

*This a review article of Martin Loughlin, Foundations of Public Law (Oxford: Oxford University Press, 2010). The promise of the book is that the retrieval of public law understood as a prudential discourse of public right will show us how liberal democratic societies have learned to negotiate between the horns of the fundamental dilemma Loughlin supposes we face. This is the dilemma articulated by Rousseau: on the one hand, a society has to take deliberate steps to produce through law free citizens in order to ensure that it is one in which freedom endures, while, on the other hand, such steps create the danger of 'bureaucratic oppression' of the sort that produces a society composed of chiefs and slaves. However, at the end of the book, Loughlin suggests that the dilemma has been resolved and that we are in danger of finding ourselves living, or perhaps even are already living, in the society of chiefs and slaves. And if the idea of public right is retrieved only to show that it is either moribund or dead, we have reached the end of what FA Hayek called in 1944 'the road to serfdom.' I argue that Loughlin comes to this surprising conclusion because of a fundamental flaw in his argument about the rule of law, in which he both reduces the rule of law to an instrument of power and suggests that it has to fail on its own terms.*

Keywords: public law, rule of law, *Rechtsstaat*, *ius*, *lex*, legal positivism, constituent power

## I Introduction

Martin Loughlin's book is a magnificent achievement, an inquiry in the grand style of late-nineteenth and early-twentieth-century German and French, political and legal thought into the nature of public law. Moreover, the inquiry is into the nature of the modern state. Public law for Loughlin is not the positive legal rules of the two main domains of a public law system – constitutional law and administrative law. Rather, it is the English term for 'political right,' '*droit politique*,' since we lack the distinction in most European languages between *ius* and *lex*: *Recht* and *Gesetz*, *droit* and *loi*, and so forth.

In the British tradition of public law, the absence of the distinction has helped to hide that the 'hegemonic account of the status of ordinary

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† Review of Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010). Subsequent references appear parenthetically in the text.

law . . . rests on foundations of right' (5). This hegemonic account was established by Thomas Hobbes, who effected a break with the natural law tradition in which it was recognized that there is a 'fundamental law,' based in religion, that constitutes the authority of the state and which thus differs from 'ordinary law' – the instrument of government authority. Hobbes replaced the concept of fundamental law with the claim that there is 'only one true concept of law: the ordinary law proclaimed by Parliament, to which all allegiance is owed' (3–4). This concept dominated British constitutional thought through Bentham, Austin, and Dicey, all the way up to modern legal positivists who claim that the question of how the authority of law is generated 'lies beyond the boundaries of juristic knowledge' (4). 'The British, it would appear, have remained faithful Hobbesians' (4). With the waning of the authority of their constitutional inheritance, there has been an attempt to 'rejuvenate the concept of fundamental law' (5–6), usually by equating it with the common law. But this equation, says Loughlin, circumvents the 'distinct nature of public law' and, in its most extreme form, 'leads inexorably down the path towards judicial supremacism – the conviction that, as authoritative interpreters of ordinary law, the judiciary must also act as guardians of fundamental law' (6).

Loughlin's book is full of resources for thinking about public law, in large part, because it exposes scholars writing in English to the rich literature of a European, state-focused tradition which is both unfamiliar to them and directly relevant to their concerns. But the book is no mere survey of literature. Loughlin's provocative argument illuminates the resources so that it will be read and reread for many years to come. However, I will also indicate why the argument fails.

The promise of the book, one that dominates 461 of its 465 pages, is that the retrieval of public law, understood as a prudential discourse of public right, will show us how liberal democratic societies have learned to negotiate between the horns of the fundamental dilemma Loughlin supposes we face. This is the dilemma articulated by Rousseau: on the one hand, a society has to take deliberate steps to produce through law free citizens in order to ensure that it is one in which freedom endures, while, on the other hand, such steps create the danger of 'bureaucratic oppression' of the sort that produces a society composed of chiefs and slaves (12–3, 428–9).

But Loughlin suggests, in the last four pages of the book, that the dilemma has been resolved and we are in danger of finding ourselves living, or perhaps even are already living, in the society of chiefs and slaves. And if the idea of public right is retrieved only to show that it is either moribund or dead, and was perhaps doomed to this fate, we have

reached, or are about to reach, the end of what FA Hayek called in 1944 'the road to serfdom.'<sup>1</sup>

## II *A pure theory of public right*

Loughlin dedicates his book to John Griffith, who died in the year of its appearance.<sup>2</sup> In light of Griffith's influential polemics against judicial supremacy, one might suspect that Loughlin's argument will follow this line of political argument. But Loughlin claims that his is a 'pure theory of public law,' one shorn of 'ideological considerations' (10). Strangely, Loughlin does not cite at this point, let alone discuss, the work of Hans Kelsen, the legal theorist who coined the term 'pure theory of law' and who had precisely the same methodological stricture on his own legal-positivist account of law. Indeed, Kelsen makes only three brief appearances in Loughlin's book, where he is referred to for his role in seeking, as a neo-Kantian legal positivist, to suppress the idea of political right (131 n 138, 211 n 8, 214), an exercise that Loughlin believes was thoroughly discredited by Carl Schmitt (213–4).

