

ARTICLES

THE NEW SEPARATION OF POWERS: HORIZONTAL ACCOUNTABILITY

*Pasquale Pasquino**

Abstract

Starting from an attempt to distinguish different meaning of the term/concept *accountability*, the article suggests a version of the doctrine of the separation of powers, where Constitutional Courts play a crucial role in the structure of divided power. The text tries to show that the historical starting point of this doctrine is the Hobbesian conceptual revolution that introduced the conception of individual equal rights. So doing, Hobbes destroys the traditional idea of mixed constitution (and limited and shared power) based on a non-equalitarian anatomy of the society and the existence of ontological different parts of the society, pushing to think differently the mechanism of divided/limited power.

TABLE OF CONTENTS

1. Fragestellung.....	158
2. Accountability.....	158
3. Horizontal Accountability.....	161
3.1. The Hobbesian Moment.....	162
3.2. Divided Power.....	164
3.3. Decline of State Sovereignty.....	167
Bibliography.....	168

* Global Distinguished Professor of Politics, New York University

1. Fragestellung

Consider the following statements:

a. The Prime Minister of the United Kingdom is accountable to the majority of the House of Commons by a convention of the British customary constitution.

b. The elected members of most of the legislative assemblies in contemporary representative governments are accountable to the voters on the Election Day for renewal of their *pro tempore* mandate.

c. "Party committees at all levels are accountable and report work to the congresses at their respective levels," as we read in an official English presentation of the structure of the Chinese Communist Party.

d. Tenured judges are somehow accountable to public opinion and to elected politicians.

This list, which one could easily expand, shows that the terms *accountable/ accountability* are used in a variety of discursive and sometimes technical, legal contexts with different meanings. In order to avoid a lack of analytical clarity on the topic of this entry, it shall be convenient to proceed in two steps. First, to clarify the possible general meanings of the term *accountability*. Then, to define the proper object of this entrée: the expression *horizontal accountability*, distinguishing it from a *vertical* one and describing, at the same time, its rationale and why it has value in contemporary constitutional *Rechtstaat*.

2. Accountability

By stipulation, it is possible to distinguish the forms or types of accountability in the statements above as: (a) political, (b) electoral, (c) by membership, and (d) reputational.

In our social life, we are accountable (we have to *rendre des comptes*, explain/ justify our past conduct) in almost all of our relations: in family and with friends, in school and at work, as citizens tax payers, etc. One could even claim that humans are *accountable animals*. Still, what do we mean by speaking of accountability? If the species can be distinguished in a meaningful sense, we need to ask what is common to the genus.

Speaking of accountability implies, to begin with, a relationship: X is accountable to Y, where X and Y can be alternatively single individuals and/or institutions (and their members).

In the minimalist sense, accountability implies that X (agent or agency) has to explain to Y what she has been doing, in our context, as a public official with some responsibilities or, more in general, as a member of a group or an institution.

The entry in the *Oxford English Dictionary* for *accountability* reads:

“The quality of being accountable; liability to account for and answer for one's conduct, performance of duties, etc. (in modern use often with regard to parliamentary, corporate, or financial liability to the public, shareholders, etc.); responsibility”.

If the common element of different forms of accountability is *to account for one's conduct*, the “specific difference” may be determined by the *consequences* of the account, once given. These consequences cover a wide spectrum of possibilities, going from tarnishing one's reputation to the loss of an occupied position and to punishment, under specific legal circumstances. In the case of a loss of a position or function, we need additionally to distinguish the temporal enforcement of the consequences. The Prime Minister in a parliamentary government may lose her position at any time because of a vote of no confidence. Her “tenure time” is virtually *zero*. The non-renewal of the parliamentary mandate for an elected official (in the absence of *recall*), instead, can take place only at the end of the electoral mandate, at the time of its possible renewal.

Now, these types of consequences of *accountability* have to be clearly distinguished from the case (d), the one in which the subject Y has tenure - which in turn can be unlimited or for a given period of time. This actor cannot be deprived of his position (except in the case of a transgression of legal duties or of moral obligations).

