

The London School of Economics and Political Science

The theoretical turn in British public law scholarship

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Declaration

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Abstract

This dissertation studies the theoretical turn in contemporary British public law scholarship with a view to understanding what is it that public lawyers do when they theorise their subject. The diversification and expansion of theoretical writings that has animated the theoretical turn was inspired by the belief that the atheoretical character of public law scholarship made it unsuited to address the contemporary problems of the field. From the critique of the ‘dismal’ performance of public lawyers came a call to scholars to embark on a search for the foundations of their subject. Most of those who answered this call understood the task to be undertaken as an inquiry into the principles or values that ground and give normative force to public law. In this sense, most approaches within contemporary British public law theory constitute a species of constructivism whose variations differ according to the theoretical resources that are employed (critical social theory, moral philosophy or political theory) and what is taken to be the normative centre of the field (the administrative process, judicial review or political accountability). Although constructivism has been dominant, it would be wrong to assume that all conceptions could be subsumed under that category. There are, I argue, two principal alternative approaches. One, called deconstructivism, contends that theory has a tendency to become estranged from practice because it fails to acknowledge constitutional change and overestimates the role of principles, creating the conditions for the unreflective reproduction of a number of ‘myths’ which have to be dispelled by uncovering the empirical foundations of the subject. The other, labelled reconstructivism, argues instead that the theorist cannot make sense of the field and its present predicaments without understanding the particular historical evolution of the subject which has been informed by competing traditions of thought. Against a widespread assumption, my contention is that these theoretical approaches are not only competitive but also complementary. Without denying that these conceptions are semantically and methodologically incommensurable, I show that this pluralised theoretical landscape represents a decisive enlargement of the understanding of the subject.

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INTRODUCTION: THE THEORETICAL TURN

Until recently, British public law was seen as distinctly atheoretical. Many did not see this as a deficiency, but as a natural corollary of the practical inclination of the British legal and political tradition¹. Some have come to argue, however, that during the last 30 years British public law scholarship has experienced a “theoretical turn”, an “explosion of theory” such that it can confidently be said that “public law theory has become an established and vibrant aspect of the discipline” (Poole, 2003, p. 435)². More than ever, theoretical enquiries have come to occupy a prominent role such that this might be said to be an age of “principle” or “theory”³. So much so, in fact, that some have even argued that this turn to theory has gone too far⁴. Despite the interest and responses elicited by the phenomenon, three basic questions remain unanswered: what is the nature of the theoretical turn? How did it come about? In what sense, if any, has it advanced the understanding of the subject?

This thesis attempts to answer those questions. It argues that the theoretical turn was brought about as a response to the growing dissatisfaction with the conceptual and methodological assumptions of traditional constitutional scholarship (chapter 1) and is to be understood first and foremost as a process of conceptual and methodological diversification. