Chapter 6

Collaborative Constitutional Accountability

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So far the chapters in this collection have ranged far and wide as they have covered a number of 'questions of accountability'. This has included discussions of disciplinary perspectives and methods (Chapter Two), the use of accountability as a buzzword (Chapter Three), the challenges of measurement within debates concerning deficits and overloads (Chapter Four), and the extent to which 'fuzzy law' facilitates 'fuzzy accountability' (Chapter Five). What has united each of these chapters has been, apart from an emphasis on 'cool theory' over 'hot rhetoric', an emphasis on proportionality and balance. As such, they have engaged with the navigational challenge outlined in Chapter One (above) by forging new routes through the existing scholarship in ways that pose fresh questions and, in some cases, new answers to perennial challenges. This chapter seeks to continue this process and to develop the focus on balance, blending and proportionality by exploring a novel way of looking beyond dominant existing debates. It does this through a focus on *collaborative constitutional accountabili'y.*

Questions of accountability under the UK constitution typically involve debate over political and legal constitutionalism. The two ideas are presented as competing opposites, with political constitutionalists advocating political controls exercised by political institutions and legal constitutionalists privileging the role of law and the courts in regulating state power. While some of the core features of this debate are useful in helping us work out the landscape of the British constitution, the course of the debate has become too polarised. This polarisation has, at times, obscured points of commonality between the two models of constitutionalism and distracted us from important questions about the actual nature of interactions between institutions, the values that the constitution does, and ought to, uphold and the real-life impact of constitutional norms and decisions on society.

Partly in answer to this polarisation, and its negative effects on constitutional discourse, some commentators now advocate a more collaborative vision of the constitution. Instead of viewing different elements of a constitutional configuration as somehow co-existing in a state of constant antagonism, this approach moves away from what tend to be highly polarised conceptualisations and instead focuses on the mutually supportive and sustaining nature of interlocking accountability institutions and relationships. In this sense, collaborative accountability is more systemic in approach and dovetails with analyses that focus on the 'accountability space' (Dubnick, 2011) or more specifically the 'accountability ecosystem' (see Halloran, 2016). This chapter synthesises and advances the collaborative approach and adds to the literature by providing evidence of constitutional collaboration in practice. The three main questions this chapter seeks to engage with can be set out as follows:

1. What are the contours of the conventional accountability debate in the UK?

2. What are the core constitutive features of collaborative constitutional accountability and how does this approach facilitate a more sophisticated understanding of the changing nature of democratic governance?

3. Where is the evidence that collaborative constitutional accountability is emerging in the practice of constitutional actors?

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This chapter is divided into three main sections, each focusing on one of the questions outlined above. As such, the next section outlines conventional UK accountability discourse and explains the need for a change in approach.

I. Political *or* Legal Constitutionalism

Khaitan (2019, 349) argues that "In a liberal democratic constitution institutional accountability is the main guarantor of liberal and democratic guarantees.' That accountability is performed through a web of institutions, processes and relationships. Constitutional accountability therefore encompasses an intermixture of legal and political checks, both to ensure that state organs fulfil their constitutional responsibilities and that they act consistently with the fundamental principles of the constitution. As such, the entire web or network of institutional checks operating in modern constitutions form an integral part of liberal constitutionalism. However, accountability mechanisms for executive power are particularly essential in both enabling the fulfilment of constitutional objectives and restraining unconstitutional exercises of power. The executive has been justifiably described as 'the most dangerous branch' (Flaherty, 1996) of government due to the manner in which the growth in the size and scope of the modern state has generally empowered the executive, often without counter-balancing increases in the power of other constitutional actors. This explains the arguments about 'constitutional balance' that have been made by Sir John Laws (see Chapter One, above), and also why theories and doctrines – as well as research and writing - tend to focus on the accountability of the executive.

This concern is particularly pronounced in relation to 'Westminster-style democracies'. As Gardbaum (2020, 1,438) explains:

> [I]in parliamentary systems...the absence of direct public election, and the less institutionally separated power, of the executive means that political accountability and responsibility to the legislature play a larger role in legitimating its exercise of public power.

UK constitutional discourse on the accountability of the executive customarily involves adopting either political or legal mechanisms of accountability. Although the debate between these two accountability frameworks has been present either on the surface or as an undercurrent in UK constitutional law for decades, recently it has become more prominent. Specifically, the debate is now prevalent in conversations about the role of the courts, the foundations and principles of judicial review and the common law constitution. This, in turn, has raised critical 'questions of accountability', while also reflecting the existence of a more generalised 'accountability angst'.

