Conceptualising Crown Accountability: 
Lessons from the Legal Pluralism Debate 

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Comparative accountability has established itself as a fruitful sub-discipline within comparative law. But issues of methodology persist, particularly regarding the analytical applicability of familiar legal terms to new settings. The inter-disciplinary debate about ‘legal pluralism’ reveals several different approaches that can be taken in tackling these methodological issues. This article reviews the usefulness of these approaches in the analysis of English legal history. It does so specifically with regard to different conceptualisations of accountability for the exercise of Crown power, as advanced variously by Bracton, Sir Edward Coke, and Lord Diplock, and as seen in the 2015 House of Commons vote on Syrian Air-Strikes.

INTRODUCTION

This Article is intended to be the first step towards a much fuller study of the comparative philosophy of public accountability in the legal histories of England and Korea. It was inspired by records of court practice in Chosun Korea, for the King was followed by two historians, who recorded the King’s words and deeds but denied him the right to review their record. Even his instruction that an ignominious fall from a horse not be recorded was dutifully recorded. It struck me that one could view this as an ingenious practice, from which contemporary polities revisiting their Freedom of Information laws might wish to learn. I endeavoured to understand more about the different ways of conceptualising accountability in the exercise of public power.
Comparative accountability is a relatively new sub-discipline in comparative law, albeit one that is already well-established.¹ Two recent illuminating examples of the sub-discipline by Hahm² and by Dowdle³ follow this Article’s introduction. This Article will take some steps towards their approach of comparative accountability, but is limited at this stage to a mere sketch of certain moments in English legal history. Specifically, it limits itself to identifying some – not all – ideas about how the Crown might be accountable for its exercise of power. The materials used are the writings of Bracton from the first half of the thirteenth century,⁴ Sir Edward Coke in the first half of the seventeenth century,⁵ Lord Diplock’s judgment at the end of the twentieth century,⁶ and a Parliamentary vote on the Crown’s prerogative to declare war in 2015.⁷

As the examples of Hahm and Dowdle will show, comparative accountability, as with comparative law, is bedevilled by significant methodological issues regarding the ‘transferability and comparability of meaning’.⁸ In short, what is meant by ‘law’ and ‘accountability’ in England today is different from what it may have meant 800 years ago, which provides certain challenges. Therefore, rather than attempting a grand analysis of public accountability in the exercise of Crown power throughout English legal history, this Article will merely make certain limited observations of that accountability at different moments in time, before turning to the ‘Legal Pluralism’ debate for assistance in tackling the aforementioned methodological issues.

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⁶ Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (GCHQ case).
⁷ HC Deb 2 December 2015, vol 603, cols 323-500.
COMPARATIVE ACCOUNTABILITY

The comparative studies of constitutions and accountability by Chaihark Hahn⁹ and Michael Dowdle¹⁰ have inspired the approach of this Article. Dowdle’s review of the intellectual history of public accountability in the Anglo-American tradition has the aim of illustrating to the reader how the meaning and articulation of a term as familiar to ourselves as ‘accountability’ has, within even just one legal-political tradition such as the US, changed considerably in emphasis and meaning.¹¹

According to Dowdle, the first century of the US’ constitutionalism was characterised by a res publica model, in which:

constitutional accountability¹² was thought to stem primarily from the constitution’s capacity to populate elite levels of government with enlightened, public-minded intelligentsia, while at the same time leaving most political decision making in the hands of largely autonomous, generally intimate, local communities.¹³

Today, we have what Dowdle terms a ‘regulatory model’ of public accountability, which is ‘a two-level construct’ of elections and bureaucracy:

At the top-level, what we will call the ‘electoral component’ of constitutional accountability makes elite political actors accountable to the public via the process of subjecting them to popular election. At the subordinate level, what we will call the legal-bureaucratic component makes subordinate political actors accountable by subjecting them to the bureaucratic command and control of higher level, elected officials.¹⁴

Dowdle identifies the start of the regulatory model of accountability with the social changes that took place between the Civil War and the dawn of the twentieth century.¹⁵ The intimate communities of pre-industrial America on which the res publica model of accountability had

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⁹ Hahn (n 2).
¹⁰ Dowdle (n 3).
¹¹ ibid.
¹² Dowdle uses constitutional and public accountability nearly interchangeably.
¹³ Dowdle (n 3).
¹⁴ ibid.
¹⁵ ibid.
partially rested were being pulled by economic forces into regional and national networks of labour and commerce. The industrialisation of society hastened two other processes: the rise of a national system of regulation and administration, leading to the legal-bureaucratic element of today’s regulatory model of accountability; and an increase in impact and importance of decisions made at the height of the political system, which increased its power and consequently the perceived need for rejuvenated accountability – the ‘electoral component’ of the regulatory model.\textsuperscript{16}