It is possible to present, moreover, a slightly different taxonomy, focusing on the consequences of what we call accountability. In many contexts, public officials have a duty or a legal obligation to explain and justify what they did or decided in

office; nonetheless, a number of different possible effects on their person and position can follow.

Latissimo sensu, accountability is a condition for the control by Y of X's behavior, a condition typical in principle of the relationship between a principal and his agent. A number of state organs are, for instance, under the obligation to present *ex post* a regular report to Parliament of what they have been doing.

Lato sensu, it consists of the strictly required obligation by public officials to justify their decisions with public arguments each time they are taken. Courts of justice in many political systems have a constitutional duty to give reasons for *each* of their opinions.

Stricto sensu, by political accountability we normally refer to the absence of life tenure of individuals occupying public office who, nonetheless, could have their mandate renewed. Hence, these officials need, in order to remain in office, to be approved by the agency that authorized that mandate, which has, moreover, the legal power to terminate the exercise of public office by someone previously appointed to that position. (The "agency" is here the members of a parliament, in the case of the cabinet; and the voters, in the case of elected representatives in modern representative regimes). Notice that, at least in the case of the voters, the power of dismissing the incumbent is entirely discretionary; it does not need any justification or giving reasons and results, moreover, from the aggregation of independent individual preferences. From this perspective, it is possible to assert that each voter exercises a microscopic fragment of the classical sovereign power, the one that could say: *sic volo, sic jubeo, stat pro ratione voluntas*. It is worth noticing that non-renewal in office is neither the fact of an individual will (as in the case of a single principal) nor of a body deliberating collectively, but the consequence of a mechanical tally of possibly incoherent, individual, uncoordinated preferences. The parallel between elections for renewal of a public office and the relationship between principal and agent - typical of private law - is for that reason, generally speaking, misleading.

Based on what I just said, it follows that the sanction resulting from accountability may vary significantly, from some real

punishment to losing the office or even almost nothing, except possibly reputation, as in the case of a Central Bank president explaining to political officials his recent financial measures.

The considerations, in the next section, will focus almost exclusively on the political-constitutional context where it is possible and now common to distinguish between *vertical* and *horizontal* accountability.

3. Horizontal Accountability

The expression of *vertical accountability* is now used currently to designate the relation between voters and elected officials in modern representative government. Elections (free, repeated, and – later on – competitive) have been considered, from the end of the 18th century, the *only* source of *legitimacy* of political authority in a “society without qualities”. By this expression I mean a political community where public power cannot be legitimately exercised by virtue of *natural differences* among structurally unequal members of the community (as in classical culture, which distinguished *gnorimoi* from *demos*). In a culture, like the post-Hobbesian one that asserts equality of the adult (at least male) members of the body politic, exercise of political authority can only be thought of and be presented as based on concepts like *authorization* or delegation – and as temporary permission to exercise a function which is not held *sui juris*, but as entrustment. The Hobbesian concept of authorization originated in an anatomy of the city that knows only equal members in the political sphere and *no natural hierarchy*, i.e. no government that is not an artifact, and hence in need of a justification. If the members of a political community are equal and there are, nonetheless, good reasons to reject an-archy, i.e., absence of government, the *raison d’être* of the government needs to be rationally vindicated. This was the intellectual achievement of Hobbes’ *Leviathan* and of his doctrine of authorization through a social contract.

At the end of the 18th century, in the republican (anti-monarchical and anti-aristocratic) political regimes, established in a stable form in the United States and provisionally in France,

through the respective constitutional revolutions enacted in the two countries, authorization took the form of exclusive procedure of *empowerment through elections*.

This 18th century theory of representative, republican government is at the origin of a reductionist ideology that ended up in the 20th century equating democracy with what the *abbé* Sieyès, in his manuscripts, described with the term *électionnisme*.

In reality, the institutional structure established in the two countries, which are at the origin of the political-constitutional system that we now call, with a shorthand term, democracy, is not identical at all with the Jacobin ideal consisting of Rousseau plus representation. A variety of institutional mechanisms were imagined and established by the liberal constitutions from the outset to tame and control political power, independently of vertical accountability (popular elections), between elections, and as a defense against what Madison called “tyranny of the majority”. The Founding Fathers of modern representative government knew well that “popular will” is an expression hiding the synecdoche by which one part (the will of the majority) is presented as the will of everyone and of the whole. Since the decisions of the elected representatives impose, in fact, a general obligation over all the members of the political community, it seems useful to present the will of one part as the will of the entire body politic. This does not change the fact that that will is the expression of one section of the community (more exactly of the representatives of it) and that the minorities need to be protected in their fundamental rights.

3.1. The Hobbesian Moment

Here a step back is necessary. Hobbesian political philosophy, which is the origin of the justification of any form of modern representative government, assigned to political authority a specific and paramount function: establishing peace, understood as a guarantee of subjects’ fundamental right (the integrity of their “life and limb”). Article 16 of the French Declaration of Human Rights epitomized and developed the constitutional doctrine of the

Hobbesian moment. There we read: “there is no constitution [meaning a just and rational political order] without guarantee of rights and separation of powers” – the latter being an instrument, an institutional technique to achieve and realize the first aim.

Representative government has, in principle, so says Hobbes’ doctrine, the function of protecting the fundamental rights of all the citizens, not simply those of the majority (or plurality, meaning the largest minority), which through competitive elections – in the contemporary version of this regime – chooses the representatives and has the legal power to renew their mandate to govern.

It is because of this function that representative government (*vulgo* democracy) cannot be reduced to what became the exclusive principle of its authorization – elections – but involves other institutions protecting the ultimate goal for which the government exists and makes it rational for citizens to obey its commands: the guarantee of the individual rights.

The general term to characterize this pluralistic structure could be *divided power*. By this expression, I mean something different from the simple distinction of state functions (likewise the traditional triad: legislative, executive, judiciary). Instead, I refer to the fact that the constitutional order distributed what was called the sovereign power (in the standard language, the legislative function) among different coordinated organs, able to check each other. The relation between these organs or branches can be characterized as *horizontal (institutional) accountability*.

Some specifications are required concerning this expression – probably introduced into academic debate by Guillermo O’Donnell – if we do not want to use it just as a synonym for “checks and balances”.

Vertical accountability implies apparently something like the relationship between a principal and an agent. The parallel, as already mentioned, is misleading. The constituency of an elected representative government is a special kind of agency lacking a unity of will. It is a bunch of individual agents, whose independent and uncoordinated wills can have the effect of censoring elected officials: meaning the refusal to renew their mandate. Moreover, in the

absence of a two-party system (or of a presidential election between two candidates), such a denial may end up with the impossibility of forming a governmental coalition (the elections in Germany in the last years of the Weimar Republic are a dramatic example of such a situation). Be that as it may, vertical accountability is the equivalent of a binary, yes-no, system. The agent is renewed in her function or not. Speaking of the election as a form of *control* over the actions of the representative and the governmental majority that she has been supported during her mandate seems simultaneously generous and confused.

Authorization through elections should be characterized rather as a mechanism of legitimacy in societal conditions where the competition is among competing/adversary elites and not enemies, since wars are not settled by votes, but unfortunately through violence and blood.

3.2. Divided Power

What we call horizontal accountability has a different structure from the vertical one and may take different forms; all of them have in common something that is similar to the principle of *collegiality* and the absence of a legal/constitutional monopoly of *Rechtserzeugung*, of law making, in the sense of the creation of legal norms.

Horizontal accountability means at the same time the end of the classical monistic idea of sovereignty *and* the end of the supremacy of electoral legitimacy.

