

This chapter is concerned with the extent to which we should think in terms of ‘public law’ or ‘public laws’. The topic is perennial. There has been debate in relation to most legal subjects as to whether we should, for example, think in terms of a law of contract or laws of contract, the latter capturing the idea that there are different bodies of law applicable to contracts of sale, employment, shipping, hire purchase and the like. So too in the realm of public law, there has been discourse as to whether the subject should be perceived in functional terms, in recognition of subject matter as diverse as social welfare and planning, tax and asylum, and utilities regulation and mental health.

While the topic is thus perennial there is also a sense in which it is under-theorized, in relation to public law at least. This is because the very idea of ‘functional’ public law that betokens an element of diversity conceals a range of more distinct ideas that must be disaggregated for the sake of analytical and normative clarity. This chapter is not predicated on the assumption that there is only ‘one’ correct meaning to be ascribed to the idea of functional public law. It is, however, premised on the assumption that clarity as to the sense in which the term is being used is a condition precedent to reasoned analysis concerning its utility. The ensuing discussion therefore explores four different ways in which the idea of a functional public law is used.

Different subject matter rules

We can begin with the most straightforward and least controversial, and thus clear the ground. There is no doubt that we have a regime of

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public laws insofar as this captures the idea that there are distinct subject matter rules in relation to mental health, education, housing, tax, asylum and the plethora of other areas that the state regulates. To make clear, the term 'subject matter rules' connotes here the detailed statutory provisions that regulate the relevant area, whether this concerns access to welfare benefits, tax liability, the conditions for seeking asylum, or the circumstances in which a person can be sectioned pursuant to mental health legislation. This is self-evidently so, and no one would deny it.

A somewhat less self-evident, but nonetheless simple point flows from this, which is that many public law cases turn almost entirely on points of statutory interpretation about whether or not the relevant statutory conditions have been met. They will often not be read by general public lawyers, because they raise no particular point about the application of public law doctrine, but they will be regarded as important by specialists in the field of planning, asylum or social welfare, insofar as the legal decision is significant for the application of that statutory schema. There is, as will be seen below, a duality in the meaning of the much-used phrase 'context is everything'. When it is used here it simply captures the legal reality that the case has turned on the meaning of a term that is specific to the particular subject matter area.

It should be recognized that this holds true for many if not all legal subjects. Public law is not special in this respect. Thus there will be many contract cases that turn either on the specific terms of contract, with no special relevance for contract doctrine, and/or which entail interpretation of statutory provisions relating to that type of contract, which will be of interest to specialists in, for example, shipping or hire-purchase, but will not make their way into general contract texts.

Different constitutional rules

There is also no doubt that we have a regime of public laws within the United Kingdom insofar as this connotes different constitutional rules for different parts of the UK. This has been especially marked since the passage of devolution legislation in the 1990s. The Conservative Government under Margaret Thatcher had no interest in devolution of power, but the

return of a Labour Government in 1997 brought the possibility of devolution onto the Westminster political agenda.¹

Devolution may be structured such that the central government devolves all its power to the other body, with the exception of reserved matters. It can, alternatively, be structured such that specified matters are devolved, with the corollary that all other matters remain within the power of the central authority. There is no *a priori* reason why the first method should be more favourable to the devolved body,² since so much turns on the list of reserved matters. This is readily apparent from comparison of the Government of Ireland Act 1920, and the Scotland Act 1998. The list of reserved powers contained in the former Act is relatively short, and relatively general. The list contained in the Scotland Act 1998 is very long, contains general reservations and a plethora of much more detailed specific reservations.

The Scottish Parliament is given the power to make primary laws, which are known as Acts of the Scottish Parliament. This does not formally affect the power of the Westminster Parliament to make laws for Scotland,³ but it has been established by what is known as the Sewel Convention that the Westminster Parliament will not legislate on devolved matters without the consent of the Scottish Parliament. The legislative power of the Scottish Parliament is nonetheless limited in a number of ways: it cannot legislate, *inter alia*, in relation to reserved matters, or in a way that is incompatible with rights in the European Convention on Human Rights ('ECHR'), or with EU law.⁴ The list of reserved matters is very extensive,⁵ and the Scottish Parliament is prohibited from legislating if the legislation relates to such matters.