Chaihark Hahm, in ‘Ritual and Constitutionalism’, challenges modern US ideas about what ‘constitutionalism’ really means.\textsuperscript{17} Taking as his starting point the idea that constitutionalism is ‘concerned with ideas and institutions related to restraining and regulating power’ and ‘about making sure that self-aggrandising power is kept under control’, he proceeds to show how this was achieved in seventeenth-century Korea, not through the terms familiar to US jurists, but through rituals.\textsuperscript{18}\textsuperscript{19} One may see that should the ruler’s authority be constrained, discussed, and even challenged through the performance and discourse of rituals, not law or institutional structures, it strikes a heavy blow against contemporary positivist assumptions that see constitutionalism’s contemporary manifestation as somehow the necessary model by which constitutionalism can be achieved, and against which all other models fall short.\textsuperscript{19}

Through analysing the role of rituals in resolving a constitutional crisis regarding the question of hereditary succession in Korea, Hahm concludes that underpinning the constitutional role of rituals may lie the weight of tradition.\textsuperscript{20} Hahm then considers the role of tradition in other constitutional settlements to suggest that this may be an important factor in the maintenance of constitutional orders more generally, which has hitherto been overlooked.\textsuperscript{21} He cites the Roman concept of mos maiorum (‘the ways of our ancestors’) as ‘constitutional restraint on the government of the Roman republic’, refers to the importance placed in Britain on the idea of ‘ancient constitution’, and notes that even in the US, ideas such as stare decisis and ‘original intent’ are means by which tradition underpins the constitutional order.\textsuperscript{22}

\textsuperscript{16} ibid.
\textsuperscript{17} Hahm (n 2) 197.
\textsuperscript{18}\textsuperscript{19} ibid. 135-136.
\textsuperscript{19} ibid. 197.
\textsuperscript{20} ibid. 149-150.
\textsuperscript{21} ibid. 200-201.
\textsuperscript{22} ibid. 201.
Hahm’s research therefore progresses the field of comparative accountability in two ways: it warns against any assumption that legal concepts must basically be articulated as they are in our own system, and reminds us that this is a failure of intellectual creativity and imagination on our part, rather than a conclusion drawn from careful empirical observation.\(^23\) Secondly, it shows some of the value in analysing and connecting examples of comparative accountability, for example by forcing us to re-examine the importance of tradition in the efficient and just functioning of our own contemporary constitutional order.\(^24\)

These issues, centred on the issue of what Rutger terms ‘the transferability and comparability of meaning,’ will be reconsidered after a brief inquiry into some of the conceptualisations of accountability in the exercise of the Crown’s power in English legal history.

**IDENTIFYING CONCEPTIONS OF CROWN ACCOUNTABILITY IN ENGLISH LEGAL HISTORY**

**Crown Accountability in Bracton’s Laws and Customs of England**

Henry of Bracton was an English jurist who lived from 1210 to 1268. His writings on the English legal system are the first known attempt to synthesis its laws, of a time in the English legal system when it was composed of several distinct parts – canon law, Roman law, customary law, and Teutonic law – each of which contained tensions against one another.\(^25\) His (perhaps edited) *magnum opus*, ‘The Laws and Customs of England’, written around 1250, was an attempt to reconcile these parts into a coherent whole, and has been hailed as ‘the most ambitious legal work from medieval England’.\(^26\)

How was the King’s accountability for his actions conceived of in Bracton’s writings? My account seeks not to focus on the arrangements for the execution and restraint of the King’s powers, nor on the sources of his authority, but rather on the philosophical conceptualisation of to whom or what the King was accountable for the exercise of his powers and why.

\(^{23}\) ibid. 201-203.

\(^{24}\) ibid. 200-201.

\(^{25}\) Bracton (n 4).

It is first necessary to outline the powers of the King at that time. Henry III, the King at Bracton’s time of writing, was very far from holding absolute power. On the contrary, all jurisprudence that was deemed to belong to questions of religion was out of his power and came under the authority of the church led from Rome, to be settled in ecclesiastical courts. This included not only all matters pertaining to the church itself (such as lands, appointments), but also to whole areas such as family law. Bracton conceived this as ‘two swords’ – one ecclesiastical, held by the head of the church, and the other secular, held by the King.27

Within the secular field, the King still did not rule absolutely. Since the fall of the Roman Empire, England, as with elsewhere in Europe, operated under a feudal model. Barons had a free hand over their possessions, including land. They were to pay homage to the King or face death, but the King’s jurisdiction did not extend into the affairs of the barons’ fiefs. That which was under the control of the barons, was out of control of the King.28

