2015; A. SCHLESINGER, *The Imperial Presidency*, Mariner Book, reed. 2004.

⁴ See e.g., H. MANSFIELD, *Taming the Prince*, New York, The Free Press, 1989; A. VIDAL-NAQUET & P. JENSEL-MONGE, *Du pouvoir exécutif au pouvoir gouvernant*, Paris, Mare et Martin, 2021.

⁵ M. MORABITO, “Introduction”, in M. MORABITO & G. TUSSEAU (ed.), *Comparative Accountability of Executive Power in Europe*, London, Routledge, 2023, *forthcoming*.

If various devices can be used to select the Executive, direct popular elections are obviously the most significant ones in a democratic perspective. However, they are not free of defects (A) and are far from being used to designate every Executive official (B).

A. *The Imperfect Mechanism of Elections*

Popular elections ensure a form of democratic legitimacy to the elected officials. However, it should be underlined that they do not create strong constraints because of the prohibition of the imperative mandate⁶. If electoral promises are commonplace, they are not binding obligations for the elected rulers who can choose to set them aside. The link between the people's will⁷ and elected Executives is thus limited to choosing men and not measures, in a Burkean paraphrase⁸. This implies a limited responsibility of elected Executives towards the people in the sense that citizens, by selecting decision-makers, are not firmly controlling the decisions that will be made.

This situation is reinforced by the fact that regularly held elections should be considered as imperfect mechanisms of responsibility⁹. Indeed, even if the dimension of *ex post* judgment of elections is often underlined¹⁰, this assertion should be qualified for several reasons. For sure, voters can sanction incumbent candidates for their past actions by refusing to re-elect them. However, the electoral process presents various limitations. Firstly, it is fragmented and heteronomous. It happens only episodically; the electoral body is never the sole triggering force of the elections and incumbents can escape their responsibility by choosing not to run for the elections. Secondly, most of the time, it does not enable to sanction by anticipatedly terminating the mandate and more generally the electoral result cannot be explained solely by the will of the people to retrospectively sanction the incumbent; motivations of voters are diverse and difficult to untangled from one another. The election thus cannot be considered as a mechanism to truly held responsible the Executive, even if it is the main mechanism to ensure its legitimacy from a democratic point of view.

Regarding the responsibility issue, the difficulty can be alleviated if some mechanism enables to terminate the mandate in an anticipated manner, and to choose alternative Executives more aligned with the people's preferences. Here, it should be underlined that this kind of mechanisms, that can be encompassed under the general label of recall procedures, are not necessarily linked with the imperative mandate. They can perfectly be conceived in association with the principle of free mandate that informs our representative systems¹¹. This will be the case if the procedures are triggered, not because officials are not respecting some previously made promises, but only because the decisions made are considered retrospectively as bad ones, so bad as to justify their dismissal. The more the citizens are controlling these procedures, depending on

⁶ On the pervasiveness of this prohibition in Europe, see Venice Commission, *Report on the Imperative Mandate and Similar Practices*, n° 488/2008, CDL-AD(2009)027, June 2009, 15 p.

⁷ The notion of "people's will" or "popular will" can be understood here quite plainly, as the choices made by the citizenry and expressed through legal procedures, without equating it with the Rousseauist concept of general will, which *stricto sensu* cannot be expressed through election but only through legislation.

⁸ E. BURKE, *Works*, 12 vols, Boston, 1869, vol. 1, p. 531.

⁹ P. SÉGUR, *La responsabilité politique*, Paris, PUF, 1998, p. 78.

¹⁰ P. AVRIL, "Responsibility and Accountability", in O. BEAUD & J.-M. BLANQUER, *La responsabilité des gouvernants*, Paris, Descartes & Cie, 1999, p. 85.

¹¹ C.-É. SÉNAC, "La révocation populaire des élus. Anatomie d'une institution démocratique", in *Mélanges Philippe Lauvaux*, Paris, ed. Panthéon-Assas, 2021, p. 929.

their ability to initiate them and to be their decisive voice, the greater the democratic character of the responsibility of the Executive and, as a way of consequence, of the system.