Whether this is so can be tested through the courts, although it has not been easy for claimants to convince the courts that Scottish legislation should be invalidated on this ground.⁶ The courts have striven to interpret

¹ N. Walker, 'Constitutional Reform in a Cold Climate: Reflections on the White Paper & Referendum on Scotland's Parliament', in A. Tomkins (ed.), *Devolution and the British Constitution* (London: Key Haven, 1998).

² Constitution Unit, *Scotland's Parliament, Fundamentals for New Scotland Act* (London: Constitution Unit, 1996).

³ Scotland Act 1998, s. 28(7). ⁴ Scotland Act 1998, s. 29(2).

⁵ Scotland Act 1998, Sch. 5.

⁶ A. Poole, 'Recent Legislative Competence Challenges' [2011] SLT 127; C. Himsworth, 'Nothing Special about that? *Martin v HM Advocate* in the Supreme Court' (2010) 14 *Edinburgh Law Review* 487.

the reservations so as to allow the contested Scottish legislation to be regarded as valid,⁷ although there have been instances where legislation has been caught by the reservations.⁸

The Supreme Court in *AXA*⁹ made it clear that while Scottish legislation, emanating from a non-sovereign body, was subject to the supervisory jurisdiction of the UK courts, it was nonetheless made by a body with plenary authority over its assigned area, subject to the limits in the Scotland Act 1998. The consequence was the legislation did not have to be made for a specific purpose, or with regard to particular considerations, and accountability lay primarily to the electorate rather than the courts. A further consequence was that common law tools of judicial review, such as irrationality, developed for review of administrative bodies, were constitutionally inappropriate when reviewing Scottish legislation, although the Supreme Court reserved the right to review on grounds other than those in s. 29 in exceptional instances where the challenged legislation abrogated fundamental rights or the rule of law.

The initial devolution settlement in relation to Wales was markedly different. The Government of Wales Act 1998 only provided for executive devolution, in the sense that the National Assembly for Wales assumed responsibilities hitherto exercised by the Secretary of State for Wales. In 2002 those exercising executive powers on behalf of the National Assembly adopted the title 'Welsh Assembly Government', and appointed a Commission under the chairmanship of Lord Richard to review the operation of devolution in Wales. The Richard Report recommended that the Assembly should be able to make primary legislation for Wales.¹⁰ This was the catalyst for the White Paper on *Better Governance for Wales*,¹¹ which laid the foundations for the Government of Wales Act 2006, which

⁷ *Martin v. HM Advocate* [2010] UKSC 10, 2010 SLT 412; *Imperial Tobacco Ltd, Petitioner* [2010] CSOH 134, 2010 SLT 1203.

⁸ *Henderson v. HM Advocate* [2010] HCJAC 107, 2011 SLT 488. See also *Whaley v. Lord Watson of Invergowrie* 2000 SLT 475.

⁹ *AXA General Insurance Ltd v. HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

¹⁰ Commission on the Powers and Electoral Arrangements for the National Assembly for Wales, *Report of the Richard Commission* (2004) (available at <http://webarchive.nationalarchives.gov.uk/20100410160947/http://www.richardcommission.gov.uk/content/template.asp?ID=/content/finalreport/index-e.asp>); R. Rawlings, *Say Not the Struggle Naught Availeth: The Richard Commission and after* (Centre for Welsh Legal Affairs, University of Wales, 2004); T. Jones and J. Williams, 'The Legislative Future of Wales' (2005) 68 *Modern Law Review* 642.

¹¹ Cm 6582, 2005; R. Rawlings, 'Hastening Slowly: The Next Phase of Welsh Devolution' [2005] *Public Law* 824.

now provides the framework for Welsh devolution. Wales now has legislative power, although by way of contrast to the Scotland Act 1998, the Government of Wales Act 2006 defines the scope of the Assembly's legislative powers by listing the subjects in relation to which the Assembly can make law, rather than only listing those areas outside its legislative competence.

The relationship between Scotland, Wales and Westminster is ordered through a Memorandum of Understanding, and accompanying Concordats.¹² The Memorandum of Understanding is not legally binding, but it is of central importance for relations between the bodies to whom power has been devolved and Westminster.¹³ The Memorandum of Understanding provides for communication and consultation between the different administrations, co-operation on areas of mutual interest, and exchange of information. A Joint Ministerial Committee was established to consider non-devolved matters that impinge on devolved responsibilities, and vice-versa, the respective treatment of devolved matters in different parts of the UK, and disputes between the administrations. The Joint Ministerial Committee meets in plenary session, with more frequent meetings for issues dealing with sectoral areas such as Health, the Knowledge Economy and the EU. The Memorandum of Understanding is supplemented by individual Concordats between the Scottish Government and UK government departments,¹⁴ and between the National Assembly for Wales and such departments.

Differential application of public law doctrine

The issue of whether public law doctrine is applied differentially is more complex. It is certainly true that Scotland has distinctive public law

¹² R. Cornes, 'Intergovernmental Relations in a Devolved United Kingdom: Making Devolution Work' in R. Hazell (ed.), *Constitutional Futures, A History of the Next Ten Years* (Oxford University Press, 1999); R. Rawlings, 'Concordats of the Constitution' (2000) 116 *Law Quarterly Review* 257.

¹³ Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5240, 2001); Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Committee Executive (2010).

¹⁴ A list of such concordats is available at www.scotland.gov.uk/About/concordats.

doctrine, but over and beyond this the extent to which it does and should vary with context, and in that sense embodies a regime of public laws, warrants careful examination.

Application of doctrine: functionalism and reductionism

We can begin with the most obvious, but least interesting, sense in which doctrine is functional, which is that the precepts of judicial review will necessarily have to be applied to a particular statutory context. Thus if the courts decide that all errors of law are reviewable, they will then have to decide whether there has been such an error, given the wording of the relevant statute; if the courts establish criteria for mistake of fact, they will then determine whether such an error has occurred in the contested proceedings; and if the courts accord a meaning to improper purposes, they will then determine whether the public authority was guilty of a transgression. In doing so context may well be everything, but only in the reductionist sense that any legal norm must be applied to a particular set of circumstances, and this is as true of rules of contract, tort and restitution as it is of judicial review.

Differential application of doctrine: institutional expertise

There are instances of differential application of judicial doctrine, where the determinative functional criterion is expertise. This can be exemplified by developments concerning judicial review for error of law, where greater latitude has been accorded to tribunals in part because of their expertise.

The courts have acknowledged issues of relative institutional expertise,¹⁵ and there are prominent instances where they have been respectful of tribunal findings because of the latter's expertise.¹⁶ This came to the fore in *Cart*¹⁷ and *Eba*,¹⁸ where the Supreme Court's rationale for limiting judicial review of the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007 Act was based in part on its expertise, such that the reviewing

¹⁵ *R (CENTRO) v. Secretary of State for Transport* [2007] EWHC 2729 (Admin).

¹⁶ *R (Wiles) v. Social Security Commissioners* [2010] EWCA Civ 258.

¹⁷ *R (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

¹⁸ *Eba v. Advocate General for Scotland* [2011] UKSC 2, [2011] PTSR 337. See also, *R. (Khalil) v. Truro County Court* [2011] EWHC 3335 (Admin); *PR (Sri Lanka) v. Secretary of State for the Home Department* [2011] EWCA Civ 988, [2012] 1 WLR 73.

court should be slow to interfere with its decisions, the result being that the test for review of error of law is now more limited than the general test established by *Page*.¹⁹

The Supreme Court in *Cart* held that judicial review was an artefact of the common law, the object being to ensure that insofar as possible, decisions were taken in accordance with the law, and in particular the governing statute in the particular area. The Supreme Court also acknowledged that neither tribunals nor courts were infallible and any judge might be wrong in law, with the consequence that there should always be the possibility that a second judge, with more experience or expertise than the judge who initially heard the case, could check for errors. If a decision of the Upper Tribunal to refuse permission to appeal to itself was never amenable to judicial review, there would, said the Supreme Court, be a real risk of the Upper Tribunal becoming the final arbiter of the law, even when it was wrong in law, so that errors of law of real significance could be perpetuated. There had therefore to be some possibility of judicial review. The Supreme Court was nonetheless mindful of the status of the new tribunal regime. This was reflected in the 'restrained' test adopted as to when the ordinary courts would review the Upper Tribunal: it was for the claimant to show that the proposed appeal raised some important point of principle or practice, or there was some other compelling reason for the appellate court to hear the appeal.