Each model of constitutionalism (i.e. *political* or *legal*) has both descriptive and normative dimensions. Political accountability prioritises the use of political norms such as constitutional conventions, with regulation by political actors and arenas. Notable political constitutionalists, whose worked helped shape the doctrine and guide its direction, include Griffith (**Griffith 1979**), Bellamy (**Bellamy 2007**), Tomkins (**Tomkins 2007**), Gee and Webber (**Gee and Webber 2010**). Under the political constitutionalist model, democracy is the primary value and, in the UK, and the principle of parliamentary sovereignty is as Ewing (2018) notes, 'the core legal principle of the political constitution.' First, democracy supplies the normative underpinning for the political constitution; as Michael Gordon (2019, 231) explains, '[i]t is the legitimacy of majoritarian democratic politics, which provides the principled rationale for political constitutionalism.' Secondly democracy provides the conditionality for the exercise of power: 'what receives democratic support, in principle, can be achieved; what does not receive democratic support, in principle, cannot be achieved' (Gordon, 2019, 131). The argument for political methods of accountability is not merely based on normative preference but also, as Griffith (2001) has argued, on assessments of the relative effectiveness of political modes of accountability. Thus, political accountability is said to be more effective because it is ultimately secured by the removability of politicians (for a discussion see Goldoni and McCorkindale, 2019; Griffith, 2002). Legal accountability mechanisms are from this perspective viewed – as Griffiths underlined in his classic 1979 article 'The Political Constitution' - as anti-democratic and ultimately dangerous, as politically illusory and offering false comfort.

The political constitutionalist model, as observed in the UK, also requires respect for the supremacy of parliament as the unassailable and most fundamental rule of the constitution (see Ewing, 2013). Specifically, parliamentary sovereignty has been positioned as central to the accountability of the executive. As Ewing (2018) notes, 'The legal principle of the sovereignty of Parliament provides both the source of legal authority, and the source of legal restraint of the power of government in a political constitution'. Gordon (p.142) goes even further to note that parliamentary sovereignty does more than empower public authority; it also facilitates the accountability of public power 'by preventing the emergence of absolute legal limits, and thereby establishing room for politics.'

Legal accountability, on the other hand, urges the development and use of legal norms to regulate the executive, and in some accounts, the legislature. The focus and starting point for legal constitutionalists is the imperative of fundamental principles such as the rule of law and respect for human rights. Law becomes centralised under more ardent legal constitutional theories, with Allan (2013, 77) maintaining that 'accountability means, above all, compliance with the rule of law.' For legal constitutionalists- including Allan (**Allan 2013**), Craig (**Craig 1998, Craig 2000**), and Laws (**Laws 2014**) the courts ought to play a significant role in defining the terms of the constitution and ensuring that state organs comply with constitutional principles and rules. Moreover, under the legal constitutionalist model, 'Courts go beyond merely supplementing the legislature's control over the executive'. As Young (2017, 58) notes, this model maintains that 'courts have their own, independently justified controls'. Legal constitutionalism does not deny the operation or role of politics, neither does political constitutionalism deny that there is a place for law in the constitution. Rather, the division is a question of priority.

There is an understanding in the UK that political accountability represents the dominant constitutional orthodoxy in the sense that the constitution *is* and *ought to be* predominantly political. Judicial accountability is therefore a secondary and subservient process to the primary role that forms of political accountability play. Against this background, legal accountability can be accommodated within the orthodox political framework but must be rigorously justified when used. This perspective and the accompanying desire to restrain legal constitutionalism motivated the responses of Griffith (**2000**) and Tomkins (**2005**) to waves of 'legalisation' of the UK constitution. Over the years, the debate between political and legal constitutionalists has become polarised and at times febrile. It has become a debate typified by 'hot rhetoric' rather than 'cool theory'. As Young (2017) has illustrated, the discourse is populated battle-laden metaphors intertwined with reductionist accounts that reduce opposing viewpoints to little more than caricatures. This state of affairs has undoubtedly arisen in part as a consequence of constitutional reforms that have, as Flinders (2005; 2010) has shown, undoubtedly shifted the nature of the British constitution towards a form of 'modified majoritarianism' where the potential for judicial ventures into political or politicised areas had increased.

Yet the real issue regarding varying accountability mechanisms is one of *priori'y, not exclusivi'y*. Accordingly, binary discourse is generally unhelpful and too crude to capture the more subtle interplay of multiple and multi-layered relationships. However, as the current nature of the debate often presents political and legal actors as opponents (see, for example, Ekins 2019, Loughlin 2020, Craig 2020), it runs the risk of obscuring areas of- and the potential for- cooperative engagement and diverting attention away from the constitutional principles at stake.. There is some recognition within each 'camp' that the dichotomised framing and debate may have diminishing returns. For instance, Goldoni and McCorkindale (2009, 74) identify what they see as a third wave of political constitutionalism which seeks not to defend political constitutionalism against legal constitutionalism, but to contemplate 'what it is that is political about the political constitution.' For Goldoni and McCorkindale (2009, 74-75), the implications of this wave could include 'the freeing up of a political constitutionalism fixated on the role of Parliament vis-à-vis the courts in order to examine a broader and a more deep set of constitutional questions.' In this vein, Gee and Webber (2010, 12) have cautioned that political and legal constitutionalism are not realistic objectives or observed in practice in any one jurisdiction, but that they provide 'an explanatory framework' for understanding and evaluating constitutions. Nonetheless, as Kavanagh (2019, 62) explains, this 'approach nonetheless perpetuates the problem of polarisation engendered by the very idea of two separate, one-dimensional models.' There is also lip service to the rejection of a perception of judges and political actors as rivals. It is in exactly this vein that Ekins (2019, 11) notes that 'Judges and parliamentarians are not and should not be rivals.' However, this statement was made in a report that referred to the *Miller II* prorogation judgment (discussed

below) as 'an affront to the political constitution' (Ekins, 2019, 13) and recommended that Parliament legislate to increase ministerial involvement in judicial appointments, and rename the Supreme Court in order to address concerns about 'constitutional primacy'. Such language unhelpfully reinforces a confrontational positioning of legal and political institutions.