B. The Rarity of Elections to Choose the Executive Team

On a practical level, it should be underlined that many members of the Executives in countries studied in the REGALIEN project are not directly elected by the people. This is obviously the case for Heads of State in constitutional monarchies such as the United-Kingdom or the Netherlands. There, no choice is given to the people and no popular dismissal is possible without a change of the political regime amounting to a revolution. In other systems, where no hereditary principle applies, Heads of State can be elected directly by the people, as in France and Portugal. However, they are often elected indirectly, by Parliament itself or by an electoral college in which members of Parliaments represent the majority. This latter option confers an indirect democratic legitimacy to Heads of State, whose powers can be more or less extended. Indeed, as members of Parliaments, or at least as some of them, are elected by the people, their intervention in the selection process can be seen as a mediation of the popular will.

No direct popular dismissal of Heads of State is possible in countries studied in the REGALIEN project, except in Romania where citizens can decide to anticipatedly terminate the mandate of the President after Parliament has called this kind of recall elections¹². In other non-monarchical regimes, a dismissal is still possible, but with no popular intervention. However, even if these destitution processes are often understood as forms of criminal or constitutional responsibility, the political dimension of these procedures should not be underestimated, because of the open-textured provisions related to the nature of the relevant offenses and the participation of elected political authorities in the proceedings. Here again, we may thus find some sort of mediated popular decision on this issue of deselection of Heads of State.

Regarding Governments, Parliaments play a major role in their selections. If this is a guiding principle of parliamentary regimes in which the Government is the “creature” of Parliament exercising an “elective function”¹³, it is not specific to it. For example, the Swiss Federal Assembly is also competent to appoint the Federal Counsellors although Switzerland is a directorial regime¹⁴. Here again, parliamentary selection of Governments is supposed to create a link, at least indirect, between the rulers and the ruled, ensuring their democratic legitimacy. This link is even more significant when Government members are also members of the House directly chosen by the electoral body. But this is not a pervasive situation in Europe. Belgium and France Constitutions for example provide for the prohibition for Executives’ members to be members of Parliament at the same time¹⁵. Nevertheless, the relations between Governmental officials and the citizenry can be established thanks to the process of parliamentary selection. If this reinforces the place of the people in the selection of their rulers, it should nevertheless be noted that the original reason for this form of selection has more to do with the representative nature of our polities than with their democratic one. Indeed, it is only the extension of the franchise during

¹² Romania Constitution, article 95.

¹³ W. BAGEHOT, *The English Constitution*, 2nd ed., 1873.

¹⁴ T. TANQUEREL, “Swiss Report”, in M. MORABITO & G. TUSSEAU (ed.), *op. cit.*, p. 12.

¹⁵ France Constitution, article 23; Belgium Constitution, article 50.

the 19th century, which is the basis for the democratically legitimising force of parliamentary selection which had developed previously¹⁶.

Regarding the ability to put an anticipated end to the mandate granted to Governments, citizens direct intervention is non-existent in countries of the REGALIEN project. No popular recall procedures can be used against the Government collectively or its members individually¹⁷. The closest mechanism appears to be the British procedure provided for by the *Recall of Members of Parliament Act 2015* that could theoretically be used against a member of the Government being also a member of the House of Commons. Nevertheless, the reasons that enable to trigger this revocation process are restrictive and its procedural features make the British recall only a limited democratising device of the British representative form of government¹⁸.

More traditionally, the possibility of repudiating the Government is associated with the principles of parliamentary regime and especially its core one of responsible government, grounded in the needed confidence of Parliament towards the Government for its continuing survival. The centrality of the principle of confidence fosters the democratic legitimacy and responsibility of the Government of the day, as it enables to dismiss it when it becomes unsatisfying for the elected representatives of the people. In this regard, democratised parliamentary regimes can be theoretically considered to ensure a stronger form of democratic responsibility than its presidential counterpart, existing mainly outside Europe. However, it should be noted that in these latter systems, forms of criminal or constitutional responsibility, such as the US impeachment, are not so different from the classical political responsibility associated with parliamentarism. Indeed, the same remarks as those already made in relation to the criminal/constitutional responsibility proceedings for Heads of State in countries of the REGALIEN project can be put into light. The political dimension of these procedures should be underlined because the misdeeds that can be sanctioned thereby are generally framed in strongly open-textured provisions, giving a large discretion to the authorities entitled to determine whether they are constituted or not, and because these authorities are generally political authorities whose partisan views are largely incorporated in the judgment, they render¹⁹. In this regard, neither the specificity of parliamentary regimes nor the enhanced responsibility of parliamentary Governments should be overstated. Unless the criminal responsibility of members of the Executive, be it a Head of State or a member of Government, is aligned with the ordinary one applicable to any ordinary citizens – which is almost never the case – the political dimension of these proceedings should be recognised. As soon as members of Parliament, mainly elected by the people, are the decisive force in the proceedings, a form of mediated popular influence on the question of the continuance of the Executive members' mandate can be recognised and consequently, a form of democratic responsibility and legitimacy of the Executive as well.