The King then had two lawful areas of action. One was as lord of his own large fiefdom, much as the barons were lords of theirs. The second was all remaining secular affairs i.e. those which fell outside the jurisdiction of an individual fiefdom. In the latter area, the King was expected to rule in a very particular partnership with the barons, an arrangement which had been partially codified in the 1215 Magna Carta but was also governed by unwritten principles from customary law.29

Within his areas of power, then, to whom or what was the King answerable for his actions? From reading Laws and Customs, it seems that the King was accountable in three different ways. Firstly, the King, as with all mortals, was deemed to have to appear before the Lord on death and ‘give account not only of [his] acts but even of every idle word that [he] utter[ed]’.30 The significance of this is that the scope is wide enough to include every action or word of the King, whether in his personal capacity as lord of his fief, or as overlord of the realm. Furthermore, it makes clear that the King, a mortal, is as equal as any other man before the

27 Bracton (n 4).
28 ibid. 225.
29 ibid.
30 ibid.
Lord, even if men are not equal on earth. Bracton is explicit that ‘gold and silver will be of no avail to set them free’ from the judgment.  

It is noteworthy that the anticipated format for account-giving before the Lord would be the same as before a judge in England, though modified to allow for the Lord’s supremacy: the form of ‘a trial, where the Lord shall be the accuser, the advocate, and the judge’. In a parallel with long-established ideas of delegation, ‘the Father has committed all judgment to the Son’ meaning that ‘from his sentence there can be no appeal’.

And what a terrible sentence awaits those who have committed iniquity on earth: the Son of Man shall dispatch his angels, who will bind the sentenced in bundles to be burnt, and shall cast them into the fiery furnace, where there will be wailing and gnashing of teeth, groans and screams, outcries, lamentation and torment, roaring and shouting, fear and trembling, sorrow and suffering, fire and stench, doubt and anxiety, violence and cruelty, ruin and poverty, distress and dejection, oblivion and confusion, tortures and woundings, troubles and terrors, hunger and thirst, cold and heat, brimstone and burning fire for ever and ever.

In weighing up the import of this form of account-giving, one ought to weigh that although it would not take place during the King’s lifetime, it would encompass every deed or word of the King (as with all mortals), would be unimaginably severe, and would be eternal: therefore distant, but direct and terrifying.

Bracton was clear that the King’s lawful actions could not be questioned by any private person. However, should the King have acted without equity, then justices are obliged to charge the King to amend or give remedy for his actions, so that the King does not incur the wrath of the Lord’s judgment. Bracton states that, ‘No one may pass upon the king’s act [or

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31 ibid.
32 ibid.
33 ibid.
34 ibid. 22 (emphasis added).
35 ‘Private persons cannot question the acts of kings, nor ought the justices to discuss the meaning of royal charters: not even if a doubt arises in them may they resolve it; even as to ambiguities and uncertainties, as where a phrase is open to two meanings, the interpretation and pleasure of the lord king must be awaited, since it is for him who establishes to explain his deed. And even if the document is completely false, because of an erasure or because the seal affixed is a forgery, it is better and safer that the case proceed before the king himself’ in Bracton (n 4) 109-110.
his charter] so as to nullify it, but one may say that the king has committed an *injuría*, and thus charge him with amending it, lest he (and the justices) fall into the judgment of the living God because of it.\textsuperscript{36} This has important consequences. According to Bracton, the King’s temporal authority came from having been appointed as ‘God’s vicar on earth’: the King’s role was to give effect to the spiritual laws of God through earthly laws.\textsuperscript{37} So long as the King is exercising his powers ‘to distinguish *jus* from *injuría*, *equity* from *iniquity*’ then he is a King, but when he fails in this regard, he is a tyrant. Accordingly, the King’s council are obliged to ensure the ‘bridle’ of the law is placed upon him and that he does not operate outside of the law. If the King and barons are not bridled by the law, then the Lord will uproot them and cast them into ‘the fiery furnace’:

If even they, like the king, are without bridle, then will the subjects cry out and say ‘Lord Jesus, bind fast their jaws in rein and bridle.’ To whom the Lord (will answer), ‘I shall call down upon them a fierce nation and unknown, strangers from afar, whose tongue they shall not understand, who shall destroy them and pluck out their roots from the earth.’ By such they shall be judged because they will not judge their subjects justly.\textsuperscript{38}

To summarise this second aspect of accountability, the King has his power in order to effect God’s will on earth, which is *jus*, or law. Through loyalty to their overlord, the King’s baronial council are obliged to ensure that the law is ‘bridled’ upon him so that he is not damned by the Lord. If they and the King failed to collectively bridle themselves by the law, the people shall call for the Lord to hasten to their aid, and he shall pass his terrible judgment upon the unbridled King and his council.\textsuperscript{39}

