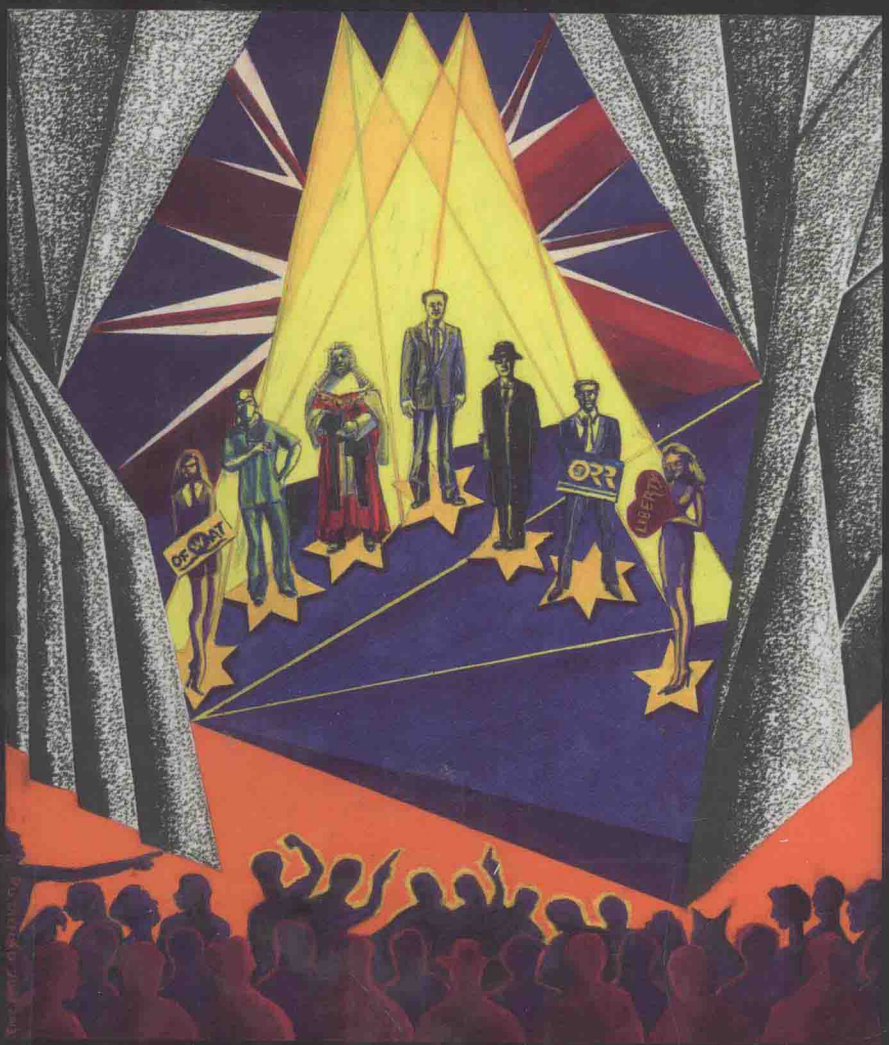
Accountability in the Contemporary Constitution

Edited by Nicholas Bamforth and Peter Leyland



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NICHOLAS BAMFORTH
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Preface

For many years, 'accountability' has been a central term in public and academic debate about the constitutional arrangements of the United Kingdom and other comparable democratic societies. While many high quality academic analyses of the notion of accountability have appeared in particular contexts, the genesis of the present collection of essays lay in a view that the time was ripe to set out a range of informed contributions to debate about the role played by accountability-related ideas in contemporary constitutional law.

Apart from thanking our contributors, we owe a debt of thanks to many people for their support for this project. At OUP, we extend our thanks to Alex Flach, Natasha Fleming, Clare Kennedy, John Britto Stephen and those involved in editorial and production tasks associated with the book. Thanks are also due to Breony Allen and Jack Bradley-Seddon for their work on the indexing. Gordon Anthony, Carol Harlow, Rick Rawlings and Andrew Harding generously offered helpful advice at many points during work on the project, and Aileen Kavanagh and Cheryl Saunders made useful contributions at an early stage. We would also like to acknowledge the help of Sebastian Payne and Colin Scott.

