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QUESTIONING A UNIFORM CONCEPT OF PUBLIC LAW

INTRODUCTION

In this essay I focus on the claim, not associated with Martin Loughlin alone, that it is possible to identify a general and substantial understanding of Public Law which has a significant bearing on our efforts to comprehend individual instances of public law within particular political communities or jurisdictions. I concentrate on the arguments Loughlin puts forward in his book to advance a singular foundational understanding of public law¹, but also refer to arguments raised fairly recently by Jack Goldsmith and Daryl Levinson in joining together constitutional law and international law as « public law », which they regard as determining what a well-ordered, properly functioning state amounts to².

The motivation for challenging a uniform concept of public law, attempted in different ways by Loughlin, and Goldsmith and Levinson, is based on three concerns. First, such a uniform concept detracts from the importance of local differences among individual cases of public law. Even where these differences are recognised, they are considered subservient to the master concept of public law. This produces a skewed analytical (descriptive) portrayal of public law, but also lends itself to assuming a general normative trajectory inherent in public law itself, serving to determine the well-ordered state. Secondly, the marginalisation of local differences distracts attention from the peculiar social and political conditions (conditions that in an important sense precede the legal) which determined the precise contours and characteristics of the public law of a particular political community or jurisdiction. Thirdly, and this despite Loughlin's rich array of disciplines and sources for his notion of public law, a uniform juristic concept of public law elevates the legal to a position that may become unstable, or possibly even dangerous: unstable, in that an unwarranted trust in the legal to « negotiate » social tensions at the expense of a full political hearing for those tensions may destabilise the law by placing upon the law a burden it cannot effectively discharge, so leaving its responses lacking consistency and credibility; possibly dangerous, in that

*I am grateful to the participants for the stimulating discussion I benefited from at the Conference on Martin Loughlin's Foundations of Public Law held at NUS in April 2015, where an initial draft of this paper was presented, and to Mike Dowdle for continuing discussion thereafter.

¹ M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010 (bare page references in parentheses are to this work.)

² J. GOLDSMITH & D. LEVINSON, « Law for States: International Law, Constitutional Law, Public Law », *Harvard Law Review*, 122, 2009, p. 1791 (hereinafter: *G&L*).

the machinery of the law may be employed to repress a fair political hearing of those tensions.

In pursuing these concerns here, I shall challenge four key positions adopted in *Foundations*: (1) the autonomy of public law; (2) the general relationship between a science of political right and public law; (3) the idea of political jurisprudence as a prudential approximation for a science of political right; and (4) the grammar of public law. In the course of making these challenges, I shall attempt some wider reflections on the manner in which tensions within the political community or the law are negotiated and resolved; on the idea of a coherent conceptual scheme within a Wittgensteinian perspective on language; and on the puzzle of the strange confidence placed in the legal over the political. Or, to rephrase that last point as a question: Why should public law succeed where ideology has failed?

Preliminary Digression on Goldsmith and Levinson

Both *Foundations* and the article by Jack Goldsmith and Daryl Levinson referred to above look to public law to produce a well-ordered state. It is instructive to bring the efforts of Goldsmith and Levinson into the primary discussion of Loughlin for two reasons. Their work demonstrates that there is a more general tendency to assume a uniform concept of public law with normative connotations for our understanding of the state; that this is not an idiosyncratic move by Loughlin. In addition, closer examination of their work reveals a differentiated vocabulary of the state which undermines the claim to a uniform concept of public law.

Loughlin is concerned with public law as « the right-ordering of the state » (p. 9). For Goldsmith and Levinson, there is a threshold role for public law in the form of key parts of constitutional law displaying the clarity required to « recognize a functioning government or legal system³ », and to establish « the authority of domestic law in a well-ordered state⁴ ». Alongside this work of what they take to be an incomplete system of public law⁵, Goldsmith and Levinson speculate on how a completed system of public law, taken to comprise both constitutional law and international law, might herald the emergence on the global stage of « a new (super)state⁶. ». Relying on public law to determine a well-ordered state presumes not only a uniform concept of public law but also a uniform concept of the state⁷. Otherwise we should have different forms of public

³ *Ibid.*, p. 1819.

⁴ *Ibid.*, p. 1799.

⁵ *Ibid.*, p. 1821, 1863-64.

⁶ *Ibid.*, p. 1864.

⁷ The uniform concept of a state is helped along by referring to a sovereign state, in both works. For Goldsmith and Levinson, see text at note 13 below. Loughlin invokes sovereignty explicitly when making the connection between a uniform concept of public

law for different forms of the state, well-ordered or otherwise. In much the same way as we could identify different forms of family law for different conceptions of the family, whether the conceptions be of a well-functioning family or otherwise.

The primary reliance on public law to promote the well-ordered state, rather than seeking the well-ordering of the state from other resources and then expecting that well-ordering to be reflected in the state's public law, places an unusual burden on this branch of law. Even if public law is regarded as qualitatively different from the rest of municipal law⁸, the suggestion that well-ordering is the province of the law suggests a pre-eminence for law in this area that would look strangely out of place elsewhere. Nobody would suggest that we should look to the law to *provide* us with the idea of a well-functioning family.

On the other hand, resorting to law appears to have its advantages, in cutting through the contestabilities of other resources. At one level, it is appropriate to recognise the distinctive role of law in cutting through these contestabilities by providing a determinate resolution of how the subject matter is to be dealt with, irrespective of the controversies that may subsist over that subject matter in moral, political, and other discourses. Law is distinctively « heteronomous » in terminating these controversies, as Neil MacCormick put it⁹. However, that is not to say that law assumes an expertise to compete in these controversies and to vanquish all opposing views on their own terms. Law simply reflects a determinate resolution of the controversy as considered fitting by those who have the power and authority to settle the matter within a particular society. Family law organised around the central idea of *patria potestas* is not a legal invention, but a form of family law reflecting the allocation of power and authority in the ancient Roman patriarchal society¹⁰.

