

BOOK REVIEWS

Review essay: Notes on comparative accountability *W. J. Eijsboerts*

L. Verhey, H. Broeksteeg and I. Van den Driessche, *Political Accountability in Europe: Which Way Forward?* Groningen: Europa Law Publishing, 2008. 344 pages. ISBN 978-90-76871-82-0. EUR 85.

In the small French town where these lines are being written, there is a medieval Roman Catholic church. On its southern side the church features a sundial, indicating the time of day. A latin motto admonishes those who consult it, reading: “*Pereunt sed imputantur*”, or “[The hours] flee past, yet they are accounted”. It is a smart little motto, compacting as it does both the relentless fleeting of time and its seeming opposite, to wit our accountability for every hour. How can one be accounted for time rushing past? In a nutshell the motto thus expresses and resolves a central paradox of political responsibility or accountability. How can a political official be asked to answer for events or situations which are happening or getting out of hand as a matter of course? Well, the very spirit of this, of accountability, is in this paradox. One might say that the counting erects an artificial structure in time, which helps to turn the unruly current of events into an element of human conduct and ethics.

Political Accountability in Europe, the edited volume under review, is concerned with the future of political accountability, especially in the European Union context. It wants to point “the way forward”. “What we are trying to achieve in this book”, the editors write, “is by comparative research trying to identify common principles (*ius commune*) and practices which have been developed in different national systems with regard to political accountability and to see to what extent these principles and practices are relevant for the further development of the European constitutional system” (p. 7).

If the way forward needs pointing, it means there must be disorientation. Indeed, the book can be seen as an intellectual spin-off from the first great governmental crisis in the Union, just ten years ago now, when the European Commission headed by Santer went down over allegations of fraud and nepotism. One of the “independent experts” who then reported on the matter and caused the fall, Walter van Gerven, then spiritually auctored the present venture by writing hopefully in the present *Review* in 2000: “This is therefore an area where comparative research would be particularly helpful in uncovering common principles, which would in turn help in designing constitutional rules for the European Union....” (as quoted in the book on p. 304).

It is a good thing that public law should become concerned with *political* responsibility or accountability. Craig and Tomkins write that “public law research into the nature of executive power is just beginning” (*The Executive and Public Law*, p. 15). This is all the more so in the European Union, in whose context executive power is simply a dark continent. The project under review has yielded a number of informative reports – and some really good ones – on political responsibility and accountability in national situations. To what extent has it fulfilled Van Gerven’s hope of constitutional engineering for Europe?

The idiom of political accountability or responsibility is an idiom of action, which identifies the executive branch. It conveniently defines the executive compared to other branches of government. Parliaments are not primarily concerned with taking responsibility or being held accountable; they are at the organizing side of political responsibility, providing a forum for its enactment. The same is true for courts of law, which are in the business of enforcing legal responsibility. If parliaments and courts themselves bear some responsibility it is secondary to their primary functions of representation and review respectively. This is why political

responsibility defines the executive among the branches of government. Inside the executive, responsibility further cuts between the core executive and the departmental or administrative executive. Political officials bear political responsibility; the civil service and its servants, the administrative part of the executive, are normally shielded from political responsibility. This is why in the Union, whose constitutional articulation is inchoate and where especially thinking of government is only beginning, there is a great analytical potential in the notion and the practice of accountability or responsibility.

Let us briefly consider the notion itself. The book's editors clearly prefer the term accountability to the more generic one of responsibility. They have managed to impose this preference on all the contributing authors, save a few. It is not a fundamental choice, but it is indicative. Even if the two notions are often roughly interchangeable and tap into a common pool of understanding, there is a notable difference of accent. In the realm of politics, accountability is the sedate sister of responsibility. It has a more limited and more defensive idiom. To "account for" a situation comes close to explaining it, opening the books. Responsibility on the other hand is related first to action and only then to understanding. Responsibility is *taken* by someone in a critical situation, as an assertion of personal initiative and authority. It is *borne* in a situation. Accountability can never be taken or borne; it is asked, attributed. Responsibility is, then, the more assertive of the two. It is the *motif* of a full blooded politician, thrusting himself or herself into the heart of the action, risking both blame and glory, which are the prize of responsibility. The accountable politician on the other hand is closer to the administrator, who prefers keeping a clean slate to getting the credit for bold action.

A research venture consciously preferring the term accountability rather than responsibility as its theme, is programmed to move the focus and the idiom away from the heart of politics, political action, into the sphere of the administration, and from the study of government to that of governance. The editors themselves realize this: "The concept of 'accountability' is these days very much *en vogue* among constitutional lawyers, political scientists, managers in the public sector and politicians, often accompanied by that other notion of 'governance'." (p. 9), they write. The title of the book, "Political accountability in Europe", on the other hand, seems to point to government rather than governance.