Judicial restraint in the application of review for error of law as it pertains to tribunals was evident once again in *Jones*.²⁰ The case concerned a claim before the Criminal Injuries Compensation Authority for compensation under the Criminal Injuries Compensation Scheme 2001. The operative legal issue was whether the claim was attributable to a 'crime of violence'. The Supreme Court held that where the interpretation and application of a specialized statutory scheme had been entrusted by Parliament to the new tribunal system, it was for the Upper Tribunal to develop structured guidance on terms that were central to the scheme, so as to reduce the risk of inconsistent results by different panels at the First-tier level. The development of such a consistent approach to the term 'crime of violence' was a task primarily for the tribunals, not the appellate courts. A pragmatic approach should therefore be taken to the divide between law

¹⁹ *R. v. Hull University Visitor ex parte Page* [1993] AC 682.

²⁰ *R. (Jones) v. First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48.

and fact, so that the expertise of tribunals at the First-tier and that of the Upper Tribunal could be used to best effect. The consequence was that an appeal court should not venture too readily into this area by classifying as issues of law those that were best left for determination by the specialist appellate tribunals.²¹

Differential application of doctrine: importance of the right/interest

Differential application of judicial doctrine may also turn on assessment of the nature of the interest infringed. This is most readily apparent in the divide between proportionality and rationality as tests for review of discretion depending on whether the claimant can assert a Convention right. It is, however, also evident within these broad categories, as exemplified by the differing intensity with which proportionality review is applied even in rights-based cases.

This is exemplified by the *Countryside Alliance* case,²² in which it was alleged that the Hunting Act 2004, which prohibited the hunting of wild mammals with dogs, infringed Convention rights. The House of Lords concluded that Article 1 of the First Protocol was engaged, since the 2004 Act limited the use that an owner could make of his land. It nonetheless held that the restriction was proportionate and in reaching this conclusion accorded the legislature a wide margin of discretionary judgment on a controversial matter of social policy. Lord Bingham was duly mindful of the dangers of subverting the democratic process if ‘on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament’.²³ In similar vein Baroness Hale made clear that the concept of what might be necessary in a democratic society had to take into account the comparative importance of the right infringed in the scale of rights protected, such that what might be a proportionate interference with a less important right might be a disproportionate interference with a more important right.²⁴

²¹ *Jones* (n. 20), [16], [32], [41], [47], [48]. See also, *Moyna v. Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929, [20]–[28]; *Lawson v. Serco* [2006] UKHL 3, [2006] I.C.R. 250, [34]; Sir Robert Carnwath, ‘Tribunal Justice – A New Start’ [2009] *Public Law* 48.

²² *R (Countryside Alliance) v. Attorney General* [2007] UKHL 52, [2008] 1 AC 719. See also *Bank Mellat v. HM Treasury* [2013] UKSC 39, [2014] AC 700, [21], [74], [75].

²³ *Countryside Alliance* (n. 22), [45]. ²⁴ *Countryside Alliance* (n. 22), [124].

The same point is evident albeit in a different way from *Animal Defenders*.²⁵ The case concerned free speech, but in deciding that a blanket ban on political advertising was compatible with Convention rights, Lord Bingham nonetheless held that the weight to be accorded to Parliament's judgment depended on the circumstances and the subject matter. He gave it significant weight in the instant case because: it was reasonable to expect that democratically elected politicians would be sensitive to measures necessary to safeguard the integrity of our democracy; Parliament had recognized that the prohibition of political advertising on television might infringe Article 10 ECHR, but nonetheless decided to proceed with the legislation and Parliament's judgment on this issue should not be lightly overridden; and legislation had to lay down general rules, which meant that a line must be drawn, and it was for Parliament to decide where.

The differing intensity of proportionality review will be affected not only by assessment of the importance of the right, but also by the determination as to how much respect/deference/weight should be given to the views of the primary decision-maker. Thus in *Roth* Laws LJ articulated four principles that would guide the courts:²⁶ greater deference would be paid to an Act of Parliament than to a decision of the executive or subordinate measure; there was more scope for deference where the Convention required a balance to be struck, much less so where the right was stated in unqualified terms, although even in the latter instance there could be room for differences of view as to how the requirements of a Convention right could be met; greater deference was due to the democratic powers where the subject-matter was peculiarly within their constitutional responsibility, such as defence of the realm, and less when it was more within the constitutional responsibility of the courts, which were concerned with maintenance of the rule of law; and greater or lesser deference would be due according to whether the subject-matter was more readily within the actual or potential expertise of the democratic powers or the courts.

The courts also take account of the importance of the interest infringed in cases outside the Human Rights Act 1998, in deciding that the

²⁵ *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, [33].