There is, accordingly, an improper opening for resorting to law as a settler of contestability through assuming that the legal resolution of controversy does actually definitively settle that controversy on its own terms: that family law provides the definitive form of a well-functioning family; that public law provides the definitive form of the well-ordered state. There may be less likelihood for impropriety in the case of family law, where law's past efforts are readily considered to have failed so dismally by

law and a uniform concept of a state: « The concept of public law explicated in this book is today a universal phenomenon, if only because the entire world is now divided into an assortment of sovereign states, each of which has governing arrangements authorized by means of law » (p. 2).

⁸ Loughlin sees it as « fundamental law » as opposed to « ordinary positive law » (p. 1-2); Goldsmith and Levinson as « public law » distinct from « ordinary domestic law » (*G&L*, p. 1795).

⁹ N. MACCORMICK, *Institutions of Law: An Essay in Legal Theory*, Oxford, Oxford University Press, 2007, p. 255-61; and *Id.*, *Practical Reason in Law and Morality*, Oxford, Oxford University Press, 2008, p. 92, 198-99.

¹⁰ For a modern example, take the treatment of married women's property within family law.

modern lights. It appears that there is far greater likelihood for impropriety in the case of public law.

The prospects for such impropriety in public law are enhanced by a number of factors. Unlike family law, public law can be regarded as the development of a modern and enlightened age¹¹. Unlike family law, public law can be regarded as a work in progress, not yet having attained the completed stage of other forms of municipal law, or « domestic law » as Goldsmith and Levinson call them¹². And unlike, say, family law – which clearly has dealt with different forms of the family – public law can be regarded as dealing with a uniform concept of the (modern) state – or so it seems.

In their article, Goldsmith and Levinson do not consciously explore the notion of a state. They simply employ a constant term, amplified to be understood as a sovereign state¹³. Public law in their own twin recognition of it is a picture of international and constitutional law as « dual systems of public law », as « two sides of the same coin », relating to « the “external” and “internal” manifestations of the sovereign state¹⁴ ». Yet Goldsmith and Levinson’s vocabulary is revealing in that it discloses a number of entities treated as synonyms for the state – that is to say, as the subject of public law.

Their differentiated vocabulary clearly raises the possibilities of recognizing different aspects of a state, or different parts of a state. Their wider vocabulary extends to the following:

- (a) state¹⁵;
- (b) state actors¹⁶;
- (c) state institutions¹⁷;
- (d) political forces¹⁸;

¹¹ Loughlin: « a consequence of the processes of secularization, rationalization, and positivization of fundamental law » (p. 2).

¹² *G&L*, p. 1821, 1863-64.

¹³ Goldsmith and Levinson admit their initial focus is on the USA, but regard their observations as applying to « other constitutional systems » (*Ibid.*, p. 1800). The significance of sovereignty as a unifying factor is expressly noted: « the idea of sovereignty was crucial to the creation of the centralized legal institutions of the state, for it was the concept that explained and legitimized the political authority of these institutions. [...] Sharing common origins in the rise of the sovereign state, these dual systems of public law were invented to limit otherwise limitless state power, from the inside and from the outside. » (*Ibid.*, p. 1862-63).

¹⁴ *Ibid.*, p. 1863, 1868.

¹⁵ *Ibid.*, e.g., 1795. Here, as is frequently the case, the term appears in close proximity to alternative expressions.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 1816.

- (e) political branches of government¹⁹;
- (f) government officials²⁰; and
- (g) the people²¹.

Each of these is explicitly used to denote what is subject to public law.

Commonly, it is accepted that a modern state encompasses the different elements that Goldsmith and Levinson mention or allude to: (i) those who govern and those who are governed; (ii) the different branches of government – the political (executive and legislature) and the legal (the judiciary); (iii) different officers, institutions, and officials within the different branches of government; (iv) the people as the governed or subjects, and the people as citizens or the electorate to whom government is accountable; and (v) majorities and minorities within the people of a state.

This differentiated vocabulary clearly raises possibilities of recognizing different conceptions of a state. This is so for two reasons. First, the different elements just identified are configured in quite distinct forms across different (modern) states. There are significant differences regarding the branches of government and with regards to the officers, institutions, and officials that populate these branches of government. The status of citizenship, with its entitlements and responsibilities, is far from uniform. The emergence of recognizable majorities and minorities, and the severity of tensions between them, differs enormously according to specific historical and cultural conditions. Secondly, there are more than one set of possible relationships among these different elements (however configured), meaning that there is a variety of blueprints for a modern state. The variety of states, even in considering only those that are modern-day and are regarded as democratic, exhibits a corresponding diversity of bodies of constitutional law, or public law²².

The point being emphasized is that where we can recognize a body of public law as being a form of constitutional law, it cannot be a law that threatens the state – since its very role is to bring together the elements of a state in a way which allows them to exist together as *this state*. Where public law as constitutional law does operate, it therefore must serve to protect this state as against alternative forms of the state (which do not uphold this practice of democracy, which do not respect these minority

¹⁹ *Ibid.*, p. 1831.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 1853.