Moreover, despite intimations of a critique of the legal-political constitutionalism divide, there are at least two reasons that a new paradigm (i.e. *collaborative constitutionalism*) is needed. Firstly, the main contemporary political constitutionalists, a group of scholars and practitioners who tend to orientate themselves with the Judicial Power Project, continue to issue scathing and sometimes vitriolic critiques of assertive judicial review that very much echo battle metaphors and antagonism. As a result, although the existing research base does contain concern about the need to move beyond an adversarial and generally aggressive binary vision of the constitution, the 'rivalry' framing persists. To be clear, there is no expectation or desire to jettison conflict and debate; conflict is a *sine qua non* of constitutionalism and governance in a modern state. What is mooted is an approach to the inexorable conflict of modern constitutional governance that focuses on constitutional principles and objectives and the well-being of the people, rather than institutional posturing. Secondly, subtle acknowledgement of the flawed nature of the current debate is welcome but insufficient. There is a need for a theory -or theories- that offers a reconfiguration of our understanding of accountability in the UK constitution. Collaborative constitutionalism is one such proposal that may shift the discourse in a more fruitful and realistic direction.

The aim of this section has been to explain, compare and contrast two main forms of constitutionalism – *political constitutionalism* and *legal constitutionalism*. The key distinctions between these two visions concern power and position and the question of which constitutional actors sit at the apex of a polity-elected politicians or appointed judges. The main argument of this section has been that the existence of a binary either/or debate has generally been unhelpful in terms of promoting a deeper understanding of longstanding questions of accountability that urgently need, if not answering, then at the very least *re*conceptualising to facilitate new perspectives, choices and understandings. In this context, collaborative constitutionalism provides just that fresh approach. The features and merits of the collaborative approach form the focus of the next section.

II. Collaborative Constitutionalism

This chapter advocates a move *beyond* the divide between models of political or legal accountability. It argues in favour of a reframing of language, debate and discourse around constitutional accountability. Movement in this direction has in recent years been promoted by a number of leading scholars, including Eoin Carolan (2015), Alison Young (2017) and Aileen Kavanagh (2019, 2023), and although variations in approach and emphasis exist it is possible to identify a number of common features. First and foremost, collaborative constitutionalists reject the polarity between legal and political accountability mechanisms, arguing that the debate often over-simplifies each set of mechanisms. Instead of focusing on conceptualisations of 'dominance' and 'supremacy', collaborative constitutionalism encourages 'fruitful conflict' (Carolan, 2015) and mutual constructive engagement between institutions with differing priorities and perspectives. Though conflict remains a feature of constitutionalism under this approach, there is no expectation that conflict will result in battle or lead to a final winner-takes-all result. Instead, constitutional collaboration 'discourages', as Carolan (2015, 226; see also Benhabib and Fredman, 1994; Fredman, 2013) notes, '… [us from reducing] constitutionalism to a conflict between the Politician and the Judge. Secondly, these authors focus on examining the *actual* day-to-day interactions between the central institutions of state as they occur in the real-world Collaborative constitutionalists depart from a fixation on models or ideal types, as models are too remote from- and indeed distract from- the actual dynamics that occur in the lived life of the constitution. While acknowledging that they are 'highly stylised' and admitting that neither can be fully realised in practice, Gee and Webber (2010, 298) defend the value of models on the basis that they can at least provide an organising perspective through which some understanding of the constitution might be secured. The risk, however, is that such perspectives become reified as theoretical anchor points that become difficult to recast or move, a dynamic which might, in turn, might explain some of the more stringent critiques of recent Supreme Court decisions. Further, models do not have superior evaluative

value in instructing us about the *objectives* of the constitution or effective means of pursuing and protecting constitutional values, let alone measuring or gauging success or failure (a theme that takes us back to themes raised in Chapter Three about 'false promises' and Chapter Four about measurement). The core contention of collaborative constitutionalists is that by shifting the analytical focus away from models and towards what actually happens in the sphere of public governance, we have a clearer view; we can observe the institutions of state working interdependently in furtherance of the fulfilment of fundamental public values.

This is not to suggest that institutional actors may not disagree about how to achieve or uphold specific values, or even how and whether a precise constitutional balance should be struck. But collaborative constitutionalism does start from the basic position that: 'In the working constitution, all three branches of government have to work together, collaborating at a respectful distance in the general promotion of important public values Kavanagh (2019, 66).' So, for instance, expressed in terms of adjudication, courts will recognise the importance of parliamentary will as an expression of democracy and seek to give effect to parliament's intentions as expressed through legislation. However, alongside this effort, courts will also seek to give effect to fundamental constitutional rights and principles by conditioning their interpretation of legislation by reference to these constitutional norms.