²⁶ *R. (International Transport Roth GmbH) v. Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, [83]–[87].

particular interest infringing warrants anxious scrutiny.²⁷ This standard of review has been held applicable in asylum cases, irrespective of whether a Convention right is engaged on the facts of the case. The leading case of *WM* concerned two failed asylum applications, subsequent to which the applicants presented new material to the Secretary of State that were said to constitute 'fresh claims'.²⁸ The Secretary of State refused to accept the new evidence, and the applicants sought judicial review. Buxton LJ, giving judgment for the Court of Appeal, held that although the decision remained that of the Secretary of State, a decision would be irrational if it was not taken on the basis of anxious scrutiny of the material to ensure that the applicant had not been incorrectly exposed to persecution. In determining whether the evidence amounted to a fresh claim, the Secretary of State had to decide whether there was a realistic prospect that an adjudicator would think that the applicant would be exposed to a real risk of persecution on return. The task for the court was to determine whether the Secretary of State had asked himself that question, rather than substituting his own views as to whether the claim was a good one or should succeed. The court also had to determine whether the Secretary of State had satisfied the requirement for anxious scrutiny, but it was not for the court to take the decision itself rather than reviewing how the Secretary of State had taken his decision.

Buxton LJ made clear that 'since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution'.²⁹ This was reinforced throughout the judgment. Thus Buxton LJ emphasized that the Secretary of State must satisfy the requirements of anxious scrutiny.³⁰ So too must the court when exercising judicial review, and this took effect through more searching rationality review in order to determine whether the Secretary of State had asked himself the correct question, and whether the Secretary of State exercised anxious scrutiny in relation to evaluation of the facts and the legal conclusions to be drawn from them.³¹

²⁷ P. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] *Public Law* 59.

²⁸ *WM (Democratic Republic of Congo) v. Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337.

²⁹ *WM* (n. 28), [7]. ³⁰ *WM* (n. 28), [11]. ³¹ *WM* (n. 28), [10]–[11].

Differential application of doctrine: systemic functional differentiation

There is undoubtedly evidence for the differential application of public law doctrine in the two preceding senses, whereby the courts modify the application of such doctrine in the light of institutional expertise and in accord with the importance of the right or interest at stake in the particular case. It is, however, more difficult to discern what might be termed systemic functional differentiation, whereby all or many aspects of public law doctrine are applied differentially because of the nature of the subject matter or area concerned. This is not to say that it might not occur, but simply that it is not easily discernible.

There may moreover be good reasons to explain why it does not occur. Most obvious is the fact that the variables that affect the way in which doctrine is applied may well cut across each other, and pull in different directions, within a particular area. Thus the public body may have considerable institutional expertise over the subject matter, which might in accord with the preceding case law cause the courts to give it more leeway when construing issues of law. The same public body may, however, also exercise power in an area where important rights are at stake, which would incline the courts to more intense review when the claim is that such rights have been infringed.

Differential application of doctrine: functional considerations and doctrinal categories

The idea of a regime of public laws as opposed to public law is also manifest in a rather different way from that considered thus far. It finds expression in dissatisfaction with doctrinal categories, coupled with the desire to reach behind them in order to reveal the real considerations that influence courts when reaching their decisions. This mode of thinking is in certain respects akin to that considered in the preceding discussion, in the sense that institutional expertise and the importance of the right/interest affected are central to the application of certain doctrinal precepts. What distinguishes the mode of thought addressed here from that considered above is a matter of degree, but an important one nonetheless.

This is manifest in two related ways. There is a desire for greater particularization of the factors that impact on the application of doctrine.

This may then be coupled with scepticism as to the need for the doctrinal categories, the suggestion being that we dispense with them and simply rely on the functional considerations to give us the answer in any particular case. Viewed in this way this approach might be regarded as the ultimate vision of a regime of public laws, where everything turns on each occasion on the way in which the wide range of functional considerations plays out.

This approach is interesting, and the reality is that there has always been an ebb and flow between the desire to construct a doctrinal structure and the desire to emphasize the more particular issues that affect the application of the doctrinal structure in a particular case. Academic fashion changes over time, and this is manifest in altered preferences in this regard. Having said that, it should also be recognized that the desire to deconstruct the doctrinal categories and concentrate instead on the functional considerations that are felt to be the 'real deal' is subject to three limits or constraints: conceptual, pragmatic, and logical.

The conceptual constraint is that you simply pull the doctrinal house down and it is then replaced by another. So, the drive for dispensing with established doctrine and focusing instead on the functional considerations that explain its application leads to a new set of doctrinal or quasi-doctrinal categories formed from the aggregation of particular functional considerations that are felt to warrant a particular result in terms of judicial review. The 'set' of functional considerations are abstracted and generalized to form what is in effect a new doctrinal category. This demands, however, articulation of a range of contestable issues concerning the nature of the subject matter area to which the functionally calibrated criteria are applicable and the more precise delineation of those criteria.

The pragmatic constraint is judicial acceptance. The approach is driven by the belief that what we as academics perceive to be the functional considerations driving judicial decisions can straightforwardly translate into a method of resolving cases that judges are comfortable with. Thus the fact that we might particularize in great detail the functional considerations that we see as underpinning case law does not mean that courts or barristers would feel content with resolving cases in this manner, shorn of the doctrinal categories that frame the inquiry. There is, moreover, the issue of the judicial capacity to take account, within the confines of the adversarial system, of a very broad range of functional considerations,

more especially given the limits on evidence considered by the court and the time constraints on adjudication.

The logical constraint bears on the relationship between the functional considerations and the doctrine that frames it. It is logically possible, subject to the conceptual and pragmatic constraints, to take account of a broader range of functional considerations when applying doctrine. It is not logically possible to dispense with the doctrinal categories in their entirety, unless something analogous replaces them. The reason is as follows. The functional considerations are designed to tell you how much leeway or not as the case may be should be accorded to the primary decision-maker. The answer crudely put may be a lot, none or some. This does not, however, tell you anything about the base from which this estimation is being conducted. Thus to accord the primary decision-maker considerable leeway where the base line is otherwise a test of correctness or substitution of judgment, is quite different from granting such leeway where the base line from which the assessment is made is reasonableness or proportionality. It might be argued that this issue will in some way form part of the matrix of functional considerations. Leaving aside the difficulty of divining what precisely this means, this would simply be importing through the back door in a less clear manner the doctrinal category that had hitherto framed the analysis.

Distinctive public law theory

The preceding discussion would be incomplete if it did not address the argument that there is a distinct 'functionalist' public law theory. This embodies a view as to the very nature of public law, which also has implications for the way in which it is applied in particular contexts. The nomenclature of 'functionalist' public law theory was coined by Martin Loughlin, who used it in contrast to what he termed 'normativist' theories, whether of a liberal or conservative persuasion.³²

For Loughlin, normativist theories are said to be grounded in ideas about the separation of powers, the rule of law and the need to subject government to law, with the emphasis on adjudicative and control functions,

³² M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992);

M. Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361.

coupled with an idea of the autonomy of law. Law is said to precede legislation, and rights to precede the state, the latter being conceived of in largely negative terms.³³

Loughlin contrasts such theories with those of a functional nature, which embrace more sociological conceptions of law.³⁴ Law is said to be viewed as part of the apparatus of government, with the focus on an active role for the state and law's regulatory and facilitative functions. Legislation is said to be the highest embodiment of law, freedom is perceived in positive not merely negative terms, and the relationship between citizen and state is conceived in more organic and less atomistic terms. On this view, public law should be used for the purpose of promoting human improvement, a healthy body politic and social solidarity. Government is the subject of duties, and public law is concerned with their substantive realization. Public law must on this view be interpreted purposively, in the sense of with regard to its function. Rights are regarded as claims 'that are recognized and enforced only insofar as their recognition promotes the common good'.³⁵

Martin Loughlin has shed valuable light on the constituent elements of what he terms the functional approach to public law, and on its philosophical foundations. The dichotomy between normativist and functionalist theory is nonetheless doubly problematic. It aggregates theories under the label 'normativist' that are very different in many respects. It disaggregates those theories from others that are regarded as 'functional' when the reality is that all theories of public law are irreducibly both normative and functional, and that is so irrespective of whether they are grounded on conservative, liberal or more collectivist/socialist foundations.

Consider first the normativist perspective. The approaches to public law that Loughlin identifies are explicitly predicated on certain political theories. That is self-evidently so in relation to what he terms conservative and liberal normativism. It is, however, equally true in relation to what he terms functionalism, since, as Loughlin readily acknowledges, many, albeit not all,³⁶ of the principal proponents had a socialist or left of centre

³³ Loughlin, *Public Law and Political Theory* (n. 32), 60–61.

³⁴ Loughlin, *Public Law and Political Theory* (n. 32), 60–61; Loughlin, 'Functionalist Style' (n. 32), 363–64.

³⁵ Loughlin, 'Functionalist Style' (n. 32), 363.

³⁶ J. N. Figgis, *Churches in the Modern State* (London: Longman, 1913).

political philosophy.³⁷ Political theories address a variety of issues, which include the nature of rights, conceptions of justice, the relationship between justice and other virtues, and the extent to which the state should seek to prescribe behaviour for its citizens. It is readily apparent that political theories such as liberalism, conservatism, republicanism, communitarianism and socialism give different answers to such issues. Indeed it is these very differences that render them distinct political theories. All such theories are normative, as that term is commonly used. They all seek to provide convincing arguments as to why certain answers ought to be given to the preceding issues, albeit based on certain factual assumptions.

This is equally true for those Loughlin regards as coming within the functionalist school, as for those of a more liberal or conservative persuasion. Thus when, for example, Fabians or New Liberals argued for greater protection of social and economic interests, this was clearly premised on normative arguments as to why such interests should be protected in the manner argued for. This was also true for those who argued in terms of social interdependence or social solidarity.³⁸ Proponents of these theories also had distinct views about the separation of powers and the rule of law, albeit different from those propounded by adherents of other political theories. It is precisely because all such theories are normative that classic or current works on liberalism, conservatism, republicanism and the like discuss such concepts without any addition of the word 'normativism' or 'normativist'.

It is, moreover, equally important to take care when arguing that certain visions of public law are wedded to particular normative precepts. Loughlin's running together of all liberal theories is especially problematic. Thus repeated assertions that liberals conceive of liberty in negative terms as the absence of external restraint, coupled with the idea that liberals regard government as repressive, conceal more than they reveal.³⁹ The statement may be true in relation to the liberalism of Hayek⁴⁰ or Nozick,⁴¹

³⁷ See, e.g., H. J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917); H. J. Laski, *Authority in the Modern State* (New Haven: Yale University Press, 1919); G. D. H. Cole, *Social Theory* (London: Methuen, 1920); G. D. H. Cole, *Guild Socialism Restated* (London: Parsons, 1920).

³⁸ See, e.g., L. Duguit, *Law in the Modern State*, trans. by F. and H. Laski (London: Allen & Unwin, 1921).

³⁹ Loughlin, *Public Law and Political Theory* (n. 32), 60, 61, 96.

⁴⁰ F. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960); F. Hayek, *Law, Legislation and Liberty, A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge and Kegan Paul, 1982).

⁴¹ R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

but it is not so in relation to that of Rawls,⁴² Dworkin⁴³ or Raz.⁴⁴ Similar difficulties attend broad assertions that normativists regard rights as preceding the state, whereas functionalists regard rights as emanating from legislation.⁴⁵ Political theories clearly differ concerning the way in which rights are conceptualized. This is a central normative issue for all political theories, but the answer provided by 'functionalists' is not necessarily so different from that given by, for example, liberal theories. Thus Laski regarded society as preceding the state and believed that individuals came to the state with rights that the state had a duty to protect.⁴⁶ This is without prejudice to a second order issue, which is whether to protect such rights through courts, legislation or an admixture of the two.

Consider now the functional dimension. The reality is that all political theories have a functional as well as a normative dimension. There is no reason why the term functional should be reserved for those theories that are more collective or socialist in orientation. Loughlin uses the term functional in a variety of ways, but none warrant the conclusion that only collectivist type theories have this dimension, or that it is lacking from liberal or conservative theories.

The term is used by Loughlin in part to capture the idea that those who subscribe to functionalist theories argue for legal norms and governmental action that will effectuate the desired ends. They seek ways to ensure that the machinery of the state attains these particular goals. This is, however, equally true in relation to all political theories. Thus, for example, libertarian or public choice theorists are also functional in this sense. They too wish to ensure that the relevant constitutional, legal and political machinery of the state is configured so as to attain the functions that they believe the state should be performing. They too believe that public law should be used to support a healthy body politic. They go to very considerable lengths to specify what this entails.⁴⁷ They can and do regard law as part of the

⁴² J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973).

⁴³ R. Dworkin, *Sovereign Virtue, The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000); R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996).

⁴⁴ J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

⁴⁵ Loughlin, *Public Law and Political Theory* (n. 32), 60.

⁴⁶ H. J. Laski, *The Foundations of Sovereignty and Other Essays* (London: George Allen & Unwin, 1921); H. J. Laski, *Liberty in the Modern State* (London: George Allen & Unwin, 1948).

⁴⁷ See, e.g., J. M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962);

machinery of government. They too focus on law's regulatory and facilitative function. They just adopt a radically different view of what that is as compared to those of a more socialist persuasion.

The term functionalism is also used by Loughlin in a different sense. He contends that liberal normativists are committed to law being non-purposive, in the sense that the state is meant to be neutral as between differing conceptions of the good. Functionalists are by way of contrast said not to be troubled by this attachment to neutrality, with the consequence that they can perceive of law as functionally serving broader societal and governmental goals.⁴⁸ It is certainly true that deontological liberal theory of the kind posited by Rawls⁴⁹ is premised on the assumption that the state should be neutral as between conceptions of the good, in the sense that it is not for the state to make choices between the value of a life reading philosophy or playing sport. Liberals of this persuasion are not, however, neutral about the principles of justice. Nor are they neutral about legislation or adjudication that affects these principles. To the contrary, they demand legislative, executive and judicial action that is purposive insofar as it relates to such principles of justice, including, in this respect, protection for civil and political liberties, and including also under a Rawlsian theory action to alleviate the plight of the socially and economically disadvantaged. Liberals regard law as purposive and functional to attain these ends. It is no answer to contend that some might prefer, for example, more extensive social rights or greater economic redistribution. This might well be so, but it has nothing to do with whether public law is purposive or functional. It simply reflects disagreement as to the background political theory that underpins public law.

There is, moreover, a third sense of the term functional that appears in Martin Loughlin's work, although it is less evident than the preceding two. Thus the term is sometimes used to capture the positive or descriptive dimension of a desired approach. There is a meaningful distinction to be had between positive/descriptive aspects of political science and more normative political theory, although values permeate the former as well

J. M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (University of Chicago Press, 1975); J. M. Buchanan, *Freedom in Constitutional Contract: Perspectives of a Political Economist* (College Station: Texas A & M Press, 1977); G. Brennan and J. M. Buchanan, *The Reason of Rules* (Cambridge: Cambridge University Press, 1985).

⁴⁸ Loughlin, *Public Law and Political Theory* (n. 32), 60, 93, 96, 102.

⁴⁹ Rawls (n. 42). Compare the perfectionist liberal approach in Raz (n. 44).

as the latter. The relevant point for present purposes is that the distinction between positive/descriptive political science and normative political theory is equally applicable to all types of political belief. Thus one might ask how far a society exhibits the features of republicanism, and then proceed to advocate the further development of such attributes on the ground that it is felt in theoretical terms to be the best way to order society. The same might equally be true in relation to liberalism, socialism, conservatism and communitarianism. The argumentation might take a different form, whereby the observer concludes in descriptive terms that the pattern of societal ordering conforms to a liberal stereotype, and then argues that this is undesirable because it is felt that a more socialist society would be preferable. All this is standard fare, and reflects much of the to and fro of political discourse. It offers no basis, however, for any distinction between normativist and functionalist theories, precisely because the descriptive and normative dimensions are applicable to all types of political belief, whether they be conservative, liberal, socialist or idealist.

Conclusion

This chapter has sought to shed light on the extent to which we have a system of public law as opposed to public laws. The issue is interesting and under-theorized, and the answer depends, not surprisingly, on more specific delineation of the nature of the inquiry. Thus it is clear that we have a system of public laws insofar as this connotes distinct statutory rules on subject matter as diverse as education, health, asylum and licensing. It is equally clear that we have a regime of public laws insofar as this captures the distinct constitutional rules that pertain in Scotland, Wales and Northern Ireland. The extent to which this is also true in relation to the application of public law doctrine is more complex, as the preceding discussion has revealed. Care is also required when considering whether it is meaningful to talk about a distinctive functional public law theory.

Further reading

P. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] *Public Law* 59

- M. Elliott, 'Proportionality and deference: the importance of a structured approach' in Christopher Forsyth et al. (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010), ch. 16.
- M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).
- J. Mitchell, *Devolution in the UK* (Manchester: Manchester University Press, 2009).
- T. Mullen, 'A holistic approach to administrative justice?' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010), ch. 16.