However, the selection and deselection of Executive members by elected representatives, supposed to ensure an increased democratically legitimate and responsible Executive, because of its ability to mediate the popular will, is in practice limited by the logic of political partisanship.

¹⁶ B. MANIN, *Principes du gouvernement représentatif*, Paris, Flammarion, 2012.

¹⁷ In Europe, only two countries seem to authorize a popular dissolution of Parliament, which could have an impact on the composition of the Government: see Latvia Constitution, article 14; Lichtenstein Constitution, article 48.

¹⁸ V. BARBÉ, « La révocation populaire des parlementaires au Royaume-Uni », in C.-É. SÉNAC (ed.), *La révocation populaire des élus*, Paris, Mare et Martin, 2021, p. 243.

¹⁹ R. ALBERT, "The Fusion of Presidentialism and Parliamentarism", 57 *Am. J. Comp. L.* 531 (2009); J. BOUDON, "Le mauvais usage des spectres", 78 *RFDC* 247 (2009).

Indeed, the significance of the people's will can be weak when political parties are the true controlling players of the parliamentary game. This is especially true in coalition governments where the choice of ministers and the programme of the government will be determined by negotiations between the winning parties subsequent to the elections²⁰. In this case, the relation to the electorate's choices is quite loose. If it is stronger in majoritarian systems, since the electoral results are more directly the cause of the selection of the governmental team, the partisan logic produces a practical weakness of the principle of political responsibility. It is only in situations of strong political crisis, such as the recent partygate in the UK²¹, that the majority party will change its leadership in order to avoid setbacks at the next elections. This means that people's will is not completely obviated. However, responsibility mechanisms will come into play only as safety valves, to ensure the preservation of the system in politically tricky contexts. Furthermore, their triggering rests upon an assessment of the current public opinion, potentially thanks to opinion polls, which is only a weak palliative for the lack of a stronger influence of the people.

Lastly, it should be noted that contemporary regimes have witnessed the development of large administrative bureaucracies. Theoretically, they are often considered to be Executive armed wings, solely implementing decisions made at the political level. In this regard, a hierarchical principle ensures the democratic dimension of the decisions made, since administrative agents respond to their political principal in a well-structured chain of command that translates a chain of legitimacy and responsibility, the political principal ultimately responding of the decisions before the people. However, besides the limits of the democratic responsibility of Governments and Heads of States already mentioned, two further qualifications should be underlined. Firstly, the autonomy of administrative agents in very large administrative structures cannot be neglected, limiting the reality of the idea of a tight chain of responsibilities. This is all the truer with the growing privatisation of public action. The web of public and private actors who are the actual decision-makers render the responsibility quite diffuse, if not completely dissolved because of the difficulty to attribute the decision to a clearly identified authority²². Secondly, modern states have also developed independent agencies, officially insulated from elected political actors. If their legitimacy is often considered to rest upon their expertise in the fields of their intervention, the question of their responsibility in a democratic society should not be overlooked²³.

The ability of the people to check and constrain the Executives' composition is thus limited by many institutional features and partisan considerations. On the one hand, if their legitimacy can be considered to flow from the consent of the people, expressed through the elections preceding their selection, this mechanism is not applicable to every Executive functions. On the other hand, existing procedures enabling to put an end to their mandate appear only as a safety valve in our representative regimes. In this regard, if the people are not absent in the choice of the European Executives, their place is firmly circumscribed. This could be a very real democratic concern. If it could be alleviated if the people were able to have a grasp on the

²⁰ S. CECCANTI, S. CURRERI, G. PASSARELLI and G. STEGHER, "Italie", in J.-P. DEROSIER (ed.), *La démocratie exécutive*, Cahiers du ForInCIP, n° 7, 2023 *forthcoming*.