²² The distinctive character of German public law, in its relation to EU law, is nicely illustrated in a decision of the German Federal Constitutional Court in 2009 – Bundesverfassungsgericht (BVerfG), Case 2 BvE 2/08, Judgment of 30 June 2009. (English translation accessible at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) The title of the commentary by Jo Murkens, « Bundesverfassungsgericht (2 be 2/08): “We want our identity back” – the revival of national sovereignty in the German Federal Constitutional Court’s decision on the Lisbon Treaty », *Public Law*, 2010, 530, serves to emphasize the matter.

rights, which are not federal, and so on). And if the sovereign is equated with the state, then constitutional law does not constrain the sovereign; it constrains that sovereign's usurper. Public law cannot occupy a duality: it cannot both protect the (actual) state and represent some cosmopolitan right-ordering of the state, in the way *Foundations* seeks to identify.

The Autonomy of Public Law

In contrast to Goldsmith and Levinson's differentiated vocabulary of the state which readily yields an array of concerns over the precise characteristics of the different aspects of the state and of their relationships (or ordering), Loughlin introduces the modern state as caught up in a single problem: «reconcil[ing] claims of individual autonomy with the existence of a regime of public authority», that is to say, «reconcil[ing] two equally powerful but contrary human dispositions: the desire to be autonomous and the desire to be a participant in a common venture» (p. 11).

Setting the stage for the emergence of modern public law as an abstract foundational question (rather than locating it in the conditions of the modern state) undoubtedly assists with procuring a uniform concept of public law. Yet the abstract formulation of the question is not sufficient to maintain uniformity in the responses, if those responses can range freely over the particular circumstances of each state, thus producing a variety of forms of public law distinguished by the constitutional arrangements responding to each set of individual circumstances in working out how precisely the demands of individual autonomy and public authority are to be met.

Loughlin therefore has to insulate his concept of public law from the disturbance of individual circumstances by locating it in an autonomous sphere. As well as referring to an «autonomous concept of public law» (p. 2, 8), Loughlin speaks of «the political realm [...] as an autonomous sphere» (p. 7, 8). Public law (operating within that sphere) becomes «a distinctive juristic discourse operating according to its own discrete logic.» (p. 2).

Public law also preserves the autonomy of the political sphere in which it operates:

[It] works to maintain the autonomous world of the public sphere, a sphere that achieves its distinctive position through arrangements that seek to reconcile claims of individual autonomy with the existence of a regime of public authority. (p. 10-11).

It is this autonomy that allows for what Loughlin has labelled «the "pure theory" of public law» (p. 10).

In talking of autonomy, purity, and discrete logic, Loughlin provokes the questions as to how the separateness of public law emerged and what exactly it is being separated from. In the excerpt quoted above, it appears that by merely addressing the foundational question regarding individual autonomy and public authority, public law ensures the autonomy of the

public sphere. But why should a response to this question enhance the autonomy of the sphere in which it is raised? Or require a discrete logic?

Further clues are provided by Loughlin's description of the emergence of the modern state and modern public law, as throwing off the shackles of religion (p. 7-8), natural law (p. 158), and the personal authority – together with the subjective wishes – of rulers (p. 8). This process consequently realigned the government of the state with the interests of the governed: « an objective order – the state which the ruler was obliged to maintain ». (p. 8). Even if these are accepted as the historical features which accompanied the creation of the modern state, the mere rejection of religion and/or natural law as providing the grounding for « fundamental law », or the mere rejection of the individual right of rulers (to be replaced by a responsibility to the governed), does not necessitate that the public (fundamental) law of the new state should be autonomous. Being not dependent on religion or natural law; independent of the personal whims of the ruler – is accepted. Being not dependent on any values²³ or traditions embraced within a particular state; being independent of the particular circumstances within a particular society affecting the relationship between the government and the governed (including who precisely gets to count, and in what way, as the government and the governed²⁴), simply does not follow as a matter of theory, and clearly has not followed as a matter of historical fact²⁵.

Possibly, Loughlin is aware of the insufficiency of what we might term the historical premises, for he introduces an additional premise. This is the equality premise. Since the state and public law are not givens under religion, natural law, or the right of the ruler, Loughlin argues that they must be produced by the members of the state themselves: « The public realm

²³ For critical discussion of the feasibility of isolating public law from the morality of a society, as suggested in Loughlin's earlier *The Idea of Public Law*, Oxford, Oxford University Press, 2003, a precursor to *Foundations*, see N. BARBER « Professor Loughlin's *Idea of Public Law* », *Oxford Journal of Legal Studies*, 25, 2005, p. 157. From Loughlin's perspective, Barber may be regarded as missing the point in stressing the contingent set of values that a particular system of public law is linked to and ignoring the transcendent quality of public law within that system, a quality that is agnostic to particular values. In this respect, Loughlin's « pure theory of public law » appears to fully take a Kelsenian turn. This would amount to a double anomaly. To move from the discredited values of religion, etc., as the basis for fundamental law, to a value agnosticism is anomalous, when what might be expected would be a recognition of the actual values undergirding fundamental law (particularly where the authentic recognition of fundamental law is couched in value-laden terms, such as responsibility to the governed). Even more anomalous would be, once having taken the Kelsenian turn, to continue maintaining the need for fundamental law. If the transcendent quality of law can be presupposed for positive law, without delving into the actual values of a particular system of law, then what need would there be for fundamental law as « a prior source of authority » (p. 2) to bring legality into play?

²⁴ On this point, consider the different positions of women, slaves, and the propertied/non-propertied classes within different modern states and at different times.

²⁵ Loughlin appears to want to avoid the historical messiness of actual states by discarding them as incapable of fully representing the theory of public law (p. 158). However, the principal point being made here is that the theory itself does not follow from his (past historical) premises. A secondary point is to question why a theory with inadequate premises should be advanced when it is also at variance with the subsequent factual data.

must function according to laws we have given ourselves ». (p. 158) This step in itself would still be vulnerable to the elaboration of different possible renderings of ourselves in the different conditions of different states, along the lines indicated in the previous paragraph. Loughlin makes a further step. He adds to his description of the posited nature of public law (p. 158) a normative conviction: « that there is a mode of right-ordering of public life that free and equal individuals would rationally adopt ». (p. 159).