This is no abstract theology. When King John, the previous King, interfered in the church’s jurisdiction, it culminated in Pope Innocent III’s excommunication of King John from the church in 1209, removing the Lord’s authority from John’s rule and absolving John’s subjects of their allegiance to him. It seemed that Philip II of France was preparing to remove John

\textsuperscript{36} ibid.
\textsuperscript{37} ‘To this end is a king made and chosen, that he do justice to all men (that the Lord may dwell in him, and he by His judgments may separate) and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them’ in Bracton (n 4) 305.
\textsuperscript{38} ibid.
\textsuperscript{39} ibid.
under the license of John’s papal excommunication. John subsequently acquiesced to the Pope and surrendered England to him as a vassal state.\footnote{ibid.}

Crown Accountability in Sir Edward Coke’s Reports

Sir Edward Coke (1552 - 1634) served as Chief Justice and later as a parliamentarian in the reign of James I of Great Britain. His reports of cases before the court and proceedings of Council are highly acclaimed and are still referred to in court judgments, such as the GCHQ case.\footnote{GCHQ case (n 6) 407.}

The rebellion of Henry VIII against Papal authority had meant the English Crown now held both of Bracton’s ‘two swords’, becoming both temporal and spiritual overlord. He was therefore no longer answerable to the Pope as to whether or not he was effecting God’s law on earth, but instead due to his position as head of the church as ‘God’s vicar’ was himself directly responsible. But conceptualisations of accountability had evolved too, as seen in Coke’s report of the ‘Proclamations’ conference in 1610.\footnote{Sheppard (n 5).}

The Proclamations conference of the King and the Privy Council sought opinions on ‘the authority of the king to restrict building in London or to regulate the trade in starch’.\footnote{ibid. 486.} Coke’s opinion, which appears to have been applied, was that the King’s authority was insufficient to do so. Coke’s reasoning as to why the King lacked sufficient authority in this case reveals a slightly different emphasis of accountability than that which guided the King’s powers in Bracton’s time (which had been based on direct and indirect accountability to God for ensuring the Lord’s jus on earth). Coke advised, and it was accordingly resolved that, ‘the King hath no Prerogative, but that which the Law of the Land allows him’.\footnote{ibid. 489.}

This was not a new conceptualisation because Bracton had already written that the King was subservient to the law which had made him King. But Coke emphasised a new character to that law, which was not based on God’s law, but rather on reason:
And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawfull Custom) upon pain of fine and imprisonment, as it is held in the 22 Hen. 8. Procl. B. but we do finde divers Precedents of Proclamations which are utterly against Law and reason, and for that void, for, Quae contra rationem juris introducta sunt non debent trahi in consequentiam [trans: ‘Whatever is brought in contrary to the reason of the Law ought not to be treated with consequence’].

This ‘reason of the Law’ which, if absent from a King’s proclamation could make the proclamation void, was not to be found in God’s law, or in natural justice, but by those justices who were ‘learned’ in the ‘artificial reason’ of law:

[T]he King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great endowments of nature; but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it.

Through this argument, Coke was conceiving a new form of accountability, where it was not to the Lord or his church that the King must be held accountable for the natural lawfulness of his actions, but to the judge. The judge was ‘learned’ of the precedents and expert in the ‘artificial’ reasoning that underpinned the law, which had since at least Bracton’s age operated over the King.

Additionally, a separate conceptualisation of accountability was beginning to clearly emerge, regarding ministerial accountability to Parliament for the exercise of the King’s power. With hindsight, we see that at the time of Bracton’s writings the King enjoyed separate powers in his capacities, as both feudal lord of his own lands, and as overlord of the realm. By Coke’s

45 ibid.
46 ibid. 481.
47 Ernst H Kantorowicz, The King’s Two Bodies: A Study in Medieval Political Theology (3rd edn, Princeton University Press 1970) 3.
time the conception was well known, if not commonly agreed, that conceptually the king had ‘two bodies,’ one mortal and personal, the other enduring and institutionalised through the Crown (‘le roi est mort, vive le roi’).\footnote{John Fortescue, \textit{On the Laws and Governance of England} (CUP 1997).}