²¹ T. HELM *et al.*, "Partygate: Johnson's removal is now inevitable, warns loyalist", *The Guardian*, 5 February 2022 (online).

²² J. ZILLER, "Dédoulement fonctionnel et responsabilité politique de l'exécutif dans les États-membres de l'Union européenne", in M. MORABITO & G. TUSSEAU (ed.), *op. cit.*

²³ A. VIALA (ed.), *Demain, l'épistocratie?*, Paris, Mare et Martin, 2022.

Executives' decisions, this is in fact the case only partially and indirectly, limiting the democratic character of our polities.

II. Controlling the Executives' Decisions

The most significant way for the people to control Executives' decisions is to be associated in their making. However, despite recent developments in deliberative democracy²⁴, the ability of the people to take part in public decision-making is quite limited (A) and not without its own risks (B).

A. *The Scarcity of Popular Interventions*

Direct popular intervention is far from being a pervasive phenomenon in our polities. The sole situation, in which the whole citizenry can be implicated, is when some initiative and referenda proceedings exist. When such mechanisms do exist, it has a double consequence: it obviously fosters the ability of the people to choose some public decisions, but it also influence the way the Executives act, rendering them more sensitive to popular preferences²⁵. If this is famously the case in Switzerland, it is not a pervading situation in Europe where a quite strong form of defiance towards direct popular decision-making seems to be persistent. Besides initiatives and referenda, a growing interest is apparent for other procedures, such as participatory budgets, mini-publics and other forms of popular consultations. However, the degree of actual popular influence will vary among these proceedings; most of them are only consultative, if not only informative for the citizens, without giving them an actual say in the final decision. Outside formal procedures providing for the direct popular intervention, liberal systems with strong freedoms of speech, press and reunion enable some kinds of informal popular interventions such as demonstrations and protests as well as wide public discussion and criticism of public decisions, which can sometimes be influential. The development of new technologies has obviously fostered these channels of popular expression. However, culture and traditions have a strong influence on the use of these tools, French people being for example more famous for their strikes than other Nations, even if some evolutions are not impossible²⁶.

Eventually, whatever the degree of institutionalisation of popular participation, only a limited role is given to the whole citizenry in controlling the Executives' decisions. More generally, the people are associated in public decision-making only indirectly, by being represented or able to trigger horizontal, inter-institutional, mechanisms of accountability and oversight²⁷.

It is obviously through the actions of Parliament, where the elected representatives of the people sit, that popular intervention is mostly mediated. It is for sure in the exercise of the legislative function that participation is the strongest. However, the various accountability and oversight mechanisms at disposal of Parliaments, besides those enabling to dismiss Executive members, should not be neglected. If they are not about repudiating dissatisfying Executives, they ensure they will publicly explain and justify their actions and even, sometimes, make them

²⁴ A. BÄCHTIGER, J. DRYZEK, J. MANSBRIDGE & M. WARREN (ed.), *The Oxford Handbook of Deliberative Democracy*, Oxford, Oxford University Press, 2018.

²⁵ T. TANQUEREL, art. cit.

²⁶ See e.g., A. BODRY, "Luxembourg" in J.-P. DEROSIER (ed.), *op. cit.*

²⁷ M. DOWDLE (ed.), *Public Accountability: Designs, Dilemmas and Experiences*, New York, Cambridge University Press, 2006.

change. Five types of such accountability mechanisms can be identified within parliamentary institutions²⁸: the manifold reports the Executives are supposed to present to Parliament, especially the ones regarding the budget; the diverse procedures of questions and interpellations; the inquiry commissions and more generally the proceedings within parliamentary committees; the parliamentary guidelines towards executive actions; and the procedures where Parliament must approve the executive decisions for them to enter or rest into force. Their intensity can thus be variable, from public information to actual constraint on Executives' choices. To make their control more effective, Parliaments can lean on the works of other institutions such as ombudspersons and independent authorities which can provide useful information. These institutions also have autonomous oversight functions, either because they are to be consulted, and can thus influence, decision-making procedures or because they can receive petitions and complaints by individuals or groups from civil society. Eventually, judicial review and litigations are forceful accountability mechanisms. Their main purpose is to protect individuals from injuries they can suffer because of public decisions but it can sometimes be used efficiently to advance some public causes.