These introductory points made, about the temporal nature of political responsibility or accountability, about its intimate relation to executive action and office, about its analytical potential, about its conceptual family, about the governance bias of the notion of accountability, let me now turn to the book. Authors from eleven EU countries have written about political accountability in their home constitutions on the basis of a questionnaire. Questions were about the actors in the procedures of accountability, about the scope of accountability, about the means of accountability and about the consequences. This was done, as noted above, in the hope that some common features might show up and be made fit for use in the European Union. In order to test the realism of this expectation, let me pick up and follow some of the interesting themes running through the book. My choice: a) agencies; b) the relation between law and politics; c) the political dynamics of accountability.

Agencies. In almost all modern democracies there is a multiplication of so-called agencies, executive bodies placed at some distance from the core government. They create practical and doctrinal problems of accountability. In some places, like the Netherlands, it appears that cabinet members are simply not held accountable for the work of agencies insofar as they lack legal competence concerning them. In other countries, this logic of "no responsibility without competence" is not accepted. Ministers in the UK and Belgium try to find ways of ducking their responsibility for the work of agencies, but find these attempts countered by parliament. In all, it is perplexity rather than commonality which is found in the approach to agencies.

Having read all the reports one is surprised how poorly this relentless development is still understood. There is not the beginning of an agreement about the reasons for establishing agencies. These reasons might be either specialization, or efficiency, or unburdening the central bureaucracy, freedom from party politics, parajudicial independence, or even escaping political accountability. All these reasons are different and apply differently to different agencies. Nor is there agreement about criteria for their external attachment (either government or

parliament or both, or even courts and ombudsman), nor about their internal structure, nor about instruments for keeping them in check (judicial, budgetary, etc.).

The only country where agencies seem to fit constitutionally is Sweden. This country has a long tradition of independent public authorities functioning under the check of transparent government (and of protestant ethics, I might add). Interestingly such non-political bodies in Sweden help to balance the monopoly of power held for many decades (up to the fall of 2006) by the same social democrat party and may explain the relative lack of corruption in spite of this monopoly (next to protestant ethics, I might add again). The situation is 100% local. All other States sit uncomfortably with their agencies, while these keep increasing in number. The same is true in the EU, where the agencies multiply both in number and in variety in an *ad hoc* way without any guiding distinctions or principles to keep them in check.

In this situation, can a single substantive principle such as accountability be distilled from the infinite variety of situations in which agencies are involved? Could it, next, be applied to the Union? This is somewhat optimistic. The idea of distilling or drawing some common essence from different experiences is a denial of the subtle construction of each local arrangement. With reference to the image of the sundial, above, at the beginning, it is somewhat as if you could find the common essence of (counted) time by first adding up clock times in fifteen countries and then dividing these by fifteen. It seems that such a process of comparing and distilling is not equally applicable to all types of norms. Let us see if there is more to be said.

The relation between law and politics in practices of political accountability. One of the interesting contrasts found between the different national reports in the book is the part played by legal and political scholarship respectively in dealing with questions of accountability. Widest apart are Britain and Germany. In Britain, constitutional scholarship, even by lawyers, involves law, political science and history. This explains the delight and insight to be gained from Tomkins's paper, mixing rules and fact, norms and history as a matter of course. His paper is the best in the book. In Germany on the other hand, where a legalistic approach to the constitution is dominant, the law profession is little interested in the politics and history of accountability. German political scientists on the other hand are uninterested in rules, preferring to study the power game in its raw unruly ways. This split is well explained and evidenced by Veith Mehde in a very good paper. As an aside, the recent Lisbon *Urteil* of the German Constitutional Court proves that when German legal scholarship does indulge in thinking about politics and democracy, what you get is not realism but a form of critical political idealism.

That same split between legal and political doctrine is obvious in scholarship of the Union structure. The gulf between those interested in legal form and those concerned with political substance is as wide as or wider than that in Germany. Personally I think that legal scholarship is well suited to bridge the gap, on condition of taking law as a subdiscipline of history. After all, law is a species of history. And Tomkins shows how: by mixing the law with the facts, the rules with the events as a matter of course. This would require, for Union scholarship, to look at the Union's specific structure and history and to figure out all the ways and forms in which accountability and, more generally, constitutional controls, are developing there. It would mean relinquishing the hope of finding commonality between the specifics of national situations and those of the Union. What commonality there is can be found in a wider and the same time more powerful channel of understanding: that of the great Western constitutional tradition.

Understanding the political dynamics of accountability/responsibility. Political responsibility (accountability) is an extremely powerful artifice created in our Western constitutional tradition. It is, singlehandedly, capable of a great variety of binding and disciplining effects between those government branches and departments that are kept separate and linked up according to the recipes created from Aristotle to Montesquieu and beyond. Let us take four of these effects. First, responsibility binds individual ministers into their cabinet as a whole. Second, it disciplines the administration into obedience to the minister and the government. Third, it makes the government dependent on the parliament. Lastly, most importantly and often ignored in legal scholarship, it harnesses the majority political parties to the government's

action. This happens when a government makes some policy a matter of its responsibility and, by putting itself on the line together with its parliamentary majority, disciplines the latter.

This last and crucial, assertive aspect of political action is outside the scope of the term accountability. A government can make a policy the subject of its responsibility, not of its *accountability*. Maybe this is why this aspect is all but absent from this book's papers? Had it been taken to the European Union level, it would immediately have shown up the limits of even the possibility of activating political responsibility there. There is no majority to put on the line, there is no line to put it on, there is no dissolution of parliament, there is no government programme to discipline the government, etc. The political context and even legal conditions of political accountability are mostly absent. In fact, the Union system is better understood as a weak version of the French government system, where the government most often (not under rare *cohabitation*) depends on the president more than on the parliament. In this comparison, the Union's presidency lies with the European Council. Like the French government, the European Commission in its government functions depends more on the European Council than it does on the European Parliament. To be sure, there are inchoate forms of a parliamentary relationship between the Commission and the Parliament, but these are legally stifled by the fixed terms of office of both and politically stifled by the lack of a programme. What remains is, indeed, a good governance check by Parliament on the Commission (as in the Santer crisis), which befits the term accountability but in the Union structure does not amount to political accountability, let alone responsibility.

Only time can tell. With its fixed terms for both Parliament and Commission the Union constitution simply does not belong dominantly in the parliamentary league. And parliamentary accountability is consequently not a leading element of structure.

The predicament. The book under consideration is a mine of information and inspiration on situations of executive accountability in Europe, even if not always a gold mine. There is so much more to be done! In the final pages editors conclude (as planned) on a "common definition" of political accountability which applies in every Member State. This is where the method of finding commonality shows up its limits. Accountability is defined thus:

"The right of the parliament to be informed by the government which gives account of how it uses its powers and, where appropriate, suffers the consequences, takes the blame or undertakes to put matters right if it should appear that errors have been made."

It is interesting to look at the further attempts at drawing common definition.

"Summarized the concept thus contains three basic elements:

- *being accountable*: the guarantee of the government being accountable to the parliament for the use of its executive powers;
- *calling into account*: the right of the parliament to call the government into account which results in the obligation of the government to inform the parliament and to explain and justify its conduct;
- *holding to account*: the right of the parliament to make a judgement on the conduct of the government which results in the obligation of the government to accept the consequences; this could ultimately mean resignation."

What, finally, can be done with the results? "This definition can help clarify the debate on political accountability in the European Union. This is especially the case while this debate until now has often been unclear or sometimes even evasive."

This is not an impressive outcome of a project as vast and ambitious as this. What more and especially what more potent information could have been drawn from the work done? Let me suggest two directions, one concerning study of the Union constitution and one concerning what may be called applied comparison.

As to the Union constitution, the book limits itself to political accountability of the Commission to the European Parliament. As it appeared, this relationship has a stifled perspective and is bound, *even legally*, to remain a sideshow in the Union constitution. There is a fixation

on the parliamentary way as the only option for the Union's constitutional evolution, excluding or ignoring non-parliamentary (presidential) elements. But even 27 countries with mostly parliamentary systems of government do not necessarily add up to a Union with a parliamentary form of government. The word "adding up" is inappropriate. In fact, 27 more or less parliamentary systems of government together, miraculously, turn out a mostly non-parliamentary form of government in Brussels.

As to "applied comparison", the matter is probably even more fundamental if also banal. It hinges on the difference between substance and form. The project was set up in the hope of drawing some common essence from different versions of a principle. Now this may work with principles of substance, such as proportionality and equality, which are easier to isolate from their context and to cook up. It is no wonder, for example, that principles of substantive law are a great help in harmonization. It is different in the realm of form, or structure. No wonder there is less harmonization in the field of European institutional and procedural law (there is, conversely, institutional autonomy). In such fields, hoping to find a common principle is somewhat like cooking up animal bones in the hope of extracting a common skeleton.

The message for applied comparative law and politics is this. Principles of substance in the course of time tend and may be helped to mix and unify; principles of structure, erected locally in and against the current of time, like the sundial in the opening paragraph of this essay, will tend to diverge and individualize. Structures can be made to harmonize, but they do so in other ways, at other levels. Accountability, as the sundial's motto meant to point out, is an element of structure rather than of substance.

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