The normative equality premise is specifically linked to the public sphere by Loughlin, through stressing its connection to liberty (« free and equal individuals »). Again, this involves two steps. One is analytical-descriptive: « freedom is a status that is realized only within the state ». (p. 12). The second is normative: « The discourse of political right, operating to enhance the power of the public sphere, strives to realize an equal liberty for all [...] » (p. 12).

There are two problems, however, in relying on this additional, equality premise to establish the autonomy of public law. The first is that there is no extant legal outworking of this premise such that it can be verified as a pure expression of the premise, untainted by « impure » local conditions. (p. 11, 158-59, 164). Whether this problem (which applies generally to Loughlin's enterprise for an autonomous public law based on political jurisprudence) can be surmounted will be considered at greater length in subsequent Parts. The second problem is that if the equality premise is adopted, it does too much. If the members of a state are to be regarded as free and equal individuals whose status is taken to determine the scope and nature of public law, then that status would be equally effective in determining the scope and nature of private law, or « ordinary positive law » (p. 2). How could free and equal individuals accept anything less? Legal rights in general, not just constitutional rights, would be determined in accordance with this premise²⁶. But this would mean that the « distinctive position » of the public sphere, together with its autonomy, would be lost.

Relating a Science of Political Right to Public Law

The failure to instantiate the equality premise is simply the other side of the coin to the ineffectual efforts to work out the science of political right. In ideal conditions, where success had replaced failure, public law would have simply reflected the understanding provided by a science of political right²⁷. In the less than ideal conditions we find ourselves in, the relationship

²⁶ Just such an argument for legal rights is made by P. ELEFTherIADIS, *Legal Rights*, Oxford, Oxford University Press, 2008. For further discussion, see my review in *Ethics*, 121, 2001, p. 652. Significantly, Barber (N. BARBER « Professor Loughlin's *Idea of Public Law* », *op. cit.*, p. 164) comments on the chapter on rights in Loughlin's *The Idea of Public Law*: « The easy way in which the moral slides into the political in this part of the book makes it hard to isolate either concept. ».

²⁷ A glimmer of this prospect is permitted when the relationship between public law and political right is introduced by Loughlin (p. 2).

between the two becomes more subtle. Public law now takes on remedial work to cover the deficiencies of the search for a science of political right (p. 158).

Loughlin spends chapters 4 and 5 charting the lack of success in establishing a science of political right. He considers this intellectual failure to be caused by the essential irreconcilability of individual autonomy and participation in a joint venture (p. 11) – an inability to answer authoritatively what was introduced at the beginning of Part III as the foundational question. The foundational question poses both a practical imperative and a theoretical conundrum.

In order to set up the modern state, some accommodation has to be made for both the individual interests of its members and the limitation of those interests in establishing governance of the state. Since this accommodation cannot be imposed by some external authority (such as divine law, natural law, the right of the ruler), it is sought by means of intellectual reflection on these two features of the state. The intellectual reflection, being deprived of an authoritative framework which forces a practical compatibility on the two (these are the appropriate interests members of a society can expect to enjoy, this is the proper exercise of governmental power within a society – as ordained by divine law, etc), treats the two as separate requirements for a society.

Once separated from a common framework, the features inevitably become opposing objectives. Considered on their own terms, they become irreconcilable. Individual autonomy is opposed to public authority; or, with participation in a common venture (p. 11)²⁸. Loughlin summons public law to effect a prudential fix of the irreconcilable, whilst still aiming to retain the elevated status of the inquiry into their reconcilability (hence the autonomy of public law). We shall examine more closely the details of his fix in this and the following Part, but an anticipatory critique can be offered already. Why attempt to fix the irreconcilable, when the more obvious response to the absence of an authoritative framework that has been lost due to the rejected conventions of a former age, is to look for a fresh framework? That line of inquiry might well take a turn into multiple frameworks, each based on the particular conditions of a society which combine to produce distinctive understandings of, and then effect a practical compatibility between, the interests of members and the exercise of government. The uniformity of public law is, again, at stake.

In this Part, we shall consider the basic mechanism of Loughlin's fix, whereby he treats public law through the idea of political jurisprudence as a prudential approximation for a science of political right. In the next Part, we shall explore the image of the grammar of public law, which is developed by Loughlin as a way of maintaining some fidelity to the theory of political

²⁸ In the course of his book, Loughlin employs different forms of the elements in tension (the irreconcilables) within the foundational question: individual autonomy and public authority (p. 11); autonomy and participation in a common venture, or, freedom and belonging (p. 11); *societas* and *universitas* (p. 160); liberty and power, or, enablement and constraint (p. 178).

right whilst acknowledging the practical realities of public law – a prudential approximation which he casts as a process of negotiation between the irreconcilable:

And since this disjuncture between freedom and belonging can be neither eliminated nor reconciled, it can only be negotiated. In one sense, this negotiation does not itself amount to the explication of right: it involves an exercise of prudential judgment. Consequently, rather than treating public law as the unfolding of a science of political right, it is best expressed as an exercise in political jurisprudence. But another way of putting this is to say that the discourse of political right involves the elaboration of a prudential language through which that negotiation is effected (p. 11).

This negotiation involves some downgrading of the ideal science of political right, captured by the expression « political jurisprudence », but importantly the fidelity to political right is preserved by viewing political right (« the discourse of political right » – a marker for the forthcoming image of grammar) as being involved in the production of political jurisprudence (« a prudential language » – another marker) and hence implicated in the process of negotiation.