Schmitt's influence on Loughlin is considerable, especially his *Constitutional Theory*.<sup>3</sup> The combination of a pure theory of public law with Schmitt is curious, given that, as one admirer said approvingly of Schmitt in 1935, all of his works are 'from the ground up trained on one target: the unmasking and destruction of the liberal, rule-of-law state.'<sup>4</sup> Loughlin, in contrast, maintains that there is only one 'value judgment that clearly underpins the pure theory' – that it is important to maintain the 'prudential discourse of political right' because that is an 'essential precondition of our ability' successfully to negotiate the tension between two contrary human dispositions: 'the desire to be autonomous and the desire to be a participant in a common venture' (11–3).

At the end of the book, Loughlin issues a rather dire warning. He sees in contemporary trends 'the return of the religious, albeit in a different

1 FA Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994) [Hayek, *Road*].

2 For Loughlin's obituary of Griffith, see Martin Loughlin, 'John Griffith Obituary,' *The Guardian* (25 May 2010) online: theguardian <<http://www.guardian.co.uk/education/2010/may/25/john-griffith-obituary>> [Loughlin, 'Obituary'].

3 Carl Schmitt, *Constitutional Theory*, translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2008).

4 Review by George Dahm, qtd in FA Hayek, *Law, Legislation and Liberty* (London: Routledge, 1990) vol 1 at 61 [translated by author]. Dahm was a member of the 'Kiel school' of law, which had the reputation of being a 'shock troop university' for the construction of National Socialist law; see Michael Stolleis, *A History of Public Law in Germany: 1914–1945* (Oxford: Oxford University Press, 2004) at 291–5.

form' – the 'return of the overarching claims of the right and the true' (465). Those responsible for these claims 'seek to overcome this prudential public reason in the name of some higher universal truth' (465). But, he predicts, they 'are unlikely to be able to realize their apparent objectives . . . [T]o the extent that their ideas are now exerting a major influence in public affairs, it is likely to ensure only that the future will be marked by confusion, disappointment, and the generation of new forms of conflict' (465). They will lose the insight of the early-modern founders of public law that its 'most basic purpose' is 'maintaining the civil peace against a backcloth of (often violent) competing truths' (465). Public law is 'born of a compromise between antagonists who cannot defeat one another' (465).

It thus seems that the retrieval of the idea of public law is urgent. We must undertake that task in order to understand the distinctive nature of public law, an understanding that is brought about by shifting the focus from positive law to political right. 'Political right' is best conceived not as a constraint on political power but as constitutive of it. Political power is 'created though the ways in which governing power is institutionalized' (11–2). Neither power nor freedom is a condition that pre-exists the state. Rather, they both come into being through the state. Constraint is thus enabling of both power and freedom. Moreover, power is relational – it does not reside in any specific place but comes about through the interaction of those institutions that make up the structure of public authority (11–2). So the task Loughlin sets himself is to explain how 'fundamental law works in the modern world' (1–2).

An unresolved question that hovers over all 465 pages of text is whether Loughlin ever produces the goods. He rejects attempts to retrieve a natural law foundation, or to revive the idea of the ancient constitution, or to find a set of political principles constitutive of the public realm. As a result, he does not elaborate but gestures at a conception of public reason as a form of practical, prudential political reasoning that effects a compromise between *potestas* – rightful power – and *potentia* – control over resources – a distinction that he takes over from Spinoza (103–6). Moreover, Loughlin also seems to think that there is nothing to be retrieved. In his concluding section, 'The Triumph of the Social?' he suggests that public law has collapsed into the social realm – the realm of cost/benefit analysis – where all that matters is calculations about how to advance the 'objective law' of the social good. We are just coming to realize that we live in the world depicted by the French 'institutionalist' thinker Leon Duguit in 1913, where the social has, in fact, triumphed over the public.

In his obituary for Griffith, Loughlin mentions both that Griffith had absorbed much of Harold Laski's 'socialist radicalism' and that, in Griffith's view, 'conflict remained at the heart of modern society.'<sup>5</sup> Since laws could be 'nothing other than statements of power relations, law could never provide a substitute for politics.'<sup>6</sup> Loughlin also says that Griffith, like Jeremy Bentham, was 'scathing of attempts to refashion law as a metaphysical entity.'<sup>7</sup> The idea of the rule of law, when extended beyond the need to ensure that government operates in accordance with the laws, is, Griffith said, 'a fantasy invented by Liberals of the old school in the late-19th century and patented by the Tories to throw a protective sanctity around certain legal and political institutions and principles which they wish to preserve at any cost.'<sup>8</sup> It is not without significance that it was Laski who brought Duguit to the attention of anglophone lawyers, since Duguit fits comfortably into the intellectual lineage Loughlin depicts: Bentham – Laski – Griffith.