Although some officials had been found liable at law in Bracton’s time, this had tended to only be for ‘officials of a humbler type, not the more exalted servants of the crown’.\footnote{Guy I Seidman, ‘The Origins of Accountability: Everything I know about the Sovereigns’ Immunity, I learned from King Henry III’ (2005) 49 Saint Louis University Law Journal 393, 444.} The King himself and his closest advisors were not triable:\footnote{‘When, in 1301, Parliament made a special demand for the removal of the treasurer – the precursor of impeachment – King Edward I firmly rejected any notion of ministerial responsibility to Parliament, stating ‘[i]f they might as well take his Kingdom as interfere with his choice of his servants’ in ibid. 443.} one reason being it would offend legal principles by making the King judge of his own case.\footnote{[T]he king could not be sued in his central courts of law, because, like any other [feudal] lord, he could not be sued in his own courts’ in ibid. 427.} This was slowly beginning to change, in part due to the emergence of an expanded machinery of government, as, ‘The King gradually lost the power to carry out the affairs of state in his own name, as ministers became the main actors of administration. Those ministers were not immune, and could be subject to challenge in both court and parliament’.\footnote{ibid. 431.}

Parliamentarians successfully impeached the King’s ministers in parliament, charging that based on rights found in the \textit{Magna Carta} Parliament had self-governing rights. In this way the executive application of the King’s power was now partially accountable to the House of Commons.

**Crown Accountability in Lord Diplock’s GCHQ Judgment**

The judgment of Lord Diplock in \textit{Council of Civil Service Unions v Minister for the Civil Service} illuminates an additional conceptualisation of accountability in English law regarding the exercise of Crown powers.\footnote{GCHQ case (n 6).}

The case at hand was the decision of the Crown’s Secretary of State for Foreign and Commonwealth Affairs to change immediately and without consultation the terms and conditions of employment for Crown employees at the Government Communications
Headquarters (GCHQ). The effect of the change would be to remove the right of employees to remain in one of six independent unions, and instead have to join an employer-provided association.54

By the time of Diplock’s judgment, it had long been established that the Crown may only exercise its public powers through ministers, and that those ministers were accountable to Parliament for their exercise of Crown powers.55 And it had long been recognised that the law controlled the boundaries of powers enjoyable by the Crown, for example whether the Crown had authority to act under a particular head of law. But until GCHQ, it had not been found that the Crown was answerable to its own judges regarding how its actions fit within a lawful head of prerogative power; the scope had been limited to merely whether that lawful power existed or not.56 Prior to the case, the Crown had only been accountable to God for this.

Lord Diplock advanced a standard, accepted by the Bench, to determine whether a Crown decision within a recognised Crown power ought to be controlled by the judiciary: namely, if the decision was illegal, irrational, or procedurally improper.57 In terms of accountability, this filled a gap that had notionally been growing for several centuries. Prior to this discovery, the Crown was only accountable to God – per the discussion regarding Bracton above – for actions executed within the sphere of its lawful prerogative powers.58 The direct accountability to God for those actions upon death, or the indirect accountability to God through the threat of papal excommunication while the King was alive, had now been supplemented by judicial review.

The re-conceptualisation implicitly represents a logical extension of Coke’s assertions in the Proclamations Conference. Coke had argued, pace Bracton, that the King is under the law, and the law is discernible by learned judges applying ‘artificial’ reasoning, rather than evoking natural justice.59 Thus, perhaps it flows that subsequent judges could decide that this ‘artificial law’ could step inside the realm of the prerogative, subject to certain self-imposed limitations

54 ibid. 375.
57 ‘illegality’ means ‘the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;’ ‘irrationality’ meaning ‘a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it;’, and ‘procedural impropriety’ including a ‘failure to observe basic rules of natural justice’ in GCHQ case (n 6) 410.
58 Bracton (n 4) 305.
59 Sheppard (n 5) 489.
(primarily deference to claims of national security), to judge the decisions of the Crown’s servants.

**Crown Accountability and Air Strikes in Syria**

More recently, new forms of accountability for the exercise of Crown powers have become apparent in the Parliament. The Crown’s power to declare war, now long exercised on the Crown’s behalf by the Prime Minister, has arguably, by emerging convention, started to require the consent of the House of Commons. Consequently, a vote was taken on 2\textsuperscript{nd} December 2015 in the House of Commons on whether or not to support the Crown’s proposal to conduct air strikes against targets in Syria.

This was an invitation by the Crown to parliamentarians for them to participate in the exercise of the Crown power (being the power to declare war). Hansard, the parliamentary record, reveals several new conceptualisations of accountability for the exercise of that power.

Many parliamentarians emphasised that they felt accountable to their conscience in exercising the power:

- Alan Johnson (Labour): ‘This new convention places a responsibility on Members of Parliament to weigh up the arguments and vote according to their conscience’

- Mark Pritchard (Conservative): ‘It should be the consciences of individual Members of Parliament that determine the fate of the sombre motion’

- Mr James Gray (Conservative): ‘It is truly a conscience vote—a vote based on our instincts, on the balance of probabilities, on our feeling for things, on what our constituents said to us and, above all, our hopes for peace in the future’.