Collaborative constitutionalism sits alongside related theories such as the New Commonwealth Model of Constitutionalism articulated by Gardbaum (Gardbaum 2013), bipolar sovereignty championed by Stephen Sedley and CJS Knight (Sedley 1995, Knight 2009) and the 'mixed constitution' recently suggested by Tomkins **(Tomkins 2013).** These theories all recognise that the realities of modern constitutional practice require a complex, non-dichotomised understanding of institutional relationships. Yet, despite common themes that connect these views with collaborative constitutionalism, collaborative constitutionalist theories seek to move beyond the conceptual assumptions on which these cognate theories rest. For instance, Gardbaum's model still accepts the utility of political and legal constitutionalist models and places the new commonwealth model along a spectrum that is partly defined by the political and legal ideal types. On the other hand, one of the appeals of collaborative constitutionalism is the opportunity to look beyond both polarised models and hierarchical constitutional orderings.

In sum, collaborative constitutionalism involves four core features:

1. Overlapping and inter-mingling legal and political norms and methods;
2. Each institution conducts its own accountability processes and according to its own normative priorities;
3. Each institution's **[which]** accountability process allows space for other institutions to contribute to deliberative engagement and resolution of issues and
4. There is no requirement for one institution to be supreme or have the final word- this is in partial recognition of the ongoing nature of constitutional disputes.

There are several reasons to support this collaborative constitutionalist framing. The first is that it arguably provides a more convincing and realistic account of constitutional developments in the UK from the 1950s onwards. That period has seen the expansion of judicial review, the incorporation of European Union (EU) law through the *European Communities Act 1972* (along with the adoption of EU law supremacy), and the duty of the courts to reinterpret legislation to achieve rights consistency under the *Human Rights Act 1998*. These changes have all seen a flow towards greater legal control within the constitution which has, to some extent, inevitably increased the visibility of the judiciary vis-à-vis the executive. And yet this process has occurred *within* the edifice of the traditional political constitution. This process has been analysed and discussed by Matthew Flinders (2008) through the concept of 'bi-constitutionality' The impact of these changes means that an account of the constitution as strictly political does not work, but neither does an account that sees the constitution as overwhelmed by legal norms and actors. An understanding of the constitution that embraces an interdependent and mutual relationship between the branches of state - as this chapter's focus on collaborative constitutionality does - is a much less convoluted and more realistic way of explaining current rights arrangements under the *Human Rights Act*, common law developments, as well as the relationship and between the UK and the EU as channelled through the *European Communities Act* and *European Union Withdrawal Act*. Second, a collaborative understanding of accountability mechanisms

is also more conducive to the safeguarding features of constitutional*ism*. An understanding that there are several sites of accountability across the constitutional landscape facilitates a failsafe in case of the failure or inability of one site to supply the requisite safeguards. One of the analytical benefits of collaborative constitutionalism, as noted for instance by Carolan, is that it looks beyond a dyadic vision of the constitution as divided between Parliament and the judiciary and engages with the accountability role of the executive. Nonetheless, the theory is most convincing and most useful in its conceptualisation of the relationship between Parliament and the courts. Specifically, it is a useful frame for understanding the dual functions of the political and legal arms of the state in holding the executive to account. It could be argued that both political and legal constitutionalism already accommodate some capacity to appreciate such parallel processes. Collaborative constitutionalists, however, might reject such a suggestion on the basis that the fixation with dominance and supremacy within and between those competing visions effectively crowds-out the space for a more mature and sophisticated focus on systemic inter-dependencies and value.

Building on this conceptual groundwork, the next section moves from theory to practice by exploring how collaborative constitutionalism takes practical form in relation to both political and judicial action.

III. Collaborative Constitutionalism in Practice

Chapter One of this book suggested that 'accountability angst' was rarely addressed through simplistic statements about 'more' or 'less' but was, in reality, more concerned with issues of blend, balance and proportionality. The way this chapter has cut into this discussion is by seeking to dissect or look beyond questions that explore either 'the demise of the political constitution' or the 'emergence of legal supremacy'. A focus on collaborative constitutionality, it has been argued, provides a far more accurate and constructive account of constitutional relationships. The aim of this concluding section is to demonstrate this argument through a brief focus on collaborative constitutionalism in political practice and then on a collaborative turn in the courts.

Collaborative Constitutionalism in Political Practice

The evolution of political accountability methods reveals the co-existence and interdependence of legal and political standards, the mutual influence of legal and political characteristics and the development and increase of political scrutiny alongside legal scrutiny. Political accountability systems have steadily been adopting – or accommodating – 'legal' solutions and influences. Processes for parliamentary accountability now recognise explicitly legal constitutional concerns through the mandate and work of the Joint Committee on Human Rights (JCHR) and the Constitution Committee in the House of Lords, both of which simultaneously conduct activities through a political process that takes account of wider constitutional concerns.