That raises, in another form, the question that remains unresolved by the book: Loughlin's place in the London School of Economics's 'dissenting' legal tradition, one that seeks to debunk the Whiggish claims of AV Dicey and his twentieth-century heirs about the virtues of the rule of law and judicial review. Academics in this tradition argue that judges are just another elite, intent on exploiting the inevitable indeterminacy of the law to try to curb attempts by progressive legislators to establish a welfare state run by expert administrators and not judges.<sup>9</sup> For them, the triumph of the social is also a political triumph since it represents the moment when we do away with the myth of the rule of law, supplanting it with rule by law, and thus with the rule of the social policies of which particular laws are simply the instrument.

In an article devoted to Loughlin's work prior to *The Foundations of Public Law*, I argued that he should be understood as part of this tradition.<sup>10</sup> But I also noted there that this understanding is hardly consistent with the place that another major figure of the London School of Economics, Michael Oakshott, has in Loughlin's legal theory. In contrast to Laski and Griffith, who wanted law to be understood as an instrument of

<sup>5</sup> Loughlin, 'Obituary,' supra note 2.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Qtd in *ibid*.

<sup>9</sup> See Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 *Osgoode Hall LJ* 223, especially 257–67.

<sup>10</sup> David Dyzenhaus, 'The Left and the Question of Law' (2004) 17 *Can JL & Jur* 7.

the powerful, the rule of statute or *lex*, thus debunking any attempt to show that the rule of law was the rule of *ius* or 'right,' Oakeshott argued that legal order has to be understood as a form of compulsory moral association whose constitution is the *ius* inherent in *lex*.

This Oakeshottian strain of thought remains central to *Foundations of Public Law*, as Loughlin returns time and again to Oakeshott's distinction between *societas*, a moral relationship in which the conditions of association are specified by law, and *universitas*, an association established to pursue some common purpose (161). This distinction corresponds to the distinction between *potestas*, the mode of authority wielded within *societas*, and *potentia*, the mode of authority of a *universitas*. Oakeshott, according to Loughlin, saw these two modes of association as the product of the desire to be autonomous and the desire to be a participant in a common venture. And, for Loughlin, modern public law is a polarized consciousness, with *societas* and *universitas* constituting its two poles (163).

Through his emphasis on this polarity, Loughlin unites in one account two great streams of British thought, both of which reached a kind of peak at the London School of Economics – the sceptical, left-wing, pragmatic stream exemplified by Laski and Griffith, and the idealist, conservative stream exemplified by Oakeshott.<sup>11</sup> For Loughlin, public law is, then, the medium in which the ineliminable tension between *potestas* and *potentia* has to be negotiated. At an early point in the book, he casts this distinction as corresponding to 'the idealism of constitutional law' and 'the materialism of administrative law' (12).

The distinction is, in my view, best captured as one between, on the one hand, a commitment to rule *by* law – that is, by the statute law enacted by a democratic parliament that distributes public goods and puts in place a staff of officials to manage the distribution; and, on the other hand, a commitment to the rule *of* law – that is, the qualities of legality that make enacted law intelligible to legal subjects as serving their

<sup>11</sup> Both in Oakeshott and in Loughlin something much more subtle is at stake than the political contrast between left and right; 'future good fixated' and 'public law / political right conserving' would be better terms, as a political movement of the extreme right might find the Laski/Griffith conception of law entirely congenial to its politics, whereas a social democrat might be fully committed to the conservation of a political order founded on public law, as indeed was Hermann Heller, a leading figure in Weimar constitutional debates. Loughlin appears to endorse Heller's theory (234–7), although he does not heed Heller's warning that Schmitt's reduction of law to politics and any attempt to construct a pure theory of law are the flip sides of the same unsatisfactory coin: one that will not purchase entry into a robust or even plausible theory of public right. See Hermann Heller, 'The Nature and Structure of the State' (translated by David Dyzenhaus) (1996) 18 Cardozo L Rev 1139 at 1195–216, especially at 1214.

interests in liberty and equality. We will see in the next section that Loughlin has a rather different way of capturing the distinction between rule of law and rule by law. But my way has, or so I will suggest, the better grip on the fundamental dilemma that Loughlin takes public law to negotiate.

#### IV *Rule by law / Rule of law*

In chapter eleven, ‘Rechtsstaat, Rule of Law, l’État de droit,’ Loughlin asks whether the rule of law is the ‘overarching meta-principle’ of modern constitutionalism (312). But the chapter is no paean to the rule of law, since Loughlin regards the achievement of a government of laws and not of men as an ‘impossibility’ (312). Law is a human creation and can hence never be placed above a ‘government of men’ and laws cannot rule because they cannot act; only people can (312–3).