This latter point is of crucial importance to Loughlin's endeavour. If, faced with the irreconcilable claims of individual autonomy and public authority, a process of negotiation were implemented as a means of exiting the impasse, that negotiation would quite reasonably be expected to tone down the claims of each side in order to bring about a reconciliation. « You cannot go for autonomy, but I can allow you protection of a number of individual interests you hold dear ». « You cannot keep hold of unlimited authority, but I can permit you to keep hold of considerable powers to enable effective government ». That, of course, would destroy the premises of a science of political right, and move us through negotiation to a quite different foundation (or set of foundations) for public law. Loughlin's foundational question gets replaced by a more prosaic question. What sort of settlement of powers between the government and the governed will work here?

Actually, the prosaic question is more elaborate, as has already been suggested in Part II. The settlement of powers will not be negotiated simply between two parties, but between different factions and elements of both the government and the governed. The fact that both sides can be split up into (internally) opposing groups has repercussions not simply for the process of negotiation that has been downgraded to deal with the prosaic question. What works here will involve a complex series of negotiations. This complexity also has implications for Loughlin's attempt to keep the process of negotiation still focused on the fundamental question, concerned with the issue of political right in the abstract.

The way Loughlin portrays the process of negotiation is not as an attempt to get the parties to back down from their irreconcilable demands (as suggested in the prosaic negotiation above), but as an attempt to allow the irreconcilable to be held in a state of tension. When dealing with the irreconcilable in terms of individual autonomy and public authority, or freedom and belonging, Loughlin stresses that the negotiation amounts to

« developing the most effective apparatus we can that acknowledges the power of these competing claims ». (p. 11). Somehow both claims are to be maintained. Subsequently, when he reflects the same irreconcilables in Oakeshott's distinction between *societas* and *universitas* (p. 160-64), Loughlin explicitly invokes Oakeshott's imagery of tension: « The state can be grasped as “an unresolved tension between the two irreconcilable dispositions [...]” ». (p. 160). And public law remains held *within* this tension by means of « “a political imagination which is itself constituted in a tension between them” » (p. 163)²⁹.

When picking up in this later passage on the role of negotiation undertaken by political jurisprudence, Loughlin points to the variety of theories and practices of public law that have occurred. These different instances are still regarded as « distinctive expressions of the polarities of a bifurcated discourse » (p. 164). That is to say, in their different ways, they employ the political imagination to occupy a point in tension between the two irreconcilables. However, what is negotiated, according to Loughlin, is not a compromise between the irreconcilables. The exercise of political jurisprudence has as its task « to negotiate between the various conflicting accounts of political right that form part of its evolving discourse » (p. 164).

The signalling of discourse prepares us for the discussion of grammar in the next Part, but before commencing that topic there is more to be said about Loughlin's portrayal of a tension between irreconcilables, and the technique of negotiation he attributes to political jurisprudence. Two irreconcilable states may be portrayed in a state of tension (say, a tension between the demands of home and the demands of the office) in a meaningful way at the point of posing a dilemma. The dilemma is found in a question confronting a person (how much time to spend at home and at the office). When the question is answered the irreconcilable states cannot be reconciled but the dilemma can be resolved (my home life is more important to me so I shall spend less time at the office). The resolution, while not reconciling the irreconcilable, breaks the tension.

That illustration of tension might be considered too simple, as involving a single stark choice between the irreconcilables, to convey the complexities involved in the formation of a state. A different setting for the recognition of tension, which may be more pertinent to our present interests, occurs when an attempt is made to provide an accurate description of complex materials which appear to exhibit contrary tendencies. How do we describe the common law? Hanoch Dagan suggests that the empirical reality of the

²⁹ Citing M. OAKESHOTT, « On the Character of a Modern European State », in *On Human Conduct*, Oxford, Clarendon Press, 1975, p. 200-201, 320. Loughlin's use of Oakeshott's tension can be contrasted with the account provided by N. BHUTA, « The mystery of the state: state concept, state theory and state making in Schmitt and Oakeshott », in D. DYZENHAUS & T. POOLE (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law*, Cambridge, Cambridge University Press, 2015, p. 10, 30-34. Bhuta takes Oakeshott's tension to be resolved at different times in different ways, more favourable to *universitas* or *societas*, and concludes (p. 37) on « the impossibility of separating the dynamics of order creation from contingent historical determinations and uncontrollable exogenous and endogenous forces ». See further, note 33 below.

common law can be captured by three tensions: between power and reason, between science and craft, and between tradition and progress. He describes these tensions as « constitutive and irresolvable³⁰ ». At a general level, such tensions convey a meaningful picture. However, when dealing with a particular instance of the common law, maintaining these tensions would be absurd. If the tensions were preserved, no law would ever emerge. On the occasion of a specific judgment, the tension between a traditional and a progressive response must be resolved in favour of the one or the other³¹. As with the more simple case, the competing characteristics remain irreconcilable but the tension is broken.

In the light of these two examples of states of tension being meaningful at one stage but redundant or absurd at another stage, the question to ask is whether Loughlin can meaningfully maintain the tension confronted by a science of political right at the stage of political jurisprudence. There are three reasons for doubting that this can be done. First, if the science of political right has been accurately represented at the start of Part III as dealing with an abstract foundational question, then the tensions found in the question (regarded as posing a dilemma) would not normally be expected to survive the production of an answer³². Secondly, the abstract condition of the question could be linked to a general picture of the domain of a science of political right, but a detailed exposition of the science would have to deal with particular arrangements that could not emerge with the tension intact³³. Thirdly, the exercise of political jurisprudence amounts to making a prudential judgment (p. 164), and it is difficult to see how a prudential judgment, bearing a juristic character, could be made without resolving the tension here, any more easily than a common-law judgment could be made without resolving the tensions identified by Dagan as intrinsic to the common law.

³⁰ H. DAGAN, *Reconstructing American Legal Realism & Rethinking Private Law Theory*, Oxford, Oxford University Press, 2013, p. 14-15.

³¹ For further discussion, see my review of Dagan's book in *No Foundations: An Interdisciplinary Journal of Law and Justice*, 11, 2014, p. 138.

³² This representation of the science of political right inverts a suggestion made by Loughlin when commenting on the futility of the search for a science of political right: « this is because political right offers a conceptual *solution* to a set of recurrent issues in political experience, and a conceptual answer to a practical question offers no solution at all » (p. 159, emphasis added). Here, I suggest that the search for a science of political right is formulated as an abstract theoretical *question*, which must then be related to a set of practical outworkings or solutions that are offered by political jurisprudence to the abstract question initially posed.

³³ There are grounds for taking Oakeshott, above note 29, to be endorsing this picture of the tension between *societas* and *universitas*. It is the « political imagination » that is « constituted in a tension between them » (at 320), and this may be regarded as encompassing the general or abstract inquiry as to the nature of a modern European state (*ibid*). However, when it comes to specific instantiations of « the still puzzling associations called modern European states », we find that the notions or « analogies » of *societas* and *universitas* are to be found among them « in ever changing proportions » (at 326), no longer in a state of tension.

These reflections on the manner in which things are held, or portrayed, in a state of tension as between irreconcilables, only for the tension to be broken in a practical resolution by exiting the tension at some point more favourable to the one side than the other³⁴, might be considered opportunistic. However, at the very least, they require in response a clarification of how the secondary stage of political jurisprudence can maintain the tension found at the initial stage of pursuing a science of political right, in a way that differs from the illustrations provided here. If, as we noted earlier in this Part, the process of deriving political jurisprudence amounts to a « negotiation » of the « disjuncture between freedom [*societas*] and belonging [*universitas*] » (p. 11), then such clarification would need to describe how this negotiation can reach an outcome which preserves the tension rather than breaks it (in the way described above). Loughlin does not provide such clarification. Instead, he depicts a process of negotiation between « various conflicting accounts of political right » (p. 164). This misses the point, for there is nothing to suggest that each of these accounts has not exited the tension in the kind of practical resolution described above. Hence a (negotiated) choice between them would simply pick out one way of breaking the tension rather than another. What Loughlin requires is a negotiation that engages directly with the irreconcilables themselves, and as an outcome sustains the tension between them.

Alongside the challenge raised by these arguments requiring a fuller account of the nature of the tension between *societas* and *universitas* and of the way in which it is resolved (or negotiated), there is a quite different argument against Loughlin's preservation of tension. This relies on a point that Loughlin himself regards as central to his view of public law: « freedom is a status that is realized only within the state » (p. 12); « power and liberty become correlative terms » (p. 178). This characteristic of public law is enough in itself to break down the irreconcilables of individual autonomy and public authority, of liberty and power. Taken together with the elaboration introduced above in considering the prosaic question, that a settlement of powers will not be negotiated simply between two parties but between different factions and elements of both the government and the governed, Loughlin's recognition of the correlativity of power and liberty has startling implications.

Whilst it might be possible to keep a tension between individual liberty and governmental power at the general level of describing the complexities of a modern state, and indeed still pose the fundamental question for the science of political right in terms of this tension, when it comes to the particular grant of an individual liberty any such tension is resolved in the practical correlativity of power and liberty. However, consider just how it will be resolved. A rich merchant and a slave have different levels of liberty while the liberty of each is dependent on the exercise of governmental power; the merchant and the slave enjoy different degrees of autonomy but

³⁴ With « proportions » skewed one way or the other, to use Oakeshott's terminology (preceding note).

neither's autonomy can exist outside of participation in a state³⁵. So, it now appears that the real work on resolving the abstract tension lies not in taking up an imaginary position within the tension, but in contesting precisely where the tension is to be broken: whose benefit (and whose detriment) will be advanced in practice by selecting particular combinations (resolutions) of power and liberty in some cases and different combinations (resolutions) in other cases.

Loughlin has two rejoinders that might be made to counter the weakened condition in which political jurisprudence has been presented. One is to strengthen political jurisprudence by appeal to the equality premise. This is actually mentioned by Loughlin at the precise point at which he links liberty to the power of the state: «equal liberty for all» (p. 12). But this is an additional premise, which skews the simple «disjuncture between freedom and belonging» that political jurisprudence is supposed to negotiate (p. 11). In addition, it is attended by its own problems, noted at the end of Part III above. The other rejoinder is to refer to the grammar of public law as being capable in some way of mounting a rescue of political jurisprudence.

THE GRAMMAR OF PUBLIC LAW

The grammar of public law introduced in the final section of Chapter 6 dealing with political jurisprudence, and more specifically public law as political jurisprudence, is accordingly the grammar of political jurisprudence³⁶. The image of grammar is a powerful one as it conveys the simultaneous possibilities of flexibility and control. Grammar does not definitively determine speech, but it can nevertheless inform us whether speech is correct; it provides «instruction in the appropriate ways to use a language». (p. 178). So too, then, the grammar of political jurisprudence does not determine precisely how the fundamental question is answered, how the tension between liberty and power is to be resolved. That was an outcome expected from the now abandoned quest for an objective science of political right. Nevertheless, the grammar of political jurisprudence can be referred to in order to establish whether a particular instantiation of political jurisprudence (a specific exercise of prudential judgment) does involve «the correct use of [these] terms» (p. 178).