The Constitution Committee's appointment in 2001 demonstrates that a period of 'legalisation' of the constitution -through, for instance, the Human Rights Act 1998, the devolution statutes and more intrusive judicial review- was accompanied by a broader shift towards assessing and evaluating the constitutional implications of government proposals at the pre-legislative stage. The Constitution Committee's various reports have all in their own ways sought to increase *ex ante* accountability of the government's plans. For instance, the Committee has emphasised 'the importance of Cabinet government and the essential role that the Cabinet committee system plays as part of the system of collective ministerial responsibility' (Cabinet Office, 2010). By also pushing for a 'clear and consistent process' for introducing and enacting major constitutional reforms the Constitution Committee has sought to bolster parliamentary or 'political' accountability. And yet at the same time by seeking to ensure that legislation with potentially far-reaching constitutional implications is subject to closer inspection and review, this process also limits the need for exercise of judicial accountability as clear and constructive pre-legislative scrutiny is likely to reduce the number of subsequent judicial review challenges. In this sense 'good scrutiny makes for good governance' as Robin Cook, Leader of the House of Commons from June 2001 to March 2003, was fond of saying (see Evans, 2019).

The parliamentary role in protecting constitutional standards is also highlighted by the JCHR. Its articulation of parliamentary responsibilities and activities reflect a collaborative understanding of the relationship between judges and political actors, with the ultimate objective of respecting human rights standards. The Committee has therefore avowed the basic principle that 'the will of Parliament includes an intention that legislation should not be incompatible with Convention rights', noting that the Government's intention 'that new Bills brought before Parliament should not be incompatible is made clear on their face.' (see HC89/HL31, 2021-22, 36-37). In relation to the legislature's interaction with the courts, the JCHR has rightly noted that Parliament's 'central role' in protecting rights continues *after* an adverse human rights judicial decision as Parliament then needs to scrutinise the government's response and determine whether a change in law is necessary. In its second report of the 2009-10 session (HL 10/HC 92, para.22) the JCHR explained that 'Parliament is central to the *Human Rights Act*. Ministers must report on the human rights compatibility of every bill and it is Parliament, not the courts, which must decide how to deal with legislation which is not compatible with the Act.' The Committee's report on Enhancing Parliament's Role in relation to Human Rights judgments maintains that:

> [I]n many jurisdictions with constitutional bills of rights, courts are deemed to have a monopoly of interpretive wisdom and there is little scope for parliamentary involvement in ensuring that the executive complies with the supreme judicial will.
>
> Under the UK's institutional arrangements for protecting human rights, however, Parliament, as well as the courts, has a central role to play in deciding how best to protect the rights which all are agreed are fundamental. This means that in our system, when a UK court decides that a law, policy or practice is in breach of human rights, Parliament still has an important role to play in scrutinising the adequacy of the Government's response to the judgment including, in some cases, asking itself whether a change in the law is necessary to protect human rights and, if so, what that change in the law should be.

The JCHR 'undertake[s] the lion's share of Parliament's scrutiny of the Government's performance on human rights issues' and it has a broad remit to consider 'matters relating to human rights in the United Kingdom'. In light of the design and role of the JCHR, it is unsurprising that the Committee has been described as part of a 'quasi-judicial' approach to parliamentary scrutiny (see Klug Wildbore, 2007), while at the same time being praised by Tomkins (2013) as a fortification of the political constitution. The Committee's work interacts with the legal process at several stages in terms of both scrutinising government bills for consistency with human rights and reviewing government responses to judicial human rights decisions. The Committee's processes are directly representative of the interweaving of legal and political mechanisms of accountability with legal standards- in the form of legislation and case law- guiding the scrutiny of Bills and the examination of governmental responses to judicial decisions. These processes see the JCHR interacting with and using judicial decisions while maintaining the character of a political accountability arena (i.e. it does not consider individual cases). In short, the JCHR's role facilitates effective and sustained legislative involvement in the accountability of both Parliament as a whole and the executive, as well as in the enforcement and protection of human rights. In this sense it provides a practical example of collaborative constitutionalism in action, which brings us to a focus on the collaborative-turn in the courts.

Collaborative Constitutionalism in Judicial Practice

Alongside parliamentary processes that facilitate mutual engagement, judicial decisions indicate a turn towards collaborative constitutionalism in the courts. The UK Supreme Court decision in UNISON on access to justice is a useful exemplar of the courts depicting the interdependence and mutual engagement of institutions under the constitution. The *UNISON* case called on the court to determine whether an Order made by the Lord Chancellor imposing fees for access to employment tribunals and employment appeal tribunals undermined access to justice. The Supreme Court found that the fees rendered employment claims unaffordable and thereby unlawfully prevented access to justice. The judgment in *UNISON* signalled a collaborative direction in the judicial development and exposition of common law rights. Lord Reed cast the court's constitutional role as part of a collaborative enterprise shared with the political arm of the state:

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them.[i]

The institutional narrative presented by Lord Reed is one of collaboration and mutual problem-solving, rather than institutional confrontation and antagonism. Battle-laden framings are set aside for a more sophisticated account of the interplay between different actors. Lord Reed's formulation sees rights claims as an avenue for a collaborative means of assessing the content of a right, and determining whether and in what circumstances the right can be limited in the pursuit of other public goods. This approach begins from the premise that both political and legal organs have a role to play in this endeavour. Moreover, in this framing, there is respect for multiple constitutional values- democracy, rule of law and fundamental rights- and each institution plays a role in safeguarding those values.