Thus Loughlin cites with approval Schmitt’s claim that the concept of the *Rechtsstaat* is a mere piece of rhetoric, exploited in political debate to denounce one’s opponents as enemies of the rule of law. The rule of law boils down to a saying: ‘Law should above all be what I and my friends value’ (314).<sup>12</sup> Given all this, one might wonder, as Loughlin does, why one should not avoid rule-of-law talk altogether, exactly Schmitt’s tactic in the book from which Loughlin adopts this saying.<sup>13</sup>

Loughlin proceeds with rule-of-law talk, first because, he says, the ‘ubiquity’ of the expression demands that it be examined (314). However, if law in the sense of *Recht* or ‘political right,’ which is the sense used in the saying, ‘is nothing more than what my friends and I happen to value,’ one might wonder at his devoting all of these pages to explicating the ‘foundations of public law.’ For the exercise would be one that did no more than explicate the basis of the contingent tastes of, as Schmitt saw it, a substantively homogeneous political community.

The second reason Loughlin offers has more to it. There is, he says, a ‘coherent formulation of the concept,’ though he hastens to add that it is ‘entirely unworkable in practice’ (314). However, even if he were right that the concept is unworkable in practice, the claim that there is a coherent concept is in a fair amount of tension with his remarks about ambiguity and his adoption of Schmitt’s stance. In addition, his brisk but illuminating tour through Britain, Germany, and France shows that each

<sup>12</sup> Carl Schmitt, *Legality and Legitimacy*, translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2004) at 94. The original is from Goethe: ‘*Recht aber soll verzüglich heißen, was ich und meine Gevattern preisen.*’

<sup>13</sup> Ibid.

tradition grappled with more or less the same set of problems and responded with more or less the same set of ideas. Finally, it is this commonality that provides the basis for Loughlin's turn to Oakeshott's rich but under studied treatment of the rule of law – the 'most profound attempt to explicate the concept of the rule of law as a coherent and foundational concept in public law' (324).

In brief, Oakeshott argues that rule of law describes the condition that obtains when human beings are associates in an association in which the terms of their relationships are both moral and obligatory.

The expression 'the rule of law,' taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, noninstrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.<sup>14</sup>

In his detailed account of Oakeshott, Loughlin detects three conditions that have to be met for the rule of law to be a coherent concept. First, the state has to be conceived purely as a type of moral association, not a collective association seeking the realization of some desired goal. Second, the state has to be understood 'entirely as a rule-based association' (322). Third, we have to 'grasp the ineffable idea of the *jus* of *lex*,' the conditions of 'justice implicit in the idea of law which prevents the rule of law from being reduced to a purely formalistic notion,' an idea which at the same time 'resists the importation of substantive values derived from natural law (e.g. bodily integrity) or conventional politics (e.g. democracy)' (332).

But, says Loughlin, these conditions are unrealizable in practice because the state is a collective as well as a moral association, and there is an irreconcilable tension between the two. In order to defend this claim, he introduces the distinction between rule by law and rule of law that I mentioned above. Loughlin agrees with me that that the two ideas have to hang together – each is 'implicit in the concept of the rule of law' (332). But he defines them differently.

*Rule by law* focuses on the qualities inherent in the concept of law. *Rule of law* addresses a more explicitly political issue, namely the desirability of establishing a fully institutionalized governing order in which everyone has an incentive to act in accordance with the rules. (333)

Thus, for Loughlin, 'rule by law' includes both 'rule by law' (the statute law enacted by a democratic parliament) and what is traditionally

<sup>14</sup> Michael Oakeshott, 'The Rule of Law' in Michael Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999) 129 at 148 [Oakeshott, 'Rule of Law'].



understood as ‘the rule of law’ (the qualities of legality that serve the interests of individuals subject to the law in liberty and equality), with the result that he redefines ‘the rule of law’ rather dramatically.

The wonderful lines at the end of Oakeshott’s essay tell us that he would have rejected Loughlin’s attempt at a redefinition: ‘The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none) and it cannot protect itself from external assault, but it remains the least burdensome conception of a state yet devised.’<sup>15</sup> Rule according to law does, according to Oakeshott, give enacted law or *lex* a certain quality and addresses those who are subject to it in a way that facilitates their ability to decide on what substantive ends to pursue without dictating those ends to them. It thus creates a mode of association in which a certain kind of freedom is made possible: liberty under law. But even here, the economist’s term ‘incentives’ would be misplaced.

It would, of course, be productive to redefine the rule of law in a way that goes against the grain of the tradition of thinking about the foundations of public law if that helped in Loughlin’s exercise of the retrieval of those foundations in an idea of public right. But it is, as I will now argue, the redefinition that gives rise to the flaw that undermines the argument of the whole book. The flaw is the result of the novel and illuminating fashion in which Loughlin combines two attempts at debunking the traditional idea of the rule of law in order to support his redefinition – Schmitt’s and that of Joseph Raz. Such a combination is lethal to any conception of public right because it not only conceives law as no more than an instrument of politics but also seems to make it very hard, perhaps even impossible, for law to play that role.

