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ACCOUNTABILITY AS A CATEGORY OF CONSTITUTIONAL LAW – TERMINOLOGICAL CONSIDERATIONS***

Abstract

This text presents the category of accountability, which is well known in the social sciences, in the context of constitutional law institutions as a useful tool for reflecting on the development of the taking/giving of an account by reporting to the entity that entrusted the constitutional law institutions with their function. The article argues that accountability can be a pivotal category in at least three dimensions: 1) for the implementation of the principle of the democratic entrustment of power within the obtained mandate; 2) the division of powers and the system of mutual entrustment and settlement of their performance, as well as 3) accounting for competencies entrusted to public administration. The text presents the features of accountability in the system of the division of powers, with the indication of key problems in this area, and briefly presents the institutions of constitutional law that can be treated as serving the implementation of accountability.

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INTRODUCTION

‘Accountability’ is a term sporadically used by the doctrine of constitutional law¹ and extensively studied by the doctrine of political sciences, including the Polish² doctrine. The accountability concept has been well recognized in the social sciences, economics, business management, public administration, and also social psychology³. It is associated with the meaning of its morphological core, that is ‘accountable’, the term from Latin, then the Old French ‘aconter’, i.e. count, account.

Accountability literally means the obligation to account (return a report) for one’s actions or functions that have been assigned to one. The entity obliged to account - issue a settlement (report) of its activity, performance of specific tasks, does so for the the person who entrusted these tasks to it. In turn, this person has the right to demand such a settlement or report. Therefore, it is the right entrusted to them to judge

¹ In the modern literature, see in particular: N. Bamforth, P. Leyland (eds.), *Accountability in the Contemporary Constitution*, Oxford University Press, 2013; A. C. L. Davies, *Accountability. A Public Law Analysis of Government by Contract*, Oxford University Press, 2001.

² In the modern literature, see in particular: A. Przeworski, S. C. Stokes, B. Manin, *Democracy, Accountability and Representation*, Cambridge University Press, 1999; R. D. Behn, *Rethinking democratic accountability*, Brookings Institution Press, 2001; R. Bellamy, A. Palumbo (eds.), *Political Accountability*, Ashgate, 2010; C. T. Borowiak, *Accountability & Democracy. The Pitfalls and Promise of Popular Control*, Oxford University Press, 2011; A. M. Goetz, R. Jenkins, *Reinventing Accountability. Making Democracy Work for Human Development*, Palgrave Macmillan, 2005. In Polish political science it is a term studied mainly by Z. Machelski, “Rozliczalność jako element jakości procesu demokratycznego w systemie instytucjonalnym III Rzeczypospolitej”, *Przegląd Sejmowy*, 2018, No 1; A. Sroka, *Rozliczalność w w badaniach jakości demokracji (na przykładzie Polski i Hiszpanii)*, Warsaw, 2014.

³ M. Messner, „The Limits of Accountability”, *Accounting, Organizations and Society*, 2009, vol. 34.

the actions of the person entrusted with a task. In the social sciences, this entity is sometimes called an agent⁴. Therefore, the obligation to account lies on the person to whom a certain range of activities has been delegated, or who was to perform certain tasks. Accountability can be described as the ability to account for an action and, as a result, the response for that action (respect or performance of an obligation). It is therefore a feature of a system that consists of the ability of the entrusting entity to account for a specific activity or sequence of activities.

In political science, accountability is primarily used to examine the quality of democracy⁵ and the relations between deputies and a political party as well as deputies and voters⁶. Therefore, it is connected with the fundamental thought regarding power in the state, according to which there is a bond between entrusters and trustees, and the latter are obliged to account for what they do as part of their authority. As Benjamin Disraeli wrote: *all power is a trust; that we are accountable for its exercise; that from the people and for the people all springs, and all must exist*⁷.

The concept of accountability has not yet been consistently and unequivocally used in the study of constitutional law⁸, including the study of Polish constitutional law. No coherent theoretical approach to this issue or comparative analyses revealing the features of this category have been developed. At the same time, the notion of accountability, if used in constitutional law, can lead to confusion as to its relationship with the 'classical' concepts of constitutional law, such as control, supervision, and political and legal responsibility. This is because its definition has not

⁴ C. Achen, L. M. Bartels, "Blind Retrospection: Electoral Responses to Droughts Flu and Shark Attacks", in APSA Annual Meeting, Boston 2002; G. Lenz, *Follow the Leader: How Voters Respond to Politicians' Performance and Policies*, Chicago, 2012, quotation from: S. Gailmard, "Accountability and Principal-Agent Theory", in M. Bovens, R. E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, 2014, p. 90.

⁵ L. Diamond, L. Morlino (eds.), *Assessing the Quality of Democracy*, The Johns Hopkins University Press, 2005.

⁶ See M. Kruk, K. Kubuj, M. Laskowska, J. Zaleśny, M. Godlewski, M. Olszówka, *Representational mandate in the Polish Deputies' practice*, Warsaw, 2013, pp. 154 et seq.

⁷ Vivian Grey' (1826), bk. 6, ch. 7.