- John Glen (Conservative): ‘I also speak with absolute clarity in my conscience that supporting this motion is the right thing to do’.

- John Glen (Conservative): ‘There is much I do not know—I concede that—but my conscience is clear. We must act and begin the long, intense, delicate and difficult process of facing up to a profound evil’. 
• Fiona Bruce (Conservative): ‘Considering all of that, I have concluded in good conscience and good faith that supporting the Government’s motion tonight and the action proposed is both right and just’.

• Chloe Smith (Conservative): ‘My morals, my conscience and my heart and head say that it is Parliament’s duty to support the Government’.

• Hilary Benn (Labour): ‘[…] the gravity of the decision that rests on the shoulders and the conscience of every single one of us’.  

These parliamentarians’ conceptualisation of being answerable to one’s conscience for the exercise of the Crown’s power may remind the reader of Bracton, where the monarch was to face God in judgment, with his conscience as his witness. Here, although the mention of accountability to God is absent, and is instead replaced with conscience alone, a more personal form of accountability. It is less terrifying than God’s judgment which carried the threat of eternal fire, as described by Bracton but is nonetheless more immediate.

Other parliamentarians emphasised that as representatives of the people, the parliamentarians were accountable to their electorate. The leader of the Labour opposition urged members of his party to write to their Members of Parliament with their views and some MPs explicitly referred to their accountability to their electorate for their sharing this Crown power.  

Still, other parliamentarians felt accountable to their parties. The ruling and majority Conservative party imposed a whip on its parliamentary members, suggesting they would be accountable to the party office for their decisions (the party can decide whether or not to support them in the next election).

**METHODOLOGICAL ISSUES AND POSSIBLE ASSISTANCE FROM THE LEGAL PLURALISM DEBATE**

The windows above into contemporary conceptualisations of accountability in the exercise of the Crown’s powers reveal fundamental methodological issues with the task of understanding accountability in times and places foreign to here and now. One issue concerns

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60 HC Deb (n 7) (emphasis added).
61 ibid. Sir Gerald Howarth: ‘There can be no recriminations and we must be free to express our views as we think fit. We are accountable to our constituents for what we say and what we do’ in ibid. col 415 (emphasis added).
the use of terminology, while the other concerns the analytical perspective of the researcher. Both issues are related.

The question of terminology arises when, for example, we consider the term ‘law’ in each of the above examples. Law in Bracton’s time was different from the law today, conceptually and linguistically. Conceptually, because the sources and sanctions of law were different – there were feudal responsibilities to one’s lord, rules pertaining to ecclesiastical matters that were to be settled in the Church’s courts according to canon law, the Common law of the realm, and customary law that might be applied. The King was ‘under the law’, but what did this mean? He certainly could not be tried in his own courts. Furthermore, this law was closer to what we now think of as ‘natural law’, being God’s law, and as ‘God’s vicar on earth’ the king was expected to rule in accordance with it.

This dilemma then raises the question of perspective. Should the researcher take a teleological approach, taking law as it is today and then taking this concept back in time (or to another place) and find examples which conform to it, calling that which matches it ‘law’ and that which does not match it ‘custom’ or such?

The issues have been considered in an interdisciplinary debate of legal pluralism and have prompted several decades of lively exchange on the matter. In my opinion there have been four proposed approaches to addressing this issue. I shall consider each in turn and show how each approach could cast a different perspective on the examples of Crown accountability provided in the Article above.

**Approach One: Universalising Our Society’s Concepts when Appraising Another’s**

This approach is perhaps the most intuitive for a legal scholar. It involves taking a concept with which we are currently familiar and have fairly clear views of its meaning, such as ‘law’, or ‘accountability’, and then looking at other times and places to see the extent to which those societies have applied this concept.
This is a familiar approach to advocates of ideas of natural or inherent justice, whether expressed in the Declaration of Independence\textsuperscript{62} or at the Nuremberg Trials, where no immunity would be given, ‘for those who obey orders which – whether legal or not in the country where they are issued – are manifestly contrary to the very law of nature from which international law has grown’.\textsuperscript{63} Such concepts, familiar to our own society, are held to be ‘self-evident’ to all or implicit to one’s membership of humanity. Where such concepts are not found, it is to be regarded as a deviation, distortion, failure or omission.

According to Dowdle, this approach can be found in contemporary scholarly research such as Alford’s analysis of public accountability in the People’s Republic of China. Dowdle criticises the approach taken by Alford in applying an Anglo-American ‘regulatory’ model of legal accountability to an analysis of the PRC’s development of clean air legislation, saying that by analysing it in terms of our own conceptualisation of accountability, the nuances of the PRC’s accountability order are lost.