Loughlin's turn to grammar is a serious candidate for rescuing political jurisprudence from the weakened condition it acquired in Part IV. It enables

³⁵ The classes of merchants and slaves are not unknown within the modern era in which the science of political right has emerged as a serious inquiry, and are accordingly fit subjects to introduce into a study of the practical ramifications of how the fundamental abstract question/tension is addressed/resolved. For a more contemporary illustration of the differentiated yields from practical resolutions of the tension, consider the contrasting positions of propertied and non-propertied, Northerners and Southerners, etc.

³⁶ It is referred to in the additional abstract for ch. 6 provided in the e-book as «the grammar of the practice [of political jurisprudence]».

a recognition of the diverse experiences of the practice of public law, or political jurisprudence, while retaining an informative role for theory in addressing those practices and even assessing their correctness (p. 179). In particular, the image of grammar is seen by Loughlin as allowing for the tension or «struggle between opposing dispositions» within the foundational question of a science of political right to be responded to in different ways without overturning the tension (p. 179). Or, we might add, without permitting the response to degenerate into the kind of prosaic resolutions contemplated in Part IV above.

The richness of grammar is not compatible with providing political jurisprudence with a «conceptual scheme in a simple logical form» (p. 179). Instead, Loughlin looks to Wittgenstein (p. 178-79). He refers specifically to only understanding the language of political jurisprudence by referring to «a form of life» (p. 178); and thus to the need to consider the «background conditions» (p. 178) of an exercise of political jurisprudence; and to the «context-dependent and purpose-relative» (p. 179) nature of that exercise, as a use of language. Given the variables involved in the different contexts in which political jurisprudence is practised, it is not surprising that Loughlin recognises that «alternative grammars are conceivable» (p. 179) yielding «discrepant meanings» (p. 179).

Nevertheless, Loughlin holds on to the value of his theoretical inquiry. He sees it as providing the skill to extend the practice of political jurisprudence «to cover unusual cases or situations that appear exceptional», which is required in «the world of public law today» (p. 179). As for his methodology, having abandoned simple logical forms, Loughlin reverts to a «more or less logical ordering» he has associated with the grammatical form of language, manifested in «displaying a coherent conceptual scheme» (p. 178):

In these circumstances, the inquiry into the foundations of public law is best furthered by examining the ways in which such terms have come to be deployed in the discourse of public law and showing how they can best be ordered into some relatively coherent conceptual scheme (p. 179-80).

The relatively coherent conceptual scheme must be understood in the light of his preceding comments as taking on a Wittgensteinian perspective, but this creates a basic problem for the direction in which Loughlin seeks to take his theoretical enterprise.

It is clear that Wittgenstein allowed for a language practice to be used for training³⁷, so the idea of a corrective grammar is not at all alien to his thought. And for that training to be effective a «relatively coherent conceptual scheme» to cover the correct use of the language can reasonably be assumed. However, there are two important qualifications to be made. First, Wittgenstein explicitly rejects the necessity of having a completed

³⁷ L. WITGENSTEIN, *Philosophical Investigations*, Oxford, Wiley-Blackwell, 2009, § 189-90, p. 692.

conceptual scheme³⁸. So devising a theoretical conceptual scheme along Wittgensteinian lines will not provide the benefit Loughlin claims for his theory of political jurisprudence, of dealing with novel cases. A corrective grammar can be related to existing practice of the language, but new uses are up for grabs. The existing practice of the language is linked by Wittgenstein to « a form of life³⁹ », as Loughlin acknowledges (p. 178, n. 95). Accordingly, the grammar (or relatively coherent conceptual scheme) for the language practice of one form of life will differ from the grammar (or relatively coherent conceptual scheme) for the language practice of another conflicting form of life. This poses a deeper problem for Loughlin.

Loughlin wants to derive a theoretical grammar of political jurisprudence from examining the « competing grammars » found « in the discourse of public law » (p. 179). But there is no basis in Wittgenstein's approach to support this. For Wittgenstein there is one practice with its own form of life and its distinctive grammar; there is another practice with its own form of life and its distinctive, competing grammar. That is it. The coherent conceptual schemes which we have identified with a Wittgensteinian grammar can only be located in a practice. A coherent conceptual scheme cannot be derived by imposing theoretical coherence on the conflicting languages of different practices. That is not to say that an alternative practice (even a hypothetical one) could not be constructed as a composite of two previous practices. The point is that the new practice (and its grammar) would compete on the same level as the preceding practices; that it would not acquire a superior status of theory. Such a move would have been anathema to Wittgenstein⁴⁰.

Loughlin's grammatical turn is not then capable of yielding at the theoretical level a uniform grammar for public law, as the basis for a uniform concept of public law. Different grammars for different practices will produce different concepts of public law. And the practical settings for political jurisprudence will not preserve it from the impure, degenerative factors that Loughlin's failed ascent to theory would have protected it from.

In the absence of a uniform grammar, could there be some looser constraint on the different forms of public law that emerge, on the different exercises of prudential judgment that political jurisprudence makes? The other linguistic image employed by Loughlin is discourse, which is also suggestive of the simultaneous possibilities of flexibility and control we

³⁸ « If someone were to draw a sharp boundary I could not acknowledge it as the one that I too always wanted to draw, or had drawn in my mind. For I did not want to draw one at all. » (*Ibid.*, § 76).

³⁹ *Ibid.*, § 19, 23, 241; 226.