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Finally, both of us would like to extend special thanks to Putachad who interpreted our arguments and debates about the project to create her wonderfully evocative cover design for this volume.

Nicholas Bamforth and Peter Leyland
August 2013

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Introduction: Accountability in the Contemporary Constitution

*Nicholas Bamforth and Peter Leyland**

'Accountability' is one of the more frequently used terms in today's constitutional vocabulary, whether in the United Kingdom, the European Union more broadly, the United States, or other liberal democracies. Interestingly, at least when it is deployed as a normative end-goal, the term seems to find equal favour with those who, in considering arrangements for policing the exercise of governmental power in a democracy, would prioritize the role of elected authorities (in particular the legislature) and those who would prioritize the role of courts. Despite their differences, members of each camp can easily designate their own favoured approach as one which directly relates to accountability, even if they understand that term rather differently when it is explored at a more detailed level. More generally, the term 'accountability', however defined, has come to assume a particular prominence in official, academic and popular discourse concerning matters of constitutional law. As such, a re-examination of ideas of accountability in a constitutional law setting, conducted from a variety of perspectives, seems entirely appropriate. This introductory chapter seeks to sketch out some of the themes relating to debates about accountability in general, and to tie these to some of the specific issues raised and debated in the present collection of essays.

A. Concepts of accountability in the constitution

Ideas of accountability play a prominent role in contemporary discussions of constitutional law and practice, and politicians, judges and other actors tend frequently to claim, whatever the substantive viewpoint or proposal which they advocate, that more or better accountability is their end-goal. Mark Bovens notes that 'what started as an instrument to enhance the effectiveness and efficiency of public governance, has gradually become a goal in itself', and 'an icon for good governance' on both

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sides of the Atlantic.[1] According to Elizabeth Fisher, 'Accountability has become a cherished principle and its importance is [nowadays] being stressed in everything from the provision of public services to criminal justice to transnational governance regimes. It is the ultimate principle for the new age of governance in which the exercise of power has transcended the boundaries of the nation state. It is a pliable concept that can seemingly adapt to novel modes of governing while at the same time ensuring such modes are legitimate'.[2] Anne Davies is clear that 'Accountability is a central value of modern constitutions'.[3] In relation specifically to the United Kingdom, Dawn Oliver has suggested that concerns about securing accountability 'became an issue in politics' in the 1970s, focusing in particular on the government's accountability both to Parliament and to the electorate, and have maintained a central role since then.[4] Colin Scott suggests that from the mid-1980s, 'public lawyers have paid more attention to accountability mechanisms going beyond the parliament and the courts, including grievance-handling, audit and internal review', but have subsequently been faced with greater challenges due to the impact on public administration of New Public Management, with its focus on strategy and economic impetus rather than constitutional constraints.[5] Carol Harlow takes this further, arguing that in the United Kingdom, 'with its current reliance on regulation as a technique of administration, accountability has become something of a fetish'.[6] The most recent sense of accountability is dominated by ideas of audit (associated with New Public Management) and punishment: 'the essential features of every administrative programme are reduced to numbers and evaluated, and every administrative action scrutinized with a view to allocating blame and censure. Transparency has been taken to extreme lengths, and has become a weapon with which the media presses incursions into private life, howling for punitive action and seeking exaggerated redress for the simplest of errors. With this has come a change in public-service values: from public service to management, economy, and efficiency, from trust and discretion to rules and regulation, and above all to quantifiable criteria'.[7]

Against this background, Fisher's reference to 'novel modes' could be felt to have particular resonance. Calls for greater or better accountability have seemingly been fuelled by the expanding opportunities presented by the development of the internet for rapid governmental responses to events, for inter-governmental cooperation, and for public discussion of politicians and government (a point related to the development—in the

[1] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European LJ* 447, 449.

[2] E Fisher, 'The European Union in the Age of Accountability' (2004) 23 *OJLS* 495, 495; note also C Scott, 'Accountability in the Regulatory State' (2000) 27 *JLS* 38, 39.

[3] A C L Davies *The Public Law of Government Contracts* (Oxford: Oxford University. Press, 2008), 92.

[4] D Oliver *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Milton Keynes: Open University Press, 1991), 12.

[5] Scott, 'Accountability', n 2 above, 40. See also Bovens, 'Analysing and Assessing', n1 above, 449.

[6] C Harlow *Accountability in the European Union* (Oxford: Oxford University Press, 2002), 189; note also her assertion, at 6, that 'the terminology of accountability may be a relatively recent arrival'.

[7] Harlow, *Accountability*, n 6 above, 189; see also 18–24. Harlow associates this with what Michael Power describes as the 'audit explosion' (*The Audit Explosion* (London: Demos, 1994), 37–9). As she makes clear at 190–1, she believes the shift towards audit-based accountability in the United Kingdom has gone too far, although she also draws attention at 109–10 to connections between the perceived efficacy of political accountability and national traditions of audit. Elizabeth Fisher has also noted

United Kingdom, at least until very recently—of an increasingly close relationship between politicians and other public servants and the broadcast and print media, coupled with occasional disquiet as to the actions and approaches of journalists[8]). Alongside the rise of New Public Management, the period since the late 1980s has seen the 'hollowing out' of government activity in the United States and the United Kingdom, with central government focusing increasingly on overall policy formation while agencies or privately-owned contractors take responsibility for areas of its execution, sparking debate about how the emerging arrangements can operate in a properly accountable fashion.[9] As Carol Harlow has observed, 'The public wants to know how it is governed; it wants in particular to know how public money is spent and to receive assurances that it has been well spent'.[10] This observation might be applied with equal force, in the contemporary constitutional landscape, to any level of government.

The notion that at least some constitutional actors should be accountable for their decisions and actions is nonetheless an old one. While it may have been assumed, in an age of inherited headships of government, that individuals were accountable to the overlord or dynastic ruler currently in power, the Enlightenment brought with it the idea that legitimate government was conducted, even if not directly by the people, then nonetheless in their interest and ultimately for their benefit.[11] The loose idea that government should properly be conducted in a fashion that was accountable to the general population emerged alongside the gradual extension of the franchise in northern and western countries, and it is hardly novel to employ accountability-related ideas in constitutional law, as well as in relation to the administrative and other legal liability of public bodies and to processes of political and public scrutiny of office-holders. As commentators note, however, ambiguity and uncertainty have long surrounded the meaning and reach of the term.[12] Discussion of accountability begs the question concerning what it means to be 'accountable', which parties an accountability relationship might or must exist between and in relation to which issues, and the sanctions which should be attached to an actor's failure to behave in an appropriate fashion, however this is defined.[13] Furthermore, whether accountability should be policed through the law, through political channels, or through some combination of the two, can be a matter for debate both generally and from situation to situation.

the incursion of accountability concerns into the private sphere: Fisher 'European Union', n 2 above, 499–500, 504; see also Scott, 'Accountability', n 2 above, 39–41.

[8] Most recently in the United Kingdom, see *An inquiry into the culture, practices and ethics of the press: report* (London: The Stationery Office, 2012), chaired by Lord Justice Leveson.

[9] See eg. D Oliver and G Drewry *Public Service Reforms: Issues of Accountability and Public Law* (London: Pinter, 1996), ch 1; Scott, 'Accountability', n 2 above, esp. 44–60; D Woodhouse, 'The Reconstruction of Constitutional Accountability' [2002] 73 *Public Law*.

[10] Harlow, *Accountability* n 6 above, 2. Note also Scott's critique of arrangements at domestic level: 'Accountability', n.2 above, 44–8.

[11] See, generally, Bovens, 'Analysing and Assessing', n 1 above, 448–9; Scott, 'Accountability', n 2 above, 39; Harlow, *Accountability*, n 6 above, 14–15.

[12] Eg. Oliver and Drewry, *Public Service Reforms*, n 9 above, 3; Bovens, 'Analysing and Assessing', n 1 above, 448, 449.

[13] See esp. Scott, 'Accountability', n 2 above, 41–2 ff; Bovens, 'Analysing and Assessing', n 1 above, 450–5; Fisher, 'European Union', n 2 above, 497–8.

At a conceptual level, Oliver has suggested that accountability is associated with responsibility, transparency, answerability and responsiveness, that it is 'explanatory and amendatory' insofar as it is associated with 'being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made',[14] and that it is an ingredient of good governance.[15] Since decision-makers are not infallible, they are required in a liberal democratic polity to justify their acts, provision being made for redress when things go wrong. Oliver argues that accountability 'furthers important objectives. It is supposed to promote openness, effectiveness, and public participation, and it is part of the system for safeguarding an uncorrupt system from corruption'.[16] Accountability mechanisms are central to such concerns,[17] and Oliver distinguishes between four types of mechanism in constitutional terms.[18] First, political accountability is owed to politicians, encompassing ministerial accountability to Parliament (in the United Kingdom) or local authority accountability to central government and Parliament. Under this mechanism, accountable actors and bodies are exposed to possible political censure and electoral risk, with political costs sometimes being exacted at a personal level (for example, via the forced resignation of a minister) if performance falls below the expected standard.[19] Secondly, public accountability is owed to the general public or interested sections of it. Most obviously, elected national and local politicians are politically obliged to explain and justify their actions to electors, with political penalties to be paid at the ballot box if an adequate account is not offered (indeed, the widest sense of accountability might be thought to be linked to the electoral process).[20] Thirdly, public bodies are legally accountable to the courts as an

[14] Oliver, *Government in the United Kingdom*, n 4 above, 22. See also Scott, 'Accountability', n 2 above, 39–40; Bovens, 'Analysing and Assessing', n 1 above, 450–9; A C L Davies *Accountability: A Public Law Analysis of Government by Contract* (Oxford: Oxford University Press, 2001), 75–6 and *The Public Law of Government Contracts*, n 3 above, 67. Oliver and Drewry suggest that accountability is 'the duty to explain or justify and then the duty to make amends to anyone who has suffered loss or injustice if something has gone wrong' whereas responsibility means 'having a job to do, and being liable to take the blame when things go wrong' (*Public Service Reforms* n 9 above, 134), but draw attention to the political and administrative debate concerning the relationship between the two (*Public Service Reforms*, ch.1). Harlow equates Oliver's definition with the rule of law: *Accountability* n 6 above, 144 (see also her broader analysis of Oliver's approach in ch.1).

[15] D Oliver *Constitutional Reform in the United Kingdom* (Oxford: Oxford University Press, 2003), 47; note also the definition advanced by R Mulgan: '"Accountability": An Ever Expanding Concept?' (2000) 78 *Public Administration* 555, 555–6.

[16] Oliver, *Constitutional Reform* n 15 above, 48. See also the association drawn with liberal constitutionalism by Fisher: 'European Union', n 2 above, 496, 500–1, 504. Davies describes accountability in seemingly broader terms, namely as 'a core value in *a democracy* [emphasis added]' (*Public Law Analysis*, n 14 above, 76).

[17] Oliver, *Government in the United Kingdom*, n 4 above, 22–3, *Constitutional Reform*, n 15 above, 48–9; Oliver notes that the range of things for which it is deemed appropriate to designate particular decision-makers as accountable will depend upon one's political philosophy.

[18] See also Bovens, 'Analysing and Assessing', n 1 above, 455–62; Fisher, 'European Union', n 2 above, 501–8; Davies, *Public Law Analysis*, n 14 above, esp. 76–87.

[19] Oliver, *Government in the United Kingdom*, n 4 above, 23–5; *Constitutional Reform*, n 15 above, 49–50. See also Harlow, *Accountability*, n 6 above, 47–52.

[20] Oliver, *Government in the United Kingdom*, n 4 above, 25–6; *Constitutional Reform*, n 15 above, 50–1. See also Harlow, *Accountability*, n 6 above, 168–9.

aspect of the rule of law, being obliged to demonstrate a legal justification for their actions if sued and to make amends if they are found to have acted unlawfully.[21] Carol Harlow has also associated legal accountability, in the European Union context, with proportionality review (given that it requires administrative measures to be appropriate as well as necessary to achieve the desired objectives) and, within limits, with requirements of due process (given that these encourage transparency in decision-making).[22] Fourthly, public bodies are sometimes accountable to non-political governmental bodies such as ombudsmen and public sector auditors, to whom explanations must be provided for their conduct.[23] As Elizabeth Fisher perhaps unsurprisingly notes, a 'resulting impression from reading these categories . . . is that accountability is a series of tools and to make any governing system "better" requires identifying and utilizing the right types of accountability'.[24]

Although Anne Davies has suggested that the fact that government acts on behalf of others 'is closely linked to the particular emphasis placed in public law on the concept of accountability',[25] Colin Scott argues that public lawyers have generally drawn ideas of accountability somewhat narrowly, relating them to the duties formally owed by one specific set of public bodies/actors to another specific set.[26] Whether or not this is correct, Richard Mulgan, a specialist in public policy rather than public law, has advanced the most visibly narrow definition of relationships which concern accountability, warning that 'accountability threatens to extend its reach over the entire field of constitutional design' if its ambit is not properly controlled.[27] Mulgan characterises the 'central sense' of accountability as 'external scrutiny', this being 'only one type of institutional mechanism for controlling governments and government officials'.[28] Other types of control exist—constitutional constraints and legal regulations—but these should not be described as accountability-related. In logic, 'being accountable for alleged breaches of the law does not mean that compliance with the law is also an act of accountability or that the law itself is an accountability mechanism . . . in the core sense. The main body of the law, which most public servants follow as a matter of normal practice' is, according to Mulgan, 'an instrument for controlling their behaviour but not for holding them accountable'.[29] Accountability need not include every mechanism—for example, judicial review, the separation of powers, federalism or the rule of law—which helps control government power. Instead, legal accountability 'is confined

[21] Oliver, *Government in the United Kingdom*, n 4 above, 26–7; *Constitutional Reform*, n 15 above, 51–2. Harlow associates Oliver's definition with procedural constraints as well as remedies (*Accountability*, n 6 above, 146) and contrasts it with Mulgan's approach as articulated in '"Accountability": An Ever-Expanding Concept', n 15 above.

[22] Harlow, *Accountability*, n 6 above, 164–5.

[23] Oliver, *Government in the United Kingdom*, n 4 above, 27–8; *Constitutional Reform*, n 15 above, 52–4.

[24] Fisher, 'European Union', n 2 above, 497.

[25] Davies, *Public Law of Government Contracts*, n 3 above, 67.

[26] Scott, 'Accountability', n 2 above, 40.

[27] Mulgan, 'Ever-Expanding Concept', n 15 above, 563.

[28] Mulgan, 'Ever-Expanding Concept', n 15 above, 563.

[29] Mulgan, 'Ever-Expanding Concept', n 15 above, 564.

to that part of the law which lays down enforcement procedures', with the main body of law serving as an instrument for controlling the behaviour of public servants rather than for holding them accountable.[30] On Mulgan's narrow view, only institutions such as audit offices, ombudsmen and administrative tribunals are properly described as institutions of accountability, given that their 'primary function is to call public officials to account'.[31] Other institutions, including legislatures, may adopt an accountability role, but it is not their *exclusive or primary* purpose (within a legislature, accountability is associated with Select Committee inquiries and the questioning of ministers, but legislatures also perform other central functions, including passing legislation). Similarly, while holding government officials to account for their actions is one important function of courts, it is not necessarily a *defining* role of the legal system or of courts in general.