⁸ R. Mulgan, "Accountability": An Ever-Expanding Concept?, *Public Administration*, 2000, No 78, p. 555; Gailmard, *supra* note 4, p. 195.

been subject to academic reflection. It has not been precisely determined, which means that it can be confused with the above-mentioned concepts.

I. THE LEGITIMACY OF SEPARATING THE CATEGORY OF ACCOUNTABILITY

The category of accountability can become an important and extremely useful instrument of analysis under constitutional law for at least three reasons. Firstly, accountability - consciously or not - is a central, axial category for democracy based on citizen participation, inclusiveness, and equal impact on participation in public life, as well as constitutionalism that includes the principle of exercising the power entrusted to an entity, as part of the mandate and the controlling of public affairs by those who grant the mandate. This function of accountability is particularly relevant to the electoral process and the well-known concept of retrospective voting. Secondly, power in a democratic state is based on the separation of powers, and therefore on a subtle system of interaction between the legislative, the executive, and the judiciary, a system based largely on a complex network of interdependence, mutual accountability, and entrustments. Thirdly, public authority operates through an administration, which is both hierarchical and a network for the delegation of competences and responsibilities, and which is accountable for the tasks to be performed, while the key administrative entities often remain accountable to elected political authorities⁹. In all the contexts mentioned above accountability can - and should, make some distinctions clear and checkable - differentiated from other forms of hierarchically or horizontally exercised forms of broadly meant responsibility in political and legal sense. It could be helpful to verify, particularly, whether the forms of taking and giving reports from exercising power act according to theoretical, commonly accepted models of democracy and principles of constitutionalism, such as the separation of powers, representation, and the rule of law.

⁹ This is not always the case, because, for example, within the European Union, the networked management of its structures leads to the illusion of accountability, according to S. Gustavsson, Ch. Karlsson, T. Persson (eds.), *The Illusion of Accountability in the European Union*, Routledge, 2011, passim.

It is therefore worth considering how we could present a model of public accountability for constitutional law from the perspective of academic research and practice. This requires, firstly, outlining the unique features of this function, or the features of authoritative relations and the entrustment of power, and the linking of the category of accountability to the fundamental principles of constitutional thought. At the same time, accountability must be carefully separated from the other relationships such as the traditionally recognized control, supervision, political and legal responsibility.

This can be achieved by juxtaposing and analyzing the functions of instruments and processes in practice and the constitutional regulation of modern democratic states that leads to the obtaining of a report on the exercising of power. Separation category of accountability could lead to the thorough scrutiny of the mentioned institutions and relations, traditionally approved as crucial elements of constitutional regimes.

Therefore, first of all, those features should be indicated that distinguish accountability from other forms, in particular forms of political responsibility and audit (control), and of verification of responsibility for exercising power. Firstly, their origin is different; control (audit) is a well-rooted institution within constitutional law that is derived from financial and administrative law; political responsibility is one of the oldest institutions of constitutional law, and it is closely related to the separation of powers, whereas accountability is a category that has a more recent history, as a result of it being transplanted from other fields of the social sciences, in particular management sciences. Institutions of political responsibility as well as constitutional (legal) responsibility have their source in constitutional regulations and are well-established after centuries of practice. Audit institutions have an almost equally rich tradition of control, especially in the control of state finances. In contrast, accountability is based on the observation of relations known so far in the state regarding the exercising of power. It is proposed to include them in a characteristic paradigm, i.e. the model of principal – agent (supervisor, commissioner – subordinate, contractor). There are also different standards used to define and evaluate the actions taken. Political responsibility has no clearly defined standards of its enforcement, it is determined ad hoc and rather ex post; in turn, constitutional liability is based on a strictly defined standard resulting from the applicable law –

its enforcement consists of examining whether the responsible entity has not violated specific legal norms. In turn, auditing uses specific, clearly defined standards. It consists of a detailed study based on quantitative criteria in respect of these standards. Accountability, in turn, uses explicit, clearly defined instruments to obtain a report on the exercise of power. Although it does not generate predetermined requirements that the accounter should meet as part of its implementation, they are a derivative of constitutional competences and obligations. It also differs as to the initiation and proceeding of the indicated forms of actions towards the entity subject to control or account. Political responsibility is initiated ad hoc, at the request of specific political bodies, in particular in the event of the loss of support of the parliamentary majority for executive actions, whereas an audit is carried out either permanently or periodically by specialized entities equipped with the attribute of impartiality, the appropriate competences which meet the specific procedural requirements to conduct the audit.

However, what is the most characteristic, and the easiest element to overlook when comparing accountability with other institutions related to the responsibility for actions taken in the exercising of public authority, is the difference in their effects and purpose. Political responsibility leads directly to the refusal to continue exercising the mandate or the authority of the person held accountable. Constitutional responsibility is aimed at applying sanctions for the violation of legal norms, usually aimed at the deprivation of the office held. An audit leads to the obtaining of receipts, the approval, or disapproval of activities covered by the audit. Therefore, all these institutions - although to varying degrees and using completely different means - are aimed at determining the scope and basis of the liability of the entity that is subject to examination and enforcement of the indicated forms of account. All these institutions, despite their rich diversity, which is the result of different legal regulations, legal and political context, and shaped practice, have a common feature, which can be described as a quasi-judicial, investigative character. Meanwhile, accountability as a separate category is oriented differently. Its intention is only to obtain a report on the authority exercised and not to apply specific sanctions. Therefore, despite the name sounding especially confrontational in Polish, it is a set of institutions consisting of obtaining knowledge about the undertaken actions with the possibility of their

further use (also in order to implement other forms of account), and not of the assessment (approval or rejection) of the subject's power.