Applying this approach to the research undertaken for this Article would clearly not have worked. For to take public accountability as understood in the UK today – periodically elected representatives holding some powers over unelected officials\textsuperscript{64} – would require one of the two interpretations. Firstly, in terms of terminology, it might mean that we would have to disregard the conceptualisation of accountability advanced by Coke, of the Crown’s prerogative being ‘under the law’ as determined by learned judges applying abstract reasoning, as being no accountability at all. We might also have to do the same with Bracton’s description of the Crown being answerable to God directly upon death and indirectly through the Pope in life. Secondly, in terms of perspective, it might require us to look back teleologically and to see Bracton and Coke’s accounts as being seeds that grew into our own fuller model or, in Seidman’s terms, the start of a ‘path’ to our present position.\textsuperscript{65} The danger of this approach is that it suggests inevitability to the change of conceptualisation, which

\textsuperscript{62} Thomas Jefferson et al., United States Declaration of Independence (Second Continental Congress 1776): ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. […] That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.’

\textsuperscript{63} Yoram Dinstein, \textit{The Defence of ‘Obedience to Superior Orders’ in International Law} (OUP 2012).

\textsuperscript{64} Joy M Moncrieffe, ‘Reconceptualizing Political Accountability’ (1998) 19 IPSR 387.

\textsuperscript{65} Seidman (n 49) 431.
denies the impact of the very real contingencies that affected the conceptualisations of accountability over the centuries.

**Approach Two: Applying Our Concepts but Accepting Variation of those Concepts Elsewhere**

The second approach is one step away from the first approach. It recognises cultural variation in the articulation of an ideal familiar to us. For example, one might take a contemporary concept and then look for alternate ways in which that concept might be manifested in other cultures, or alternatively, explain another society’s conceptualisation in terms of concepts familiar to us. One of the forerunners of this approach was the anthropologist Malinowski, who found that while the Trobriander Islanders may not have had ‘law’ in the sense then understood by his readers, with statutes and courts, the Western European concept of law could nonetheless be found if the analyst were to tolerate local variation. According to Malinowski, ‘The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are arranged into chains of mutual services, a give and take extending long periods of time and covering wide aspects of interests and activity’.66

Hahm Chaihark’s work is a recent illustration of this approach. Hahm took a very contemporary conceptualisation – constitutionalism – and looked back to the Chosun dynasty of Korea to explore whether or not there existed features which, even if they were not termed ‘constitutional law’ at the time, may have been regarded as such by contemporary scholars.67 As mentioned earlier in this Article, Hahm did find analogous conceptualisations, but they were manifested in a manner very different to our own (centred around ritual), and would clearly have been missed entirely if one had applied the first approach above.

In the context of this Article, such an approach would have taken the contemporary understanding of accountability (*infra*) and looked back in order to find whether there was anything in the writings of Bracton or Coke that appeared functionally similar, irrespective of its name or form. This is similar to the first approach, but differs because it accepts the ‘other’

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67 Hahm (n 2).
manifestation of the concept in its own right, not perceiving it to be either an incomplete or nascent version of our own. It is still our conceptualisation that is the model however: Malinowski found ‘civil law’ in the Trobriands, not ‘kula exchange’ in Europe.

**Approach Three: Study Conceptual Variations then Extrapolate**

In the first two approaches, the scholar takes familiar concepts and compares them to other times and places. The third approach jettisons the idea that our society manifests certain ideals against which other societies may or may not vary. Instead, it perceives that our society’s concepts, like any other society’s concepts, are variations of a broader, discoverable concept, the attributes of which can be induced through comparative research. This is partly a swing back to the approach adopted by naturalists and positivists, insofar as it posits a universal category, but takes a relativist’s approach in identifying and analysing its manifestations.

For example, Griffiths has argued that ‘law’ is a type of social control. In so doing he expanded his conceptualisation of ‘law’ to include examples across various societies, where the Anglo-American conceptualisation of law was just one variant among myriad equal others, and then induced a generalised concept that united them all (social control).

It is also the approach of Dowdle in his analysis of public accountability in the PRC. Rather than follow Alford’s approach of applying a US conceptualisation of public accountability and finding little that matched, he first sought to understand the Chinese model on its own terms, before identifying key aspects that might be considered common to other societies:

“[This inductive approach to understanding PRC] show[s] a picture of a parliament, despite its significant electoral and democratic infirmities, doing what parliaments everywhere do: working with a diversity of public and private constitutional actors to craft legal-regulatory responses to social

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69 Ibid.
problems. And, therefore, it is possible that there is nothing unique about its particular role in promoting constitutional development.”