Debate thus exists about the range of relationships which should properly be categorised as concerning accountability. A separate but related issue concerns which form(s) of accountability should be prioritized. Dawn Oliver notes that '[t]he question of to whom accountability is owed is often crucial, as is the design of the mechanisms of accountability, to the good working of the constitution. Choices have to be made about the balance between the different forms of accountability—whether legal accountability is to be preferred to political accountability, or whether a number of forms of accountability can operate in parallel'.[32] Anne Davies associates political accountability with the government's accountability to Parliament for the merits of decisions, and legal accountability with the standards applied by courts to test the legality of such decisions. She also emphasizes the importance, in the constitutional setting, of accountability to the public, whether through the ballot box or participation in the decision-making process.[33] Different forms of accountability—accountability being tied (on this view) to the promotion of the public interest and the justification by public bodies of their actions, to the modification of policies which turn out not to have been well-conceived, and to the making of amends where there have been mistakes or misjudgements—may have advantages and disadvantages in different contexts,[34] even if the term 'accountability' might at the most general level be associated with matters of institutional design relating to the 'rule of law' values involved in democratic government. Debates about the meaning of accountability are crucial to furthering such values at both macro- and micro-levels and thus play a large role in many of the essays in the present collection, as does the distinction between different forms of accountability.

[30] Mulgan, 'Ever-Expanding Concept', n 15 above, 564.

[31] Mulgan, 'Ever-Expanding Concept', n 15 above, 565. Accountability is also to be distinguished from 'responsiveness' and 'dialogue': n 15 above, 566–72.

[32] Oliver, *Government in the United Kingdom*, n 4 above, 28. See also *Constitutional Reform*, n 15 above, 54–6. Note also Bovens's bases for assessing accountability: 'Analysing and Assessing', n 1 above, 462–7.

[33] Davies, *Public Law of Government Contracts*, n 3 above, 67 and ch.4.

[34] Oliver, *Government in the United Kingdom*, n 4 above, 30; see also *Constitutional Reform*, n 15 above, 55–6. Compare Harlow, *Accountability*, n 6 above, 165–7.

Nonetheless, as is evident from Richard Mulgan's arguments, some theorists are concerned about the potential looseness of accountability language, and have called for proper controls to be imposed upon its usage. Mulgan himself notes that it is 'now a commonplace' that '"accountability" is a complex and chameleon-like term' which 'crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the major burdens of democratic "governance" (itself another conceptual newcomer)'.[35] Mark Bovens suggests that accountability 'is one of those golden concepts that no one can be against', while being 'a very elusive concept because it can mean many different things to different people'.[36] It is 'one of those evocative political words that can be used to patch up a rambling argument, to evoke an image of trustworthiness, fidelity and justice, or to hold critics at bay.... As an icon, the concept has become less useful for analytical purposes, and today resembles a dustbin filled with good intentions, loosely defined concepts and vague images of good governance'.[37] Carol Harlow talks of its 'current catch-all meaning',[38] the practical implication being that accountability might be seen, alternatively, in an all-things-to-all-people sense, in narrowly audit-focused terms, or by prioritizing the political.[39]

Given the range of contexts in which the term 'accountability' is now used, concerns of the type just articulated may to some extent be inevitable. Nonetheless, it is clearly important—in order to avoid undue ambiguity in constitutional analysis—to keep them fully in mind when considering how ideas of accountability are defined and applied, and when asking whether they play a valuable role. This point certainly applies when considering the essays in the present collection.

B. Accountability in the contemporary constitution

Turning now to the individual contributions, it should be stressed that the concern in this collection is not to investigate accountability from the perspective of political science, but rather to develop the idea in the context of constitutional and public law (UK constitutional and public law in particular). As noted earlier, for public lawyers one of the deeper arguments about the proper or best understanding of accountability lies between those who advocate the prioritization of accountability through political mechanisms and those who would prioritize legal accountability. This sometimes feeds through into the many key questions concerning the contemporary constitution which can be seen through the lens of accountability: or, more

[35] Mulgan, 'Ever-Expanding Concept', n 15 above, 555.

[36] Bovens, 'Analysing and Assessing', n 1 above, 448.