Despite concerns that cases such as *UNISON* demonstrate a form of judicial over-reach, the Supreme Court has generally been very careful to emphasise the confines within which common law constitutional adjudication is maintained. For example, despite reliance on *UNISON* by the applicants in *R (C) v SSHD*, in support of an argument that fees regulations made under the *Immigration Act 2014* for a child or young person to be registered as a British citizen were unaffordable and accordingly ultra vires, the Supreme Court rejected the argument and applied ordinary rules of statutory interpretation. Lord Hodge explained that the calibration of the judicial role relative to Parliament and the executive was, at least partly, occasioned by the choice of interpretative approach. The applicants in *O* sought to rely on the principle of legality, according to which fundamental rights and principles can only be overridden by clear, unambiguous words. However, this principle, with its attendant flexibility for judicial construction of statutory terms, was held to be inapplicable as the case did not engage fundamental rights. Two limits or guidelines were observed. Firstly, interpretation under the principle of legality is only reserved for fundamental or constitutional norms (where there are no relevant constitutional norms, ordinary statutory interpretation, with its more limited role for courts, remains operative). Secondly, the category of constitutional rights is 'kept within narrow bounds' (*R (O) v SSHD* [43]) reflecting rights which 'everyone living in a democracy under the rule of law ought to enjoy'.[ii] Notably, both foundational pillars of democracy *and* the rule of law play a role in identifying which rights should be classified as fundamental or constitutional.

Box 6.1 Constitutional Moments: *Miller (No.1)* and *Miller (No.2)*

The decision in *Miller (No 1)* concerned the question of who had the power to trigger Article 50 of the Treaty on European Union which notified the President of the European Council of the United Kingdom's formal decision to leave the union. The legal challenge had a consequence of bringing significant public attention to the question of whether the executive (using the prerogative powers) had the power to unilaterally trigger Article 50 or whether the government must first receive Parliament's authorisation through primary legislation. Both the High Court and the Supreme Court held that the government could not trigger Article 50 using its prerogative powers. The initial decision of the High Court was met with significant public and media acrimony, including the infamous 'Enemies of the People' headline in the *Dai'y Mail* newspaper on the 4 November 2016.

The decision in *Miller (No 2)* concerned the Prime Minister's request of August 2019 to the monarch to prorogue parliament. The prorogation would have the effect, so the Supreme Court held, of preventing parliamentary scrutiny and accountability. The legal challenge in 2019 was led by a coalition of parliamentarians and activists including Gina Miller. In a unanimous decision the Supreme Court enhanced the substantive effect of parliamentary sovereignty by applying it to limit the power to prorogue Parliament. Essentially the judicial system bolstered parliamentary accountability and the 'political' constitution in a manner which reinforced checks on executive power.

In addition to roles in safeguarding constitutional rights, constitutional dynamics are also revealed in judicial understandings of institutional principles at common law. The *Miller, Cherry* case, provides useful evidence of judicial views on the development and protection of fundamental institutional principles. Extensive engagement with the case is also useful as the Supreme Court's judgment has been cited as proof of judicial overreach and of the legalisation of the constitution.. Indeed, the decision has been identified as a motivation for the government's launch of the Independent Review of Administrative Law, which culminated in the *Judicial Review and Courts Act 2022*. Yet, as one of the most significant constitutional cases and constitutional moments of recent decades an examination of *Miller II* also provides meaningful insight into constitutional collaboration in practice.

The case arose from extraordinary circumstances. In the run-up to the UK's scheduled exit from the EU, the Prime Minister advised the Queen to prorogue Parliament for five weeks. Businesswoman and activist Gina Miller and a cross party group of MPs challenged the lawfulness of the Prime Minister's advice to the Queen. The government, however, argued that the matter was not justiciable. The government maintained that the only appropriate accountability mechanisms for the Prime Minister's advice to the Queen were political and to be exercised by Parliament. In a significant contribution to discourse on constitutional accountability, the Court rejected the idea that the existence of political accountability for a particular act or decision displaced the necessity for, and lawfulness of, legal or judicial accountability. Lady Hale and Lord Reed defended the idea of concurrent legal and political accountability. The court's two reasons for concluding that 'the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play' involved a *practical* argument about the realistic effects of proroguing Parliament, and secondly a *principled* constitutional argument resting on the role of the courts and the distinction between legal and political assessment benchmarks. In a practical sense, the court observed that:

> The effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished (*Miller, Cherry*, 33).

Effectively, and as Sinclair and Tomlinson (2019) have illustrated, the lengthy prorogation made it impossible for Parliament to scrutinise government decisions surrounding the withdrawal from the EU at a time of fundamental constitutional change. The Court's recognition of this fact is consistent with its increasingly realistic approach to constitutional questions. As Wheatle (2020) argues, the Supreme Court is now going beyond formalistic techniques and instead taking cognisance of the real-world practical impact of governmental decisions. Moreover, such a pragmatic approach is highly consistent with the collaborative focus on the real-world interactions of the institutions of state.