Applying such an approach to the examples of this essay, the researcher might find similarities common to the conceptualisations of accountability described by Bracton, Coke, and Diplock, and from this deduce certain generalisations or objective themes of which each instance is a variation. For example, one might highlight the centrality of the idea of conscience of the decision maker’s conscience, whether the judge of that conscience will be God in Bracton’s day or oneself in Diplock’s. Or one might observe the use of language around conceptualisations of accountability and how it was used discursively in each age to advance certain positions of social actors.

Approach Four: Find Linguistic Pairs, then Compare

The fourth approach was developed by Tamanaha, and is seemingly without parallel. It was explicitly advanced in order to effect a breakthrough in the legal pluralism debate, conceptualising conceptions of law for the purposes of comparing different times and places. Tamanaha’s proposed solution was merely to accept whatever conception any particular society attached to their word for ‘law’:

> It is not necessary to construct a social scientific conception of law in order to frame and study legal pluralism. As proof of this point, notice that the first part of this paper extensively elaborated on situations of legal pluralism in the medieval period and during colonisation without positing a definition of law. The exploration in the first part avoided the conceptual problem by accepting as ‘legal’ whatever was identified as legal by the social actors, as just described.

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70 Dowdle (n 3) 357.
71 The significance of the Magna Carta ebbed and flowed over the centuries, apparently depending to the extent to which social actors found it available and useful in pushing for a preferred normative order.
It is a neat theoretical approach that should be congratulated for shifting the debate, and for tackling the flaws of earlier approaches by being neutral in its comparison of term conceptualisations, and by basing the conceptualisation in reality of usage rather than in abstraction.

However, in my opinion, it faces seriously challenges because it is essentially constraining the researcher to an approach of comparing dictionary terms. What if a society does not use the term ‘law’? Hahm’s research exemplifies the potential problems with this approach. If we translate ‘law’ as 법 (beop), which is a very standard thing to do, then when we start examining the Chosun polity we find ourselves looking at something very narrow and particular, and it seems unconvincing to say that we shouldn’t also look at 예 (ye) which, depending on the context, might also be translated as ‘law’. Or should we instead start with 법 and then seek to translate that into English? In that case we get an entirely different field of enquiry and find ourselves back at the start of the debate about whose terms we should use.

Applying this approach to the review of certain forms of accountability of Crown power, one quickly gets stuck due to the different terminologies. Bracton did not use the term accountability in describing the relationship of the king to God but it seems perverse to therefore exclude his accounts because it was not identified as ‘accountability’.

**CONCLUSION**

A key issue we face both in comparativist constitutional law and in our practical need to understand our rapidly evolving political, social, and regulatory environments is the need to develop analytic methodologies that are sensitive to as yet unfamiliar aspects of public accountability – aspects that are effective but do not correspond to the structural, institutional, or cultural configurations we use to identify public accountability in our own environments.

- Dowdle, 2006
Therefore, this Article enquired into how ideas of accountability have been conceived at certain points in English legal history regarding the exercise of power held by the Crown. It found that within a period of 800 years, there has been great change, consistency, and innovation. One example was conscience: it was paramount in Bracton’s account in the thirteenth century, and again in 2015 where parliamentarians were invited to share in the Crown’s power of war, though the threat of a terrifying but somewhat deferred judgment of that conscience by God is now seemingly replaced by a far milder but more immediate judgment of that conscience by the self. Another example is the consistent subservience of the Crown to the law, as asserted by Bracton, Coke, and Diplock.

But what that law was and to whom the Crown ought to be accountable to for their possible transgressions of it changed quite considerably across all three jurists. For Bracton, the law was God’s *jus*, to whom the king was accountable. In an almost complete contrast, for Coke, the law was that which had been learned by the judges and was a law of skilled artificial, not natural reasoning. Diplock based his advancement in review of the manner of the application of prerogative power to statutory developments of recent decades and subsequent case precedents.

This is but one instance of a fundamental methodological challenge involved in comparative legal studies. How can we compare or draw insights from systems that may mean different things by the same terminology or not have those words at all? Related to this but even more fundamentally, what position should the researcher adopt in handling concepts that may have no equivalent between societies, past or present?

It was found that the interdisciplinary debate of Legal Pluralism has travailed much of these difficulties, and that the opinions within that debate can be summarised into four broad approaches. Applying these approaches to the preliminary research of the Article into comparative accountability in English legal history of the exercise of Crown powers, it was found that some are clearly unsuitable for this particular research task at hand and might safely be left aside. The approach that would seem to be most worthy of following for further studies in this area is the approach adopted by Dowdle and by Hahm, that being a broad and inductive exploration of the concepts as they stand within each society to be compared,
allowing possible new extrapolations from a comparison of the similarities and differences
thus found.
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