#### V *Debunking the rule of law*

Loughlin draws on Schmitt for the claim that the idea of law in expressions such as rule of law or *Rechtsstaat* has to incorporate certain qualities – for example, generality – that distinguish it from a mere command or expression of will. He finds a considerable consensus among jurists about these qualities, with their classic expression being Lon L. Fuller’s discussion of eight desiderata of the rule of law. But Loughlin rejects Fuller’s claim that these desiderata are moral; instead, he proposes that they should be understood as ‘functional or prudential,’ since ‘serious failure to comply with these criteria would make it impossible to subject human conduct to rules’ (333–4).

<sup>15</sup> Ibid at 178.

At this point, Loughlin invokes Oakeshott, in the face of the fact that Oakeshott was clear that the criteria elaborated the conditions for a moral association. It is also clear that, when Fuller talked of the internal morality of law, he thought of his eight desiderata as moral precisely because they brought into being such an association. Moreover, Loughlin's reduction of the desiderata to functional or prudential criteria, so that the virtue of law in its action-guiding properties is purely instrumental in the same way that the virtue of a knife is its sharpness, relies on Joseph Raz's legal-positivist account of the rule of law.<sup>16</sup> Loughlin's wholesale endorsement of Raz's argument that the rule of law serves to make the law into a better instrument of government amounts to a rejection of Oakeshott and his view that 'the propriety which identifies the *ius* of *lex* must be composed of moral, non-instrumental considerations.'<sup>17</sup>

When I said, in the previous section, that Oakeshott's essay is under studied, my point was that legal and political philosophy might look quite different today if Oakeshott's essay 'The Rule of Law,' first published in 1983, had the place that Joseph Raz's 'The Rule of Law and Its Virtue,' first published in 1977, has enjoyed, whether as inspiration or as foil. For while Oakeshott sets out to explain the *ius* in *lex*, Raz's essay is a polemic against two other attempts to perform a task similar to the one Oakeshott sets for himself, Fuller's and FA Hayek's.

There are moments of deep ambiguity in Raz's argument, but the strategy is clear. By taking something from Hayek (that the rule of law is necessarily connected to the realization of individual autonomy) and something from Fuller (that the rule of law is a matter of principles internal to law), he seeks to show that compliance with the rule of law is a purely instrumental value. Thus, with Hayek, he argues that the rule of law is a necessary condition for human autonomy, as it enhances the predictability of state action and that makes individual planning possible. But against Hayek, he argues that autonomy, in this sense, has to compete with other political values, some of whose realization might justify a sacrifice in predictability. From Fuller, Raz takes the idea that law has to comply to some unspecified extent with internal legal values. But against Fuller, Raz argues that such compliance serves to make particular laws more effective instruments of the substantive values they are meant to

<sup>16</sup> Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983) 210 [Raz, *Authority*].

<sup>17</sup> Raz, *Authority*, *ibid* at 154. For helpful discussions of Oakeshott on non-instrumentality, see Richard B Friedman, 'Oakeshott on the Authority of Law' (1989) 2 *Ratio Juris* 27; Richard B Friedman, 'What Is a Non-Instrumental Law?' (1992) 21 *Political Science Reviewer* 81; also David Boucher, 'The Rule of Law in the Modern European State' (2005) 4 *European Journal of Political Theory* 89.

implement; hence, if a particular law has a morally obnoxious content, its compliance with the rule of law makes it more effective and hence morally worse.

In sum, while, for Raz, an exercise in unpacking the idea of the rule of law is an exercise in unpacking values internal to law, the values turn out to be criteria that a legal order must observe if law is to be as effective as possible in communicating determinate judgments from law maker to legal subject. Thus Raz's account of the rule of law seeks to debunk attempts to show that there is a *ius* in *lex* such that, when *lex* complies with *ius*, a moral association is constituted. In this way, Raz avoids confronting an argument common to Fuller and Hayek – that law that conforms to the rule of law makes possible a certain kind of human interaction that cannot be reduced to individuals' knowing what the content of the law is in advance of deciding what to do so that they can avoid bumping into its prohibitions.<sup>18</sup>

Since Oakeshott held a similar view, the only agreement between Raz and Oakeshott is that both do not think that the rule of law is conceptually tied to democracy. In contrast, at the level of understanding the rule of law, there is vast agreement between Schmitt and Raz, with the difference being that Schmitt offers a kind of genealogical argument whereas Raz provides a conceptual argument. And, since Loughlin sets up his endorsement of Raz with a summary of Schmitt's genealogical argument, he seems to see the two as complementary in just this way (333).

In his *Constitutional Theory*, Schmitt traces what he regards as the inevitable degeneration of what he calls the 'bourgeois *Rechtsstaat*' from a genuine political existence into something helpless in the face of attacks from within and without.<sup>19</sup> On his account, that state was doomed to fail. In its political fight against absolutism, liberalism had to make a pact with democracy, which has the result that the qualities of the rule of law get reduced to criteria of validity that increase the efficacy or instrumentality of the law and which gives us the legislative state in place of the rule-of-law state. The legislative state then degenerates into the administrative state, in which officials are empowered by formally valid laws to

<sup>18</sup> Hayek was more prone than Fuller to providing the impression that his argument could be so reduced, but see Hayek, *Road*, supra note 1 at 82, where he distinguishes between 'providing signposts and commanding people which road to take.' See Lon L. Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) 206–11.

<sup>19</sup> Carl Schmitt, *Constitutional Theory*, translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2008) at 181. For further discussion, see David Dyzenhaus, 'The Concept of the Rule-of-Law State in Schmitt's *Verfassungslehre*' in Jens Meierhenrich & Oliver Simons, eds, *The Oxford Handbook of Carl Schmitt*, Oxford University Press [forthcoming].

decide as they please. We get the arbitrary rule of the individuals who happen to occupy the role of public official.

## VI *Legality's grip*

Loughlin, then, not only ends his book by seeming to announce the death of public law conceived as a discourse of public right, but also, despite the great efforts made to illuminate the richness of the European thought about public right, seems to ally himself with a Schmittian logic that regards such a death as inevitable.

There are two dimensions on which his argument can be assessed – the empirical and the normative. On the normative dimension, if public law maintains a negotiation between *societas/potestas* and *universitas/potentia* and if the worry about the victory of *potentia* is that we get a nation of chiefs and slaves, it is difficult, as I already indicated, to see how Loughlin's account differs from Hayek's in *The Road to Serfdom*, though he gives Hayek scant attention.

Schmitt too was somewhat ambiguous about the normative dimension. There are traces of nostalgia in his account of the heyday of the rule of law that can be interpreted as establishing a surprising commonality between himself and Hayek, which explains the regard in which Hayek held one of liberalism's most radical critics.<sup>20</sup> Both think that the rule-of-law ideal was, at some point, realized in practice but has since degenerated, a necessary process for Schmitt, a contingent process for Hayek. Because of this last difference, Hayek advocates resistance in a bid to recover the ideal, whereas Schmitt supposes that only some authoritarian solution, based on a conception of the substantive homogeneity of the people, can rescue us from the predicament of rule by the warring factions seeking to capture the administrative state. In Oakeshott's account, the ideal plays a rather different role. It is presupposed in the development of the European state and, while never realized in practice and perhaps unrealizable, still presents something toward which we should strive once we realize its place in the fabric of a certain vision of a civil society, a compulsory association in which law – *ius* – constitutes the terms of the association in such a way as to give a moral quality to its laws – *lex*. Loughlin approaches each of these positions at times but never clarifies his own.<sup>21</sup>

<sup>20</sup> See William E Scheuerman, 'The Unholy Alliance of Carl Schmitt and Friedrich A Hayek' (1997) 4 *Constellations* 172.

<sup>21</sup> One factor that likely gets in the way of clarification is Loughlin's self-conception as a legal scientist, a methodological commitment that aligns him with Kelsen, and of the figures he actually discusses in any detail, most closely with Raz.

In addition, any assessment of where Loughlin stands on the normative dimension is complicated by ambiguities on the empirical dimension. His empirical diagnosis, as well as his claim that public right is a prudential discourse, brings him close to the position if not the mood of Eric Posner and Adrian Vermeule. They are cheerful Schmittians, since they celebrate what they take to be the fact that the executive is ‘unbound’ by law.<sup>22</sup> They argue that, in a well-functioning liberal democracy, such an executive is the best-equipped institution to make welfare-maximizing decisions, as it is in the best position to make cost/benefit calculations. In addition, they argue that the executive remains politically bound and these constraints on the executive maintain it on a liberal democratic path.

However, at other times, Loughlin seems to suggest both that legality is, in fact, capable of disciplining the discourse of public right and that there is a moral point to this exercise. For example, in his discussion of the prerogative and of emergency powers, he seems to suggest with Schmitt that the executive has a legally unlimited and illimitable authority to decide when there is an emergency and how to respond to it. But Loughlin is drawn to the places in Schmitt’s work where Schmitt intimates something different; for example, he quotes (401) Schmitt’s claim that, in an emergency, ‘the state remains, whereas law recedes.’<sup>23</sup> Schmitt, Loughlin says, is not making the point that the ‘state cannot remain faithful to the “demands of legality”’ (410); rather, Schmitt is pointing out that there are moments when the workings of public law require that the ‘rules of positive law be set aside, suspended, or modified. Positive law recedes, but *droit politique* remains’ (401). Loughlin comments that this ‘aspect of public law jurisprudence seems today to have become lost from view,’ and he quotes, in support, Schmitt’s claim that the exception ‘is different from anarchy and chaos, order in the juristic sense still prevails even if it not of the ordinary kind’ (401).<sup>24</sup> However, in the original Schmitt does not speak of the absence of the ‘ordinary kind’ of order; rather, he says that the order that exists is ‘in no respect’ an ‘order of right.’<sup>25</sup>

<sup>22</sup> Eric Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011).

<sup>23</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago, IL: University of Chicago Press, 2005) at 12.

<sup>24</sup> Quoting *ibid* at 12.

<sup>25</sup> ‘Weil der Ausnahmezustand immer noch etwas anderes ist als seine Anarchie und eine Chaos, besteht im juristische Sinne immer noch eine Ordnung, wenn auch keine Rechtsordnung’: Carl Schmitt, *Politische Theologie: Vire Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot, 1990) at 18–9.

Thus the difference between Schmitt and Loughlin is that the former always disambiguates in favour of the radical position that, as we saw above, the idea of 'right' is nothing more than what my friends and I happen to value. Moreover, for Schmitt, the term 'friend' is politically loaded, since the distinction between friend and enemy is the essential distinction of politics, or, as Schmitt portentously puts it, of 'the political.' In contrast, Loughlin seems to want to disambiguate in the other direction. Indeed, his claims that public law's 'most basic purpose' is to maintain 'the civil peace against a backcloth of (often violent) competing truths' and that public law is 'born of a compromise between antagonists who cannot defeat one another' (464) would show, for Schmitt, that Loughlin is prey to the same liberal fantasies as AV Dicey and his ilk; at best, that Loughlin is a disillusioned fantasist who hankers after legality but sees that it is not only ineffable but unachievable.

Consider that, in the midst of his discussion of the prerogative and emergencies, Loughlin offers the throwaway line: 'in western European regimes, these executive powers have now generally been regulated through statutory procedures and judicial oversight' (398–9). Similarly, in his discussion of what he calls the 'English quarrel with administrative law' (440), the attempt (as he sees it) to preserve under judicial guardianship the common law tradition against the legislature, Loughlin notes, again in a throwaway way, that only after reform to judicial review procedures and 'after the judiciary had made significant progress in developing a more coherent set of public law principles,' could the haphazard arrangements of administrative tribunals be streamlined into an ordered system,' all of which resulted in 'a more rational system of administrative law' (444–5).

These lines are, I think, thrown away because their elaboration would require Loughlin to reconsider his understanding of the British tradition as one in which Hobbes's hegemonic account replaces the concept of fundamental law with the idea that there is 'only one true concept of law: the ordinary law proclaimed by Parliament, to which all allegiance is owed,' as well as his view that there is a direct line from Hobbes to contemporary legal positivists who claim that the question of how the authority of law is generated 'lies beyond the boundaries of juristic knowledge' (3–4). And that process of reconsideration would produce an account of the same tradition in which the foundations of public law in an idea of right were not at all hidden but, rather, were brought into the light as internal, quite ordinary principles of legality.<sup>26</sup>

<sup>26</sup> This point is the main theme of a most illuminating review article on Loughlin's book: Mark Walters, 'Is Public Law Ordinary?' [unpublished, on file with the author].

Oakeshott, we should note, not only began such an account, but also regarded Hobbes as the major classical inspiration for it. In his essay on the rule of law, he took seriously Hobbes's account of the laws of nature, since he understood that, for Hobbes, the laws of nature make up the content of *ius*. Moreover, he attempted to show that law's authority is an object of juristic knowledge precisely because authority is generated from within law, an insight that he attributed to Hobbes.<sup>27</sup> Finally, Oakeshott said that just this conception of law 'hovers over the reflections of many so-called "positivist" jurists,'<sup>28</sup> though he did not specify whom he had in mind.

Through these remarks, Oakeshott put in place the basis of an account of legality in which Hobbes effects a radical break with the past in conceiving of the principles of natural law as entirely secularized, formal principles that are constitutive of a form of civil association in which sovereignty inheres in an artificial – that is, legally constituted – person. Natural law is reconceived as principles of legality that make intelligible to the members of a political society the claim that they are under a prior obligation to obey the laws made by a body or person the authenticity of which can be checked formally. This person or body need not be a parliament because what matters from the legal perspective is not the political constitution of the body but that it is legally constituted.

That is not all that matters. The *lex* made by the body has also to be interpretable by both judges and legal subjects as conforming to *ius*. That has the result that, as Hobbes put it, the laws are as 'Hedges are set, not to stop Travellers, but to keep them in the way.'<sup>29</sup> It is easy to understand much of the criminal law in this manner, as well as private law. It might seem more difficult to understand public law in this fashion, in particular administrative law, since the particular legal regimes that together make up the work of the administrative state are put in place to manage the delivery of substantive benefits. However, it is in this area that perhaps the greatest strides have been made in developing principles of legality that condition the exercise of public power in such a way that its exercise is intelligible as serving individual liberty.