Under this light, the powerful Executives of contemporary era are entangled in a quite impressive web of accountability mechanisms. Their power is not unchecked. They must quite often justify publicly their decisions. However, these devices enable only a limited popular participation and, when they do so, they are not free from risks.

B. The Risks of Privatisation and Partisan Bias

Every time, the citizens, or at least some of them, are able to influence public decisions, risk that some individuals or groups can take advantage of this ability is not far away. The threat of capture, and thus of privatisation, of public decision-making processes is a pervasive one. This seems to be a growing concern in Europe, as shown by the recent development of legislation to prevent conflicts of interests and to regulate lobbying²⁹. This risk of capture is present, whether there is an institutionalisation of popular participation or not. Firstly, some participatory processes are specifically centred on the interventions of some groups, such as trade unions, associations, NGOs, and lobbies, this being especially the case in countries with a tradition of consociationalism such as the Netherlands³⁰. Secondly, when initiative and referenda exist, these procedures can be diverted from their original intent of empowering the whole citizenry, since a sort of marketplace seems to be emerging with companies specialised in political activism³¹ and being mostly available to the most powerful, well-organised and well-financed groups. Thirdly, mechanisms of individual or collective complaints and petitions, before courts and independent authorities, are submitted to the same dangers. Finally, in the non-institutionalised channels of popular expression, the risk of hearing mainly from the loudest voices, even if they are not necessarily majoritarian within the civil society, cannot be neglected.

Regarding the various mechanisms of horizontal accountability, the situation of Parliament and other institutions supposed to be independent should be considered separately. On the one hand, the ability of Parliament to be an effective controlling institution of Executives'

²⁸ For more details, see A. BACHERT-PERETTI, "Le contrôle de la démocratie exécutive", in J.-P. DEROSIER (ed.), *op. cit.*

²⁹ *Ibid.*

³⁰ L. BESSELINK, "Reports on the Netherlands", in M. MORABITO & G. TUSSEAU (ed.), *op. cit.*

³¹ J.J. RUIZ-RUIZ, "Espagne", in J.-P. DEROSIER (ed.), *op. cit.*

decisions is dependent upon the same considerations already mentioned in respect with its constraining ability towards the composition of the Executives. Its effectiveness is conditioned by partisan considerations, the degree of consistency within the majority, the significance of prerogatives of individual members of Parliament and the informal relations between members of the Executives and members of Parliaments. On the other hand, the ability of independent authorities to exercise their function of oversight is dependent upon their actual independence from the Executives. If they are composed of affiliates of the Executives, their checking power will in practice be only nominal and can even sometimes serves to advance the Executives' objectives³². As such, the risk of partisan bias, loosely understood to encompass the difficulties associated with political and non-political institutions, cannot be neglected.

* * *

At the end of this panorama, the democratic deficit of our institutional settings cannot be overlooked, despite the promise linked to the extension of the franchise in the 19th century. Here Rousseau's words appear to echo: "The people of England regard themselves as free; but they are grossly mistaken; they are free only during the election of members of Parliament. As soon as they are elected, slavery overtakes it"³³. As our current systems proclaimed to be true, if not pure, democracies, this deficit in the actual capacity of the people to have a say in public decisions, which is more and more felt by the people, is maybe a cause of the growing popular defiance towards our institutions.

The popular intervention in public decision-making is quite circumscribed; only on rare occasions can the whole citizenry have a direct impact. It is much more often that their representatives act in their name or that only some of them, as individuals or organised groups of the civil society, will be able to be influential. Both possibilities carry their own risk of distortion of the popular will. In this regard, the representative and liberal dimension of our institutional settings seems to remain more significant than its democratic one. Furthermore, the relationship between the Executives and the people appears to be displayed mainly as a duty to explain and justify public decisions, echoing the current significance of the transparency principle. It seems however to be only a consolation prize for those who believe that the people should be the true master of their destiny.

³² See e.g., G. TUSSEAU, « Les juridictions constitutionnelles en contexte illibéral: la figure du complice », in V. BARBÉ, B.-L. COMBRADE et C.-É. SÉNAC, *La démocratie illibérale en droit constitutionnel*, Bruxelles, Bruylant, 2023, *forthcoming*.

³³ J.-J. ROUSSEAU, *The Social Contract*, Book III, Chapter XV.