While the first argument made by the court was that the impact of the lengthy prorogation was to render accountability by Parliament impossible, more fundamentally the court firmly defended the co-existence of legal and political accountability by outlining the distinctions between the constitutional functions fulfilled by the courts and Parliament. So 'the courts have a duty to give effect to the law' while Parliament will judge the government according to policy imperatives. The court also recognised the constitutional obligations of the executive to the legislature, explaining that as the person who advises the Monarch on prorogation, the Prime Minister bore 'a constitutional responsibility to have regard to all relevant interests, including the interests of Parliament. This is a critical point. In framing their decision in this way the courts were not attempting to usurp the role of any other constitutional actor but, if anything, to underline the constitutional obligation of the executive not to seek to avoid parliamentary accountability. Therefore, the decision did not reflect judicial over-reach; rather, it reflected a commitment to supporting and ensuring the political facets of the constitution and parliamentary sovereignty.'

The role of the courts in relation to Brexit, and the specific debate around the prorogation of parliament in 2019, will be explored from a range of perspectives in several later chapters. As such, the remainder of this section focuses on forging a link back into this chapter's core focus on collaborative constitutionalism. It

does so through a focus on three thematic couplets: measurement and benchmarks, conventions and conversion, and evolution and adaptation.

As Chapter One underlined, accountability is a complex concept. This is reflected in apparently endless debate and discussion about '*Who?*' '*How?*', '*When?*', '*For what?*' which are themselves to some extent complicated by the way in which the concept contains mechanistic and normative elements. What *Miller, Cherry* brings to the discussion is a practical example of the contestation of the meaning of accountability, particularly from the perspective of different institutions of state. Accountability centres on applying normative standards to actions and decisions. But the normative standards applied and the methods by which they are applied depend on the institution in question. So the accountability standards in Parliament are political standards – including policy objectives, democratic principles and budgetary constraints . For the courts to exercise accountability, there must be legal standards against which courts can assess governmental action. Accordingly, part of the challenge made by critics in contested cases is to cast doubt on the very existence of relevant legal standards that can be applied to the decisions and actions at issue. This is evident in responses to *Miller, Cherry*, where critics of the decision argue that there were no relevant legal standards for the court to apply as the question was exclusively a political question, or that the relevant legal standards were expanded beyond their proper boundaries. In essence and returning to Ellen Rock's emphasis in Chapter Four (above) on measurement and the need for 'normative yardsticks', the courts were accused of creating their own measures. Loughlin (2019), for example, distinguishes between parliamentary supremacy as a formal and functional principle and argues that it 'has always been understood to be a formal legal rule that grants supremacy to the laws enacted by the Crown in Parliament.' And yet, as argued above, the court's judgment reads as a rejection of constitutional formalism. Further, the court was arguably on solid constitutional ground in viewing parliamentary sovereignty as a normative or functional principle. For instance, the continuing nature of parliamentary sovereignty- whereby one Parliament is unable to bind a successor Parliament- has long been used as justification for the interpretive doctrine of implied repeal.[ii] The effect of continuing sovereignty is the presumption that where two ordinary statutes conflict, the later in time will prevail- the will of the successor Parliament prevails over that of the previous Parliament.

A second objection to the use of normative standards applied by the court has been that the court converted *political conventions into legal rules*. Critics challenged the court's finding that not only parliamentary supremacy, but also the requirement of ministerial accountability to Parliament- was a constitutional principle enforceable by judges. Ministerial accountability, both individual and collective, has been traditionally understood as a constitutional convention and, as such, *is* - or *was*, prior to the *Miller, Cherry* decision- a political norm, to be observed and enforced by political actors. Under orthodox constitutional law, as recently reaffirmed as the first *Miller* decision in 2017, 'Judges …are neither the parents nor the guardians of political conventions; they are merely observers.'[iii] The apparent conversion of the normative character of ministerial accountability has, accordingly, generated critique for converting a political convention into a legal norm. As Ekins argues:

> The principle [of political accountability] underpins a range of conventions and practices which make up our political constitution, in which the Government is formed by and accountable to the Houses of Parliament, especially the Commons. The principle is sometimes noted by courts but it is not a legal principle and cannot justify novel judicial intervention. [iv]

Similarly, Finnis (2019) criticised the Court for 'suddenly transforming the historic principle of Parliamentary accountability into a legal principle'. Paul Craig offered a thoughtful response to this critique in which he highlighted the use of parliamentary accountability and responsibility by judges to explain and justify the exercise of deference to the state in judicial review and human rights case law. This is a salient point and there are many examples of this practice. For instance, the Supreme Court decision in 2014 not to grant a declaration of incompatibility in relation to existing law and policy on assisted dying was partly premised on existing parliamentary activity and responsibility for the issue.[v] The response from Ekins is that there is a distinction between the use of parliamentary accountability in such cases and the use of the principle in *Miller, Cherry* in that the former case law activated the principle to limit judicial power whereas in the *Miller, Cherry* the principle was used to augment judicial review. This response is arguably unconvincing. The salient factor is that the core of both uses of parliamentary accountability was to protect

parliamentary power. As such, both uses are fundamentally consistent and reflective of the interrelationship between political and legal norms