Because of its origins and sources, accountability is associated with settlement and account, which in turn are naturally connotated as part of a broadly understood report in quantitative fields, data reporting, and financial accounting. However, accountability also has a much broader narrative character. As one of the authors puts it graphically, it verbally bridges the gap between action and expectations¹⁰. Therefore, it has a much broader conceptual scope in constitutional theory and practice. The vast majority of forms of accountability are implemented in the form of reports on the actions taken, presenting their premises, reasons and reporting the effects of such activities in the sphere of entrusted power.

Therefore, it should be recognized that there are significant differences between the forms of responsibility and control, so far described in the constitutional literature, and the indicated category of accountability, the introduction of which into the study of constitutional law can be a tool to facilitate the analysis of relations between public authorities themselves, and between them and the sovereign and other (informal) participants in political relations. There is also the need to separate it from the other categories that have been discussed. While we can commonly call accountability everything related to the settlement of tasks and power, including the previously mentioned forms of control, legal and political responsibility, it is worth separating accountability in its strict sense, which goes far beyond the previously recognized model of constitutional reflection.

There are at least three important values of public life, known to the theory of constitutional law, which address the separation of accountability in constitutional theory and practice. The first is the openness and transparency of public life, which is inherent in the democratic form of governance and control. The second value is the rationality of authoritative actions. It is necessary to provide a report of the function or actions taken, firstly, to consider the rational premises for these activities, and secondly, to present them in such a way that this rationality is visible. Finally, an important value of accountability

¹⁰ Messner, *supra* note 3, p. 923.

is to bring about the legitimization of authoritative actions and power structures. The legitimacy of the power exercised in the state depends, not only on the way in which it was obtained, but first and foremost on the manner in which it was exercised - effectiveness, compliance with the objectives of the community, and the aforementioned rationality, which are assessed by a collective entity entrusting the exercise of power in a continuous and attentive manner.

Accountability is closely related to the principles of the political system, in particular the principle of separation of powers and the rule of law¹¹. These principles set conditions fundamental for a democratic state. They indicate the limits within which the entity exercising authority is to operate, as well as the need for other authoritative entities to control it. Implementing this significantly depends on what constitutes the assumption of accountability, i.e. that every imperative task, as well as every action must be accountable. The entity performing them must be prepared to present a report on the actions taken and demonstrate their legality and purposefulness. Accountability is also associated with the implementation of the principle of representative democracy. Political representatives are obliged to present a report on their activities to the sovereign (as will be discussed below), as well as to institutions of direct democracy, which sometimes impose sanctions on these representatives, when they act against the will of those who are represented. This can include, in particular, a recall referendum, but also a citizen veto. Although these institutions tend to negate the actions of the representatives, either in the absence of consent to a specific legislative action or a refusal to trust *ad personam*, it is impossible to imagine their implementation without the prior obligation to submit a report on the actions - and in the first place insufficient justification of these actions - by an entity whose authority is thus questioned.

¹¹ C. Harlow, "Accountability and Constitutional Law", in M. Bovens, R. E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, 2014, pp. 199–201.

II. FEATURES AND TYPES OF CONSTITUTIONAL ACCOUNTABILITY

Accountability in the social sciences is a category based on two assumptions:

- 1) the relationship between the principal and the agent consists of entrusting a certain range of powers and competences. This relationship lies at the beginning of the requirement, and there is the agent's responsibility to account for such tasks.
- 2) accounting for performance of entrusted tasks and power is possible when there are clear standards for this account, regarding the extent to which this relationship is to be passed and, as a result, settled.

However, in academic theory and in the practice of constitutional law, both of these assumptions raise a lot of doubts and require some adaptation.

The first of these, i.e. the classically understood principle of the principal-agent, is not adequate to describe and analyze the relationship between entities of power in constitutional law for at least two reasons. The first consists of the definition of the principal's subjectivity - his ability to settle in a context of accountability to a collective entity, a sovereign who grants the mandate to exercise power in a democratic state. The problem of the so-called collective principal appears especially in the area of electoral accountability¹² and the settlement carried out by representatives of the sovereign - the social substrate of the sovereign, i.e. parliament. The principal - hierarchical agent, immanent for the classic relationship, is not always present in constitutional law. Accountability often takes a diagonal (network), horizontal, or even internal form.

Also the second assumption that accountability is only possible when there are clear criteria for reporting relations cannot be fully positively verified, especially when it comes to forms of electoral accountability, the

¹² Gailmard, *supra* note 4, pp. 93-94. On the problem of assuming homogeneous election preferences, see J. Ferejohn, "Incumbent Performance and Electoral Control", *Public Choice*, 1986, Nr 50, pp. 12-20.

criteria of which are not obvious to researchers¹³. The proposed use of the category of accountability for the analysis of instruments and relations known to constitutional law, therefore requires careful treatment of the classical assumptions, and their adaptation to the conditions of the special nature of the principal, which requires the complex and diverse nature of relations between entities of power to be taken into account, especially in relation to the entrusted power, tasks, or competences, and nature of the mandate that this entrustment generates.

There are two different basic variants of accountability in constitutional law. The first of these is electoral accountability, while the second is accountability within the division of powers. Both are fundamentally different from the accountability known to administration sciences and are not based on the Weberian administration paradigm. Relations are not purely hierarchical - they are rather diagonal (especially as part of accountability in the government system).

Electoral accountability is a category that deserves special attention because it is connected with the theory of representative mandate granted in democratic elections. Political representation, according to the classic conception of A. Birch, should perform, among others, two functions, that is to be responsive and accountable¹⁴. We can talk about political accountability when voters have a legally guaranteed, but also real, opportunity to enforce responsibility for actions and decisions taken by a deputy during the term of office. In other words, they have a chance to remove a representative who performs his tasks in a way that is contrary

¹³ See for ex. A. Fumarola, "The Contexts of Electoral Accountability: Electoral Integrity Performance Voting in 23 Democracies", *Government and Opposition*, 2020, Vol. 55, Issue 1.

¹⁴ A. H. Birch, *Representation*, London, 1971, p. 107. As Birch puts it: *The specific functions (of representation) may be defined as follows:*

(a) *responsiveness: to ensure that decision makers are responsive to the interest and opinions of the public,*

(b) *accountability: to provide a way of holding political leaders publicly accountable for their actions.*

On the meaning of these two functions - cf. M. Czeźnik, *O empirycznym badaniu demokracji w Polsce*, www.is.uw.edu.pl (12.12.2013). See also D. Samuels, T. Hellwig, "Electoral Accountability: A Conceptual and Empirical Reassessment (Draft Version)", in: *Annual Meeting of the American Political Science Association*, Boston, 2008.

to the expectations of voters. Accountability is implemented primarily during the electoral process, i.e. at the end of the term of office - although there are also forms of its implementation before the end of the term of office, especially when using the recall institution, i.e. the dismissal by universal vote due to dissatisfaction. Electoral accountability is therefore nothing but the effective elimination of those representatives who have failed the electorate by refusing to re-grant their mandate or the rewarding with re-election those who have met the expectations. In political science, it is often associated with the concept of retrospective voting¹⁵, i.e. the settlement of representatives by voters as part of the next electoral process. It is also an institution in which the real influence of citizens on decisions regarding a governed community is most fully realized. It is characteristic of a democratic system, thus constituting - as it was described in one of the works - the "Holy Grail" of constitutionalism¹⁶. However, there are several paradoxes associated with the implementation of this type of settlement of representatives, which raises questions about the effectiveness and actual function of this type of category.

The first group of these questions is related to the general election fulfilling the function of settlement from the mandate previously granted to representatives - that is, what in political science is called retrospective voting as an instrument of electoral accountability. As M. Czeńnik puts it, the implementation of accountability during elections requires, not only not voting for wrong - according to the electorate - representatives, but also voting to support alternative candidates¹⁷. In a situation where there is real choice, i.e. the possibility of voting for a potentially winning candidate, is limited to one grouping, accountability cannot be achieved. The situation is similar in the case of the cartelization of politics, i.e. control of the political scene by competing groups effectively dividing the

¹⁵ In the modern literature, see in particular D. Stiers, "Static and Dynamic Models of Retrospective Voting: A Clarification and Application to the Individual Level", *Politics and Policy*, 2019, Vol. 47, Issue 5; I. Esponda, D. Pouzo, "Retrospective Voting and Party Polarization", *International Economic Review*, 2019, Vol. 60, Issue 1.

¹⁶ M. N. Franklin, S. Soroka, C. Wlezien, "Elections", in M. Bovens, R. E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, 2014, p. 389.

¹⁷ Czeńnik, *supra* note 14, p. 19.

electorate among themselves¹⁸. A voter with preferences related to one political group is not able to settle 'his' unsatisfactory representative. This phenomenon, in turn, enhances the effect of weak competition on the political scene – weaker competitive options are not able to break into the consciousness of the divided electorate¹⁹. These circumstances are directly related to the political system, but also to the legal conditions for the functioning of the party system (such as electoral law or forms of financing political parties).

Other conditions regarding the enforcement of ex-post electoral accountability are related, for example, to the limited term of office - how to settle a representative in the second and last term. Such a representative is accountable only if he can be re-elected (and he decides to present himself again).

But this is only one group of problems. Others are much more troublesome from the point of view of the theory of accountability and relate to its basic assumptions - in the first place the already mentioned relationship between the principal and agent, i.e. the issue of how the collective (nation or electorate of the constituency) can be considered as a principal. What is its ability to actually demand the submission of a report and exercise this right? Secondly, as J. P. Olsen²⁰ notes, there are no clear and unambiguous standards (criteria) for accountability during the election campaign, as well as during the term of office. However, there are mechanisms that can increase this accountability. For instance a recall institution, but also mechanisms used in electoral law to prevent the dissemination of false information, the assumption and purpose of which mechanisms is to ensure the effective access of voters to real information, among other matters about the current power. However, there is no direct relationship between such instruments and the basic element of accountability, i.e. the obligation to submit a report on the account of its activities by representatives.

¹⁸ R. S. Katz, P. Mair, *Democracy and the Cartelization of Political Parties*, Oxford University Press, 2018.

¹⁹ See P. K. Enns, G. F. McAvoy, "The Role of Partisanship in Aggregate Opinion", *Political Behavior*, 2012, No 34, p. 629 and research cited therein.

²⁰ J. P. Olsen, "Accountability and Ambiguity", in M. Bovens, R. E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, 2014, pp. 113–114.

The problem with the application and analysis of electoral accountability is also related to the inevitable presence and function of intermediaries in the settlement process - especially political parties and the media. The aforementioned cartelization of politics, as well as internal (more practical than external) mechanisms of competition of candidates within party committees, and clientelism, are problems related to the functioning of modern political parties. The contemporary media, including social media, in turn, generate phenomena of messages directed - more than ever before - to followers of a particular worldview²¹. Thus, media bubbles appear, generating cascading messages, and thus ensuring the participation of social media in election campaigns and during the exercise of power. These intensify the cartelization of politics, which minimizes the importance of a reliable settlement from entrusted authority.

The second type of constitutional accountability is the one between the subjects of power. It is based on the division of powers - their balancing and mutual inhibition, i.e. network (diagonal) connection, and less on hierarchy and subordination²². Here, the whole sense of considering its separation from other mechanisms and processes is revealed. The paradigm of the principal-agent relationship and accountability criteria are much easier to apply.

Although in the literature (especially Polish), the categories of responsibility and accountability have been treated so far without careful distinction²³, it is worth distinguishing and treating accountability not as a general concept, which includes all forms of responsibility, control, audit, supervision, transparency, but as a special category with different characteristics. It is possible to indicate institutions of constitutional law which perform the function of implementing accountability, i.e.

²¹ There is extensive literature on this subject. P. W. Hamlett, M. D. Cobb, "Potential Solutions to Public Deliberation Problems: Structured Deliberations and Polarization Cascades", *Policy Studies Journal*, 2006, Vol. 34, Issue 4, pp. 629-648. On "enclave deliberation" see. T. Kuran, C. Sunstein, "Accountability Cascades and Risk Regulation", *Stanford Law Review*, 1999, Vol. 51, No. 4.

²² J. Waldron, "Accountability: Fundamental to Democracy", *NYU School of Law, Public Law Research Paper*, 2014, No 13-14.

²³ R. Grzeszczak also draws attention thereto, "Odpowiedzialność i rozliczalność władzy wykonawczej", *Kontrola Państwowa*, 2011, No 2, pp. 126-127.

those whose function is to obtain reports on the course of the process or achievements without applying sanctions or drawing consequences. Such institutions include parliamentary committees of inquiry, the task of which is to examine a specific matter and the subject of work may include, "examination of allegations against the government administration, its errors, arbitrariness, abuse of power, waste, dishonesty, fraud"²⁴. It is true that in the Polish science of constitutional law, there is no doubt that the committees of inquiry are an emanation of the control function of the parliament, which has been confirmed by the Constitutional Tribunal several times²⁵. However, in the judgment of November 26, 2008 (U 1/08), the Tribunal, confirming the constitutionality of granting to the Sejm committee of inquiry the competence to examine the activities of members of the government who no longer performed their functions, stated that the "*Sejm's control means the Sejm's right to obtain information on the activities of specific organs and public institutions and the right to express an assessment of this activity. This control serves to gather information necessary to perform the legislative function, makes it easier for the public to obtain information on the operation of state organs, ensures that the state apparatus is subject to public opinion control.*" In the same statement of reasons, the Tribunal also emphasized that proceedings before a committee of inquiry are primarily intended to examine the circumstances that cannot, or can only laterally, be explained and resolved in non-parliamentary proceedings.

In a judgment from nine years earlier, the Tribunal clearly separated the functions of judicial proceedings and proceedings before a committee of inquiry, indicating that the committee's purpose is to examine the activities of a given public authority, and in particular to determine the scope and causes of irregularities in its functioning. This gathering of information, in turn, allows for the taking of the necessary political steps to prevent irregularities and improve the operation of the state

²⁴ F. M. Kaiser, W. J. Oleszek, T. J. Halstead, M. Rosenberg, T. B. Tatelman, *Congressional Oversight Manual. CRS Report For Congress*, Washington 2007, pp. 2-3.