[37] Bovens, 'Analysing and Assessing', n 1 above, 449; see also 467. Although the definition of accountability proposed by Bovens seems in practice to be akin to Oliver's, he also argues against *equating* accountability with transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity, perhaps leading to ambiguity given that Oliver *associates* the concept with responsibility, transparency and answerability (alongside the public interest).

[38] Harlow, *Accountability*, n 6 above, 23.

[39] Fisher, in 'European Union', n 2 above, 499–500, also notes the broad and fluid nature of the term.

exactly, via debates about its meaning. Many of these questions were highlighted in the previous section, and include in particular the definition of accountability (if an exact definition is possible), its role in relation to institutions and values, and whether accountability is better promoted in the constitutional context through the courts, political institutions or a combination of the two. The collection thus opens in Part I with arguments from a variety of theoretical perspectives: historical, comparative, constitutional and philosophical. In Part II, the focus shifts more specifically to courts, and in Part III to the legislative and executive branches of the state. In Part IV, the interplay between the legislature, executive and judiciary in contemporary constitutional arrangements is considered, and in Part V other specific areas are analysed from an accountability standpoint. In each part of the collection, though, the contributors seek to tie discussion to general views of accountability. Of course, it is inevitable that there are considerable overlaps between the material in the different Parts, in particular given the extent to which theoretical and practical analyses interact. The Parts are intended merely to provide a loose ordering so as to assist with navigation around the diverse ideas which arise in the course of the discussion.

In Part I, John Allison revisits the work of the nineteenth and early twentieth century theorist A V Dicey, presenting new arguments about Dicey's perspective concerning legal accountability, while Mark Tushnet explores accountability and the nature of judicial decision-making from the standpoint of a political conception of law.

Allison[40] seeks to explore the dichotomy between legal and political accountability by focusing in particular on Dicey's historically neglected focus on the legal spirit of the constitution, by which he meant the way in which the persons of the time looked on their institutions and expected them to work (Dicey thus believed the spirit of the English constitution to be legal rather than military or civil administrative). Allison suggests that each possible spirit corresponded to a different idea of accountability. Legal accountability, corresponding to the legal spirit, was owed by officials to independent judicial authorities (rather than a specialist administrative court) acting according to due process and established rules and principles. While Dicey anticipated political accountability through constitutional conventions, its role was sidelined in his account, helping to entrench the legal/political dichotomy taken up by later scholars. Allison also suggests, though, that it is important to view Dicey's arguments in context. When Dicey was writing, university-level legal education was only just emerging in the United Kingdom, helping to explain what might nowadays be seen as his undue focus on the purely legal. Furthermore, his characterization of the spirits of different constitutions seems to involve understandings of the idea of national character which would nowadays be seen as artificial. Allison argues that over time, Dicey was forced to acknowledge the existence of certain civil administrative elements in the English constitution, but that the role of those elements was broader and far stronger than he was prepared openly to acknowledge. Military elements also emerged with the two world wars

[40] JWF Allison, 'The Spirits of the Constitution'.

and the courts' reactions to challenges to government actions related to those wars. In reality, Allison concludes, the twentieth century witnessed the emergence of a trichronic constitution—that is, with all three elements characterised by Dicey as belonging to different constitutions—and it is appropriate to think in a more balanced fashion about the accountability arrangements in play. With this in mind, he details at length the gradual move among public law scholars away from paying lip-service to Dicey's account through to moving wholly beyond it or rejecting it. Analysis of ideas of accountability, on this view, clearly plays an important part in our understanding of the development of public law thought.

Mark Tushnet's essay[41] engages with accountability from a comparative and political rather than directly historical perspective. Tushnet's central question concerns how judges on the highest (apex) courts are made accountable as part of a constitutional system. The question is posed on the assumption that such judges wield political power, particularly when exercising discretion. This point in itself raises accountability issues which cannot easily be answered, because it is recognised that to make judges directly accountable might threaten to undermine their independence. As a result, Tushnet's essay not only provides an assessment of the effect on accountability of institutional features, including the control of judicial salaries, judicial tenure and the mechanisms for judicial appointment (including the case for election), but also analyses from a comparative standpoint how judges in the United States and other jurisdictions are made directly accountable to the law. Tushnet contributes to the debate concerning approaches to the judicial reasoning process with reference to recent decisions of the Supreme Court in order to better understand what legally restrains judges from making entirely personal judgments. Is it, for example, because there are 'right' answers in the law, or is it merely because a decision is simply in an abstract sense palpably legal? Tushnet reasons that there are too many potentially 'correct' decisions for 'correctness' to be the criterion for accountability to law, except in the weak sense that a judge is accountable to law where his or her decision falls within the (often wide) range of reasonably defensible legal interpretations. It goes without saying that constitutional theory and legal theory are heavily intertwined. With this in mind, Tushnet's arguments might be said to be deploying a particular account of the nature of law in order to explain a theory of constitutional accountability.

In this regard, there are direct links between Tushnet's account and the essays found in Part II—although in these latter essays, by Trevor Allan, Sandra Fredman and Jeff King, it might be suggested that arguments concerning the nature of law are slightly more implicit, the foreground concern being to offer an analysis of judicial accountability within the context of constitutional theory (in the essays found in Part III, in turn, a theoretical dimension is still important, but attention is concentrated still more visibly on the consequences of theory for judicial accountability in practice).

[41] M Tushnet, 'Judicial Accountability in Comparative Perspective'.

Allan[42] seeks to defend a legal constitutionalist view of accountability and legitimacy. He characterises the rival political constitutionalist view (associated with, among others, Mark Tushnet), which he rejects, as associating administrative legality with conformity to statutory standards. Legal constitutionalists, by contrast, understand administrative legality or accountability to law as entailing the judicial enforcement of rule of law-based values of fair or just treatment. The debate between these schools, and between rival legal constitutionalist views, depends on our understanding of the concept of law, and in turn of executive accountability to law. Allan suggests that whereas political constitutionalism sees law as a tool for the execution of political goals, common law constitutionalism promotes accountability to law as a moral vision of law related to liberty and justice. Similarly, in enforcing principles of legality through judicial review, the courts are seeking to identify the boundaries of legitimate state power, rather than to usurp other institutions.

If, as Allan suggests, law is always an interpretation of the demands of legality, positivist concerns about the sources of law are superfluous. From Allan's non-positivist perspective, accountability to law entails conformity to the constitution of a free society, different types of legal power being read in the light of that tradition. In supervising the legality of administrative action, a court must construct the character of the jurisdiction under review by reference to independent standards of legality as well as legitimate public purposes. Courts seek to find coherence within legislation and judicial precedent. Allan seeks, against this background, to interpret debate about the rule of law and about the role of the common law as opposed to legislative intent as the basis for judicial review of executive action. He suggests that the demands of legality are met by bringing common law principle to bear (via interpretation) on statutory functions, avoiding an unhelpful competition between competing sources of law.

For Allan, judicial review of executive action is thus based on the principle of legality, which is closely linked to the political values of freedom and justice. Accountability to law means more than compliance with positive law: it informs and guides interpretation of the law, amounting ultimately to respect for law and legal process. Allan is thus seeking to tie his approach to judicial review and (more theoretically) accountability to law to his rejection of a positivist conception of the nature of law. This is connected in turn to the idea that government (and implicitly Parliament) is being made accountable to the idea and the ideal of legality, linked to the rule of law, and that the standards of judicial review reflect this. His account is thus normative and interpretive, tying accountability to the nature of public law and of law more generally.

The background to Sandra Fredman's essay[43] lies in the debate between legal and political constitutionalists. Some commentators have tried to move beyond the sharply-delineated boundaries in this debate: for example, 'dialogue theorists' have characterised certain pieces of legislation, including the Human Rights Act 1998 in the United Kingdom, as dividing the protection of individual rights between the

[42] T Allan, 'Accountabilty to Law'.
[43] S Fredman, 'Adjudication as Accountability: A Deliberative Approach'.