⁴⁰ Elsewhere, in dealing with competing theories, Loughlin affirms a rejection of an external, authoritative role for theory: « These are competing theories, and since there seems no prospect of discovering the Archimedean point from which objective authority can be determined, the search for a science of political right becomes a journey without end » (p. 159). Since by taking a Wittgensteinian approach the theories have been grounded in the practices, the sentiment should have a similar impact on competing practices.

attached to grammar. The possibility of a unifying control is particularly strong where the focus is on a controlling discourse that emanates from a single recognized source. And this is precisely how the lingering influence of political right (despite its failed scientific status), as noted in Part IV above, is expressed: as « the discourse of political right » within which prudential judgment is exercised (p. 11); and as an « evolving discourse » of « various conflicting accounts of political right » (p. 164). Yet this alternative image can no more guarantee a uniform discourse than the rejected image of grammar could secure a uniform grammar. If it transpires that the source (the basic tension within political right) is capable of generating conflicting responses (dependent on where and how that tension is broken), we are left with a similar variety of discourses⁴¹.

Why the Juristic Turn?

Loughlin's ambitious investigation into the foundations of public law is motivated by the failed quest for an objective science of political right, which (as we noted at the beginning of Part IV) is fully charted by him. By making the turn to a juristic form of prudential judgment in political jurisprudence, Loughlin attempts remedial work to fix the deficiencies of a science of political right (see Part IV above) without being captivated by the false enticements of ideology. His concern accordingly becomes to promote a pure theory of public law « shorn of ideological considerations » (p. 10), so as to establish the autonomy of the political realm grounded on the autonomy of public law (see Part III above). And this requires a uniform concept of public law. A central claim of this essay is that such purity has not been established by Loughlin's arguments, and in responding to these arguments much has been discovered to support the alternative proposal made here that there exist multiple concepts of public law, coloured by the local circumstances of their individual emergence, including prevailing ideologies.

It seems strange that there should be an attempt to transcend these local circumstances, or the peculiar social and political conditions (including prevailing normative considerations) that precede the emergence of a particular state with a particular legal constitution, by resorting to the law that they themselves have formed. It would appear far more natural to seek the objective science of the state in an understanding of the pre-legal political factors, in an objective political science. This attempt has been made, and not only in seeking the science of political right. Ironically, there are grounds for thinking that expressing the conceptual branch of a pure

⁴¹ Loughlin appears to recognize this problem (p. 179) but switches between images, allowing for alternative or competing grammars, while keeping a singular discourse of public law, and then relying on a theory of public law to produce an ordering of the terms of that discourse into a « relatively coherent conceptual scheme » (p. 179-80) – without indicating why the competing grammars should not be linked to competing discourses, and even to competing relatively coherent conceptual schemes.

political science was the original aspiration for ideology at its inception in the writings of Antoine Destutt de Tracy after the French Revolution⁴². Subsequently, it became obvious that such an aspiration was doomed and ideology as a term was broadened out to convey the various partisan conceptual schemes of different political perspectives or traditions.

Loughlin's position is clear in its explicit disavowal of ideology in a partisan sense, and of any pretension found in « overarching claims of the right and the true » (p. 465). Where his position remains ambivalent is in the role he accords to public law, in producing a remedial or prudential response to the failings of political science. If the science of political right has failed, then the remedial work that follows this discovery can take two quite distinct forms. On the one hand, the remedy can be to return us as close as is now possible to the original aims that we now concede are not realizable in an absolute sense: we are satisfied with an approximation where perfection is not attainable. On the other hand, the remedy may be to find something else to meet the objective that the original effort has failed to deliver: we give up on the ideal altogether and turn to something that actually works.

Similarly, when the remedial work is characterized as prudential, the particular prudence involved is open to conveying moral strains of what is appropriate in exercising governance over others⁴³, or to conveying realistic strains of what can be made to work⁴⁴. Following this ambivalence through to Loughlin's proclaimed foundational status of public law, the foundation may then be either a justificatory one or a pragmatic one. That is to say, the theory of public law has a more modest objective of identifying an effective apparatus of government under the law, or a grander objective of developing the most effective apparatus we can. Loughlin chooses to add that normative embellishment (p. 11)⁴⁵.

The recognition of a normative, justificatory aspect for public law has also been detected in Loughlin's equality premise, discussed in Part III above, despite (as was noted there) the impurity of its local implementations. But the debasement of a pure, or autonomous, discipline of public law in its local instantiations turns away from the justificatory side of its ambivalent character, leaving it to be dominated by its pragmatic side. The danger then is that the justificatory side is wholly unfounded, and

⁴² See M. FREEDEN, *Ideology: A Very Short Introduction*, Oxford, Oxford University Press, 2003, p. 4-5; M. FESTENSTEIN & M. KENNY (dir), *Political Ideologies: A Reader and Guide*, Oxford, Oxford University Press, 2005, p. 7; E. KENNEDY, « "Ideology" from Destutt De Tracy to Marx » *Journal of the History of Ideas*, 40, 1979, p. 353. For wider discussion of the relationship between ideology and law, see A. HALPIN, « Ideology and Law », *Journal of Political Ideologies*, 11, 2006, p. 153.

⁴³ See Loughlin, quoting Oakeshott, « moral and prudential guardianship » (p. 161).

⁴⁴ See Loughlin, « a prudential language through which that negotiation is effected » (p. 11).

⁴⁵ The same normative addition is made when Loughlin describes public law in terms of a « prudential discourse of political right » being « an essential precondition of our ability *successfully* to make those negotiations » (p. 13, emphasis added). It is clear at that point that the success is measured in normative, not merely pragmatic terms.

spurious claims to purity or objectivity in the case of public law will do as much damage as have false pretensions to an objective science of political right, or a scientific status for ideology.

Loughlin's ambivalence over the role of public law, wavering between a simply pragmatic and a full-blooded normative account, serves to conceal this danger. But the real test of the credentials of Loughlin's account of public law lies not in unravelling this ambivalence. It lies in challenging the basis for a uniform concept of public law that is capable of bearing the foundational political status he is minded to give it. Through making this challenge, the conclusion reached in this essay is that we have discovered nothing to suggest that public law can succeed where ideology has failed.

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