When James Madison thought of taming the “legislative vortex” by distributing that function among three elected and vertically accountable organs (the two houses of Congress and the president), he did not imagine that a single political party could have been able to capture the three branches and thus void their function of horizontal control. It is only much later that the non-elected and non-vertically accountable federal judiciary became essential part of the constitutional structure of divided (sovereign) power (as Hamilton anticipated in *Federalist* 78 and Marshall repeated in his Supreme Court opinion of 1803).

This transformation became real in the United States (meaning different from the simple, original function attributed to the Supreme Court as judge of federal conflicts – the original jurisdiction of Article III, Section 2 of the U.S. Constitution) only near the end of the 19th century. Elsewhere, it generalized mostly after the Second World War in new democracies, when Constitutional Courts, introduced in post-authoritarian regimes, started to play a significant and increasingly important role in the fabric of law of constitutional democracies.

This event modified the original structure of the divided power, giving to non-elected organs a central role in preventing abuses of power and contributing to the guarantee of rights. The development in the 20th century of the *Parteienstaat* inside the structure of representative government made obsolete the classical mechanism of a distribution of the legislative power among different elected and independent elected branches of government (as it was imagined by Madison in the *Federalist* 47, 48, 51). Only non-elected organs, because of their independence from electoral results and from immediate control of political parties, can reestablish the checks inside the law-making power – which by the way, is worth repeating, cannot be reduced to the production of statutory legislation.

Our constitutional democracies can be presented as a new form of *mixed government*. The classical mixed constitution (*memigmene/mikté politeia* in Aristotle and Polybius, *republica* in Machiavelli) was based on the sharing of political authority among the constitutive and unequal parts of the city (*mere tes poleos*); elections played a marginal role, if any, in that structure (with the partial exception of the Roman Republic). The new form of mixed regime is based not on the distribution of public offices to the sociological components of the society, but on two different types of organs: elected and non-elected, with different types of legitimacy. It combines vertical and horizontal accountability: elections, on one side, and, on the other, the power for the non-elected organs of producing legal norms, otherwise of stopping or modifying decisions of the elected branches of law-making power. Elections, in constitutional democracies, have lost the monopoly as the

legitimacy-granting mechanism. Vertical accountability, for the reasons discussed, does not guarantee the general protection of citizens' rights. A government chosen by the majority (or plurality) of voters is deprived of the neutrality that Constitutional Courts can more easily provide, since their members have no incentive to satisfy a specific constituency, given the impossibility (with very few exceptions) for its members to be reappointed (or simply because they are appointed with life tenure, as in the United States). This independence makes the members of the Courts more able to fulfill the function of guaranteeing the constitutional rights of the citizens, the paramount function of political authority in the tradition of the western *Rechtsstaat*.

This independence vis-à-vis both the voters and the government – the usual (not the unique) parties to the conflicts that these Courts have to adjudicate – does free them, despite this legal independence, from constraints and limits on the exercise of their power. Elected organs still have the possibility to react to decisions of the Courts that they deeply disapprove, whether through constitutional amendments or reenacting statutes similar to the one cancelled or modified by these guardians of the constitution. Constitutional Courts are not a new sovereign, but a new organ of the mixed government that in a society of legally equal citizens has to establish the divided power within the constitutional structure, assigning to organs with different sources of legitimacy the possibility of controlling each other. Alternation in governmental position of elites competing for political office through election offers only a diachronic possibility of concern for and respect of citizens' rights (of a section of them, by the way: the winners rather than the losers of the electoral competition). The new mixed government establishes a synchronic or at least a continuous form of control among institutional elites of different types, acting according to different incentives: reelection, on one side; increasing of legal and political authority through the reputation of neutrality and impartiality in the protection of citizen's rights, on the other.

The circumstance that Constitutional/Supreme Courts have (sometimes) the last word does not make them the equivalent of a

sovereign agency. In the absence of closure, litigation would lose its very *raison d'être*. No one would go to court (with the exception of people behaving illegally) in anticipation that there would never be a final decision on the conflict. The old objection *quis custodiet custodiet* would become *ipso facto* a recipe for anarchy and denial of a legal *remedy*, in absence of which there are no *rights*.