There is, however, a more challenging counter to Craig's analogy - in deference cases, parliamentary accountability is only used indirectly to affect the law. That is, the use of parliamentary accountability in such cases is not as a legal principle in itself, but as a political norm or practice that is used to affect the level of scrutiny applied by the court. However, *Miller, Cherry* goes beyond indirect legal effect by affording direct legal effect to parliamentary accountability as a legal constitutional principle that can limit the extent of a prerogative power. This concession does not, however, mean that the entire judgment is misguided. The judgment could be read as *evolution* of the normative role of parliamentary accountability- from having indirect to direct legal effect. On this understanding, the treatment of parliamentary accountability is part of the incremental evolution of the common law constitution. Alternatively, the reasoning could suggest that parliamentary accountability has both political and legal dimensions, with the legal dimension capable of application by the judges to, as it were, bolster the political constitution.

The central argument is therefore that *Miller, Cherry* does not represent a displacement of the political constitution, as some critics have claimed. It reflects a court that sees itself as acting alongside other institutions to protect fundamental constitutional norms. While the court ruled the prerogative unlawful, it did so in defence of Parliament's constitutional role. The judgment also acknowledged the existence of political space and capacity that had simply not been utilised- by suggesting that prorogation *would* have been lawful if reasonable justification was presented, the Court exercised a form of deference to the government. The judges afforded space to the government to provide reasons for its interference with parliament's constitutional duties (on this see Masterman and Wheatle, 2019). When viewed in this light, the *Miller, Cherry* judgment represents a collaborative approach to constitutionalism rather than a form of judicial supremacy or over-reach.

Finally, it is also worth noting that the criticisms of those who claimed the political constitution had been displaced by *Miller, Cherry* have not been supported by subsequent post-2020 judicial decisions. If anything, the attitude of the courts to the executive has been more favourable, possibly even somewhat deferential. Decisions such as *R (Begum) v Secretary of State for the Home Department* in which the Supreme Court refused to overturn the government's decision denying Shamima Begum leave to enter the UK to challenge the deprivation of her citizenship provides a case in point. Such decisions have prompted some commentators to argue that the Court is actually currently *overly* deferential, almost as a counter-reaction against the controversy surrounding *Miller, Cherry* (see Graham, 2022). Recent case law suggests that, as the Supreme Court underlined in *Miller, Cherry*, that decision and the circumstances that prompted it were highly exceptional. The decision did not signal a new age of judicial supremacy.

There is, of course, a more subtle and contextual discussion that needs to take place but which often remains lost beneath a fixation on judicial activism. An approach that might deliver answers to pressing 'questions of accountability' might focus upon *which cases in which contexts* prompt judges to restrain governmental action, or to engage in constitutional innovation. Comparing *Begum* to *Miller, Cherry*, for example, exposes deep cleavages. The former dealt with the very foundations of responsible government, *Begum* with national security and terrorism. *Begum* touched on issues of contingent and insecure citizenship for ethnic minorities and, as Prabhat (2023) has demonstrated, these are topics where British law and institutions have very often adopted a restrictive- and conservative- approach. Such contextual analysis and awareness should certainly supplement, if not define, the debate concerning judicial activism and restraint.

Conclusion

So where does this leave us in terms of understanding both the theory and practice of democratic accountability? Firstly, this chapter has argued that framing longstanding questions of accountability in simple polarised terms of 'politicians *versus* the judiciary', 'supremacy *versus* subservience', etc. is generally unhelpful. It tends to produce more heat than light, or more 'hot rhetoric' than 'cool theory'. It is in this context that this chapter has explored the theory of collaborative constitutionalism. This theory encompasses an emphasis on understanding the complementary and interdependent nature of different accountability processes and arenas. It is therefore *systemic* in approach and seeks to acknowledge and understand the full accountability space rather than focusing on which institution is (or is not) 'supreme'.

In this sense a collaborative emphasis does fit with the navigational challenge that was outlined in the opening chapter in the sense that it forges new routes, identifies gaps in the knowledge base and poses new questions. There are, of course, lingering questions about the practice of collaborative constitutionalism and its interaction with the wider constitution. Such questions include the definition and interaction of the shared constitutional values of the institutions of state. There are also avenues to explore the potential relevance of collaborative constitutional theory well beyond the confines of a focus on the UK and beyond law and into comparative political and socio-legal studies. It is likely, for example, that more consociational or power-sharing democracies might be more aligned with reflecting and refining a more collaborative approach. Certainly, as multiple democracies around the world grapple with the pluralistic realities of modern governance, there is a strong case for the relevance of collaborative constitutionalism and similar theories.

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[i] *UNISON* (n 15) [68] (Lord Reed)

[ii] Thoburn [37], [42], [59]. Amanda Perreau-Saussine, A tale of two supremacies, four greengrocers, a fishmonger, and the seeds of a constitutional court C.L.J. 2002, 61(3), 527, 528.

[ii] *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 609

[iii] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [146].

[iv] Richard Ekins, 'Written Evidence from Professor Richard Ekins- The Supreme Court's prorogation judgment and its constitutional implications'
https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/prorogation-and-the-implications-of-the-supreme-court-judgment/written/106116.html

[v] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38