²⁵ Among others in the judgment of September 22, 2006 reference number file U 4/06, as well as the judgment of the Constitutional Tribunal of April 14, 1999, reference number K. 8/99, OTK ZU 1999, No. 3, item 41. The statement about the committee of inquiry as one of the basic constitutional tools of parliamentary scrutiny was also expressed in the judgment of November 26, 2008, U 1/08.

apparatus by changing the law or bringing specific people to political or constitutional responsibility²⁶. Proceedings before the committee of inquiry are therefore the implementation of settlement understood as the reports from authoritative activities, a necessary stage for the enforcement of forms of responsibility.

Some other instruments that allow parliament to exercise its control function can also be included in accountability, not in liability, provided that liability is understood as the obligation to incur sanctions (political or legal) for their actions. Such instruments include the right to request a hearing, in particular the obligation to present information and reports along with the obligation to participate in the work of the Sejm committees incumbent on the ministers and heads of general government administration bodies, as well as interpellation procedures (interpellations, inquiries, information on current issues and a question in current matters), and as well as parliamentary procedures (in parliamentary committees) preceding the decision on granting discharge. The aim of the indicated institutions is to receive and analyze (or evaluate) a report on the actions in a given scope.

A separate field of this category consists of the settlement of scandals and oppressive regimes or those violating the basic standards of democracy. Transit justice mechanisms, i.e. coping with new structures of the state with a bad past, often take the form of seeking and describing the facts and causes of the phenomenon, including through the work of special parliamentary bodies or of bodies of a mixed composition, often with the participation of experts (fact-finding bodies)²⁷. Particularly noteworthy are mechanisms such as special parliamentary committees or special bodies with a plural composition such as truth and reconciliation committees, which operated primarily in Latin American and African countries, as well as some European countries. Their most important function is to report or rather demand a report from those holding power

²⁶ Judgment of the Constitutional Tribunal of April 14, 1999, reference number K 8/99.

²⁷ T. Lachowski, "Komisje prawdy jako mechanizm sprawiedliwości tranzytywnej na obszarze Bośni i Hercegowiny oraz innych państw byłej Jugosławii", in P. Chmielewski (ed.), *Balkany Zachodnie: między przeszłością a przyszłością*, Łódź, 2013, p. 330. See also the typology contained in the work of M. Krotoszyński, *Modele sprawiedliwości tranzytywnej*, Poznań, 2017, pp. 235–243.

or responsible for crimes, repression, etc. This type of activity is written in the language of accountability. Today, accountability instruments of a similar nature appear in a slightly different context of settlement, that is, learning facts and analyzing them after the financial crisis that hit many countries in the last decade. So in the United States of America a Congressional committee was created to investigate the causes of the crisis after 2007. This also occurred in Spain with special committees appearing at the level of regional parliaments to examine the causes of the financial crisis, after attempts to establish such a commission at the central level were effectively blocked. These have also been committees appointed by the European Parliament to examine particular situations²⁸.

An instrument in the form of Regulatory Impact Assessment (RIA) (ex ante and ex post) can also be considered an interesting and increasingly widely used accountability mechanism. Regulatory Impact Assessment is a systemic approach to critically assess the achievements and effects of the desired and side effects of legal regulation. Impact assessment of regulations is considered to be a form of estimating the effects of ongoing legislative activities and is a special element of the methodology of legislative work, which consists of determining the anticipated economic, social and legal consequences of the proposed solutions²⁹. Although this is a rational, necessary and obvious element of law-making activities, it has only recently been formalized in Poland and other countries³⁰, and it is relatively rarely regulated. The list contained in the OECD Government at a Glance report from 2015 shows that in only a few countries does the ex post assessment obligatorily apply to all laws (Denmark, Hungary, Japan,

²⁸ It is worth mentioning the following committees: on the alleged fraud in the Community Transit System (1995), the BSE crisis (1996), and the collapse of the Equitable Life Assurance Society (2005).

²⁹ M. M. Wiszowaty, "Ocena skutków regulacji i procedury konsultacji publicznych w procesie legislacyjnym - analiza prawna", in G. Kopińska, G. Makowski, P. Wąglowski, M. M. Wiszowaty, *Tworzenie i konsultowanie rządowych projektów ustaw, Raport z badania nad sposobem prowadzenia konsultacji publicznych i tworzenia dokumentów towarzyszących rządowym projektom ustaw w 2012 roku*, Warszawa, 2014, p. 42.

³⁰ W. Kozłowski, M. Matczak, O. Luty, "Ocena skutków regulacji a krajowy i wspólnotowy proces prawotwórczy", in M. Kruk, J. Wawrzyniak (eds.), *Polska w Unii Europejskiej. XLVI Zjazd Katedr i Zakładów Prawa Konstytucyjnego. Wierzbą, 3-5 czerwca 2004 r.*, Warszawa-Kraków, 2005, p. 181.

Italy, the Netherlands, the United Kingdom). This type of evaluation is also carried out in relation to regulations established in the EU³¹. It is at the same time an institution with a diverse scope, which makes it difficult to compare its applications, regulations, and effects, as, for example, among the countries applying ex post evaluation in relation to all laws in Denmark, Italy, and the United States, it applies compulsorily, and it always investigates to what extent has the regulation been achieved; whereas in Hungary and Japan, the impact assessment is not relevant³².