3.3. Decline of State Sovereignty

Horizontal accountability, this contemporary form of divided power, has a double face. On one side, within the structure of the constitutional order, it represents the end and disposal of both the myth of popular sovereignty and the Westminster model (in French, the *gouvernement d'assemblée*). On the other, in the system of globalized relations among states, it is the beginning of a phenomenon that is becoming more and more relevant: the decline of states' both *internal* and *external* sovereignty. The Westphalian order survived the transformation of the modern, independent, sovereign territorial state from principalities and monarchies to national representative democracy. In general, with the partial exceptions of China and the United States, nation-states are nowadays mostly semi-sovereign entities. International and supranational legal orders are increasingly interfering with and even dismantling states' sovereignty. The European Union is the most obvious and in a sense dramatic instantiation of this metamorphosis. To the inability so far by legal and political theory to explain and make sense of this metamorphosis has for some time now been given the name "democratic deficit". The weakness of our understanding is masked by this label of an alleged deficiency of the reality.

Various contributions in this volume show *ex abundantia* the interconnections between state and supranational governance and the reciprocal controls - with the inevitable tensions of this transition. The mechanisms and the justification of national democracy are no longer up to the emergent reality of the post- Westphalian system. Hegel famously observed that theory is like the owl of *Minerva*, which first begins her flight with the onset of dusk. The evening is

near. Theory is waking up.

BIBLIOGRAPHY

- Accattino, P., *L'anatomia della città nella Politica di Aristotele* (1986).
- Bovens, M., Goodin, R. E., Schillemans, T. (eds.), *The Oxford Handbook of Public Accountability* (2014).
- Bovens, M., *Analyzing and Assessing Accountability: A Conceptual Framework*, in 13 *Eur. Law J.* 447 (2007).
- Cassese, S., Torchia, L., *Diritto amministrativo. Una conversazione* (2014).
- Elster, J., *Accountability in Athenian politics*, in Przeworski, A., Stokes, S., Manin, B. (eds.), *Democracy, Accountability and Representation* (1999).
- Elster, J., *Limiting majority rule: Alternatives to judicial review in the revolutionary epoch*, in Smith, E. (ed.) *Constitutional Justice under Old Constitutions* (1995).
- Godding, P., *Jurisprudence et motivation des sentences, du Moyen Age à la fin du 18e siècle*, in Perelman, Ch., Foriers, P. (eds.) *La motivation des décisions de justice* (1978).
- Grant, R., Keohane, R.O. *Accountability and Abuses of Power in World Politics*, in 99 *Am. Pol. Science Rev.* 29 (2005).
- Hansen, M. H., *The Athenian Democracy in the Age of Demosthenes* (1999).
- Maitland, F. W. *A Historical Sketch of Liberty and Equality, as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge* (1875) on-line at <http://oll.libertyfund.org/titles/870>, accessed 12/30/2014
- Nippel, W. *Mischverfassungstheorie und Verfassungsrealität in Antike und früher Neuzeit* (1980).
- O'Donnell, G., *Horizontal Accountability in New Democracies*, in 9 *Journal of Democracy* 112 (1998).
- Pasquino, P., *Machiavelli and Aristotle: The anatomies of the city*, in 35 *History of Eur. Ideas*, 397 (2009).
- Przeworski, A., *Democracy and the Limits of Self-Government* (2010).
- Schumpeter, J.A., *Capitalism, Socialism and Democracy* (1942).

- Stewart, R.B., *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, in 108 Am. J. of Int'l Law, 211 (2014).
- Warren, M.E., *Accountability and Democracy*, in Bovens, M., Goodin, R.E., Schillemans, T. (eds.), *The Oxford Handbook of Public Accountability* (2014).
- Wolff, H.J., *Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie* (1970).

http://en.wikipedia.org/wiki/Motions_of_no_confidence_in_the_United_Kingdom

<http://www.china.org.cn/english/Political/25060.htm>

<http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>

<http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>