Loughlin's throwaway lines acknowledge these developments, which took place against predictions he made in a powerfully argued essay in this journal in 1978.<sup>30</sup> They are the concrete manifestation of a successful

<sup>27</sup> Oakeshott, 'Rule of Law,' supra note 14 at 173.

<sup>28</sup> Ibid at 175.

<sup>29</sup> Ibid at 239–40.

<sup>30</sup> Martin Loughlin, 'Procedural Fairness: A Study of the Crisis in Administrative Law' (1978) 28 UTLJ 215, responding to David Mullan's classic article, David Mullan, 'Fairness: The New Natural Justice' (1975) 25 UTLJ 281. I analyse and update this



rule-of-law project, but one that cannot fit within the confines of the narrative he establishes, at the outset of the book, with the portrayal of Hobbes. And in other work, Loughlin has made it clear that he follows the distinguished Italian political philosopher, Norberto Bobbio, in regarding Hobbes's laws of nature as somehow providing a basis for the legal subject's obligation of obedience to the sovereign but as thereafter going missing in action, as they have no traction in civil society.<sup>31</sup>

The issue here is not some minor point of Hobbes scholarship. It is the extrusion of *ius* from one's conception of *lex* that leads to the banishment of the question of how the authority of law is generated from juristic knowledge. But the question has to be answered somehow, even if it is to deny that there is an interesting question to be answered. Schmitt's answer is mostly a denial. For him, authority is generated politically through an exercise of constituent power – a legally illimitable moment of existential drama in which the distinction between friend and enemy is successfully drawn.

The true founders of legal positivism, Bentham and Austin, also mostly deny the worth of the question. For them, law is best understood as a means of transmitting determinate judgments about welfare, and the authority of those judgments turns on an evaluation of their substance. Similarly, for Laski and Griffith, all interesting questions about law are best reformulated as questions about a political constitution.

HLA Hart, Raz, and their students in contemporary anglophone legal positivism are ambivalent. On the one hand, the *de jure* or legitimate authority of law is a question decided by an evaluation of the substantive content of the laws; that is, it is determined by morality. On the other hand, the *de facto* authority of law is decided by compliance with internal, formal criteria similar to those Fuller listed as desiderata of the rule of law.<sup>32</sup> When Oakeshott said that his conception of the rule of law 'hovers over the reflections of many so-called "positivist" jurists' he might have had in mind the passages in Hart and Raz where they explore such internal, formal criteria. But the so-called positivist who made the greatest

exchange in David Dyzenhaus, 'David Mullan's Theory of the Rule of (Common) Law' in Grant Huscroft & Michael Taggart, eds, *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) 448.

<sup>31</sup> Martin Loughlin, 'The Political Jurisprudence of Thomas Hobbes' in David Dyzenhaus & Thomas Poole, eds, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 5 (contrast, in the same volume, David Dyzenhaus, 'Hobbes on the Authority of Law' 186). See Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, translated by Daniela Gobetti (Chicago: University of Chicago Press, 1993).

<sup>32</sup> See David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 *Global Constitutionalism* 229.



contribution in this regard was Kelsen, who also set out an account of the workings of the ‘principle of legality’ in a democratic and prudential discourse shaped by public right.

It is a great pity that Loughlin’s grand survey of European thought omitted consideration of Kelsen’s essay on ‘the nature and value of democracy,’<sup>33</sup> since, perhaps more than any other work of the first half of the twentieth century, it shows how legality can help to produce ‘civil peace against a backcloth of (often violent) competing truths’ (464). Such consideration would perhaps only have served to increase Loughlin’s own ambivalence when it came to the question of authority, since he seems to think both that constituent power is the source of legal authority and that it has to be made ‘reflexive’ – that is, brought within legal order (221–8, 285–7). His claim in his discussion of prerogative and emergency that ‘legitimacy is not reducible to legality’ (387) is correct because democracy is plausibly a necessary condition of legitimacy and conformity with legality does not entail that the law has been produced democratically. But legality in the Oakeshottian counter-narrative has its own legitimacy that is properly within the ‘boundaries of juristic knowledge.’

The significant traces of this counter-narrative within Loughlin’s book and, indeed, the ambiguities about whether the rule of law should be understood instrumentally or non-instrumentally and whether, if the latter is right, the rule of law is no longer even a useful instrument, display, in my view, the strength of his book. For stripped of the fiction that there is such a thing as a pure or apolitical account of political right, his argument makes vivid the resources for two competing narratives about the foundations of public law and shows why even those who, like myself, disagree with him comprehensively must, from now on, take the book as our starting point in an inquiry into the *ius* of public *lex*.

<sup>33</sup> Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen, Germany: Scientia, 1981).