The Polish practice of applying RIA has significant weaknesses: the assessment criteria (both ex ante and ex post) are characterized by a significant degree of generality, in which, in practice, the formulation of the assessments of the RIA are too loosely defined, and the scope of the application of this institution is also very narrow. Impact assessment of ex ante regulation is used only for projects on the initiative of the Council of Ministers (laws and regulations) and only at the initial stage of work on the project³³. However, as a model, the basic function of the regulatory impact assessment, especially the one carried out ex post, is to review, analyze, and assess the effectiveness and possible defects of legislation. The process of such assessment carried out under conditions of impartiality and expert judgment, as well as with the participation of all groups of stakeholders, including primarily the addressees of the assessed legal acts, can be considered one of the mechanisms aimed, among others, for reporting by project promoters and legislators on actions taken in the sphere of public authority. It is worth emphasizing that this type of report and its analysis are not intended to enforce the responsibility of these entities, but only to present the actual effects of the actions taken and – in the longer term – their possible correction. This type of mechanism does not fit into the traditionally understood forms of control or legislative function – although it is associated with them. However, its purpose is different, and conducting such assessments has

³¹ OECD (2015), „*ex post evaluation*” in *Government at a Glance 2015*, OECD Publishing, Paris, DOI 10.1787/gov_glance-2015-en.

³² *Ibid.*, Table 8.8.

³³ R. Piotrowski, „Organizacja procesu legislacyjnego”, in A. Malinowski (ed.), *Zarys metodyki pracy legislatora. Ustawy, akty wykonawcze, prawo miejscowe*, Warszawa, 2009, p. 67; see also Wiszowaty, *supra* note 29, p. 44.

a significant impact on the obligations to report not only specific activities or justification, but also to report on their effects. The instruments mentioned above and their functions prove that there is a practical dimension – and a need – to differentiate and thoroughly scrutinize their ability to exercise accountability as such, understood as giving/taking a report – not in the framework of traditionally meant responsibility (political or constitutional).

Another issue of constitutional law that can gain a new dimension through the introduction of the accountability category is the functioning of judicial power. Forms of control over the judiciary have so far been seen mainly as part of instance supervision, i.e. exercised within the framework of the administration of justice by higher courts. The literature also emphasizes the importance of internal accountability that is based on the trust given to the holders of this power³⁴, also from the perspective of selection procedures and judicial administration³⁵. However, most often this issue (also in public debate) is seen in the context of the lack of this accountability, i.e. the inability to respond to the unethical or illegal behaviour of judges³⁶. In the sense assumed herein, while accountability should be understood as a report from the exercise of power, it is practiced under judicial power in another paradigm. It is not about disciplinary or criminal liability or the administrative removal or the transfer of judges, who have been found to be unfair, inefficient, or who do not comply with the requirement of impartiality. These types of sanctions against the misdeeds of the judiciary are an expression of their responsibility in the exercise of office and require evidence of the acts that may give rise to such sanctions. However, accountability in its pure form, i.e. the report of the authority exercised and the justification of the actions taken in its scope, is under judicial authority implemented in the most complete manner among all the branches of power. The justification of the court's ruling is

³⁴ J. Mansbridge, "A Contingency Theory of Accountability", in M. Bovens, R. E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press, 2014, pp. 58–59.

³⁵ M. Fabri, P. M. Langbroek, H. Pauliat, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, 2003, passim.

³⁶ See for ex. *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, International Commission of Jurists, Geneva, 2007.

the form of settlement of the exercise of authoritative activities and this is the most common form of reporting from the entrusted authority. The judicial authority finds the most complete accountability in this sense and is designed for it. At the heart of the exercise of judicial power, therefore, lies its immanent accountability. However, it is implemented through the court's justification of the judgment, provided that certain requirements are met, including its clarity and reliability, i.e. the presentation of the real reasons for the decisions taken, indicating the exact context of the application of legal norms, indicating the reasons and circumstances of giving them meaning (specification), as well as transparent and understandable motives for these activities³⁷. Allegations of a lack of accountability of the judicial authority are therefore justified only if such conditions are not met and the authority entrusting the judicial authority – both the defendants and third parties – is unable to read the full and reliable account of the actions taken. The accountability in the described meaning can be a much more important factor of judicial authority and – in consequence – not diminishing trust in judicial power, than in traditionally meant responsibility, which brings risks and threats for judicial independence.

III. THE IMPORTANCE AND THREATS OF THE ACCOUNTABILITY CATEGORY

Accountability is a concept rooted in the Anglo-Saxon model of entrusting power and the Weberian model of bureaucracy and efficient governance that is based on the assumption of a clear separation of powers and the separation of what is private from what is public. In contrast, the modern way of exercising power differs significantly from this model, and accountability is divorced from power in the context of complexity, multicentricity, ambiguity, the privatization of goals and tasks, competences, the cartelization of political parties, the growing role of experts, who are supposed to absolve and give reasons, and lobbyists.

³⁷ Exhaustively about the requirements of exercising judicial power in the conditions of modern democracy, C. H. Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford University Press, 2015, passim.

It is not difficult to notice, therefore, that accountability is referred to in constitutional and legal contexts, as well as in public debate, usually when it is alleged to be lacking. This applies both to the ability to account for entities exercising power as part of the electoral process, as well as at many levels and governance structures, especially at the transnational level, in the organization of the European Union's authority, but also to non-governmental organizations, which sometimes have a significant impact on those exercising public authority, and also the blurring of the exercising of public authority through QUANGOs – the facade non-governmental organizations, acting as authorities of power with entrusted functions and resources.

The issue of the increased reporting of power is equally dangerous from the point of view of the importance of accountability in democracy. The contemporary world of the media, which makes everyone a sender, informer, and commentator on their own and other people's activities, including a person holding public functions, means that contemporary power is supranational and characterized by an excess of stories about leadership functions. This phenomenon is not only detrimental, but it is also dangerous from the point of view of the quality of power exercised, the defining of long-term goals and achieving them; after all, the rational choice of those in power consists in constant campaigning, not effective governance – it just brings better results³⁸. Such phenomena are accompanied by a reduction in the role of the traditional media, or at least their functioning in the current model, as source knowledge about facts objectified by the plural transfer. The polarization of the media, and the creation of media bubbles and information cascades have caused a change in the rank of content placed on social media, and have led to a drastic decrease in the quality of the cognitive message about exercising power. At the same time, there is a growing epistemic mobilization associated with observing the activities of public authorities, more and more fictionalized – both by their entities and the world of the media. Because of the constant reporting of what seems to be the world of power, perfect conditions arise for the formation of pseudo-

³⁸ Report on such research in B. Daley, E. Snowberg, "Even if it is not bribery: the case for campaign finance reform", *Journal of Law, Economics, & Organization*, 2011, Vol. 27, No. 2.

accountability – the transmission and reception of a highly distorted or even fictionalized version of public authority activities. The effect of this on public debate, which was caused by a crisis of confidence in classical democratic institutions and the model of exercising power in the traditional way, is to blur the standards of exercising public authority, and create an environment in which authentic accountability could easily be forgotten or neglected. The results of this fictionalized and unverified account of power, is that accountability is reduced, leading possibly to frustrated anti-system movements, populism, and authoritarianism. In addition, there may be a degradation of the standards of receiving the report itself – a report on the entrusted authority and confusion of its significant different institutions and procedures: settlement of compliance with the requirements of the process of exercising power or its effects, electoral accountability and accountability implemented in the exercise of mutual relations of public authorities, internal accountability implemented hierarchically or diagonally.

It is therefore necessary to redefine and evaluate this institution using the concepts used by constitutional law.

CONCLUSIONS

The phenomenon of accountability has not been discussed often in research by constitutionalists and, it has rarely been analyzed at a non-contributory level. But the crises of modern democratic countries require us take a closer look at this phenomenon and the functioning of the system of exercising power more closely, from a slightly different point of view than that of the political sciences. The importance of verifiable communication about what is going on with entrusted power in a democratic system is fundamental. This article proves the thesis that this undisputed assumption of constitutionalism, is too often equated with the paradigm of legal or political responsibility – both in terms of electoral accountability and between entities of power. The latter model is oriented towards sanctions – punishment or removal from office. Meanwhile, the accountability category allows for an examination of the report of the power exercised – the conditions for submitting this type of report, and the possibility of its verification by those who entrusted the exercise of

power and their assessment. Is this not scientifically worthless, however, to apply new names to long-known institutions of constitutional law - pouring old wine into new bottles using the pictorial metaphor of Noam Chomsky³⁹? If you follow this metaphor, it is worth conducting such an experiment in order to check whether the category of accountability does not affect the understanding and assessment of the model of political control over the government exercised by the parliament, which is fairly reflective, or the control function of elections. These forms of control are launched in order to trigger certain sanctions through a specific decision, to enforce responsibility, most often in the most severe form in political life, which is removal from power. However, they are exercised under the dictate of the majority, in an atmosphere of confrontation and accusations, which, firstly, reduces their importance in the sphere of real control over the exercise of power, and secondly hinders or even prevents the passing of an authentic and verifiable account of entrusted functions or mandate. On the other hand, the accountability category that requires focusing on reporting and verifying the report in a manner oriented on the content and scope of the entrusted authority, for which it is necessary to meet several conditions, among which is detachment from taking decisions on sanctions as part of accountability, and thus detachment from the requirement to vote according to the majority, the non-confrontational nature and assumed impartiality of this process seem to be the most important. Therefore, if we return to the metaphor cited, accountability is old wine in new bottles. Constitutionalism requires more than electoral confrontation and parliamentary crisis Redefining the method of submitting and receiving reports from the entrusted power in the categories of responsibility hitherto defined by constitutional law science as part of the electoral process and parliamentary scrutiny may take on an unexpectedly bitter taste.

³⁹ N. Chomsky, "Old wine in New Bottles: A Bitter Taste", *Electronic Journal of Radical Organization Theory*, June, 1996, available at: https://chomsky.info/199606_/ [last accessed 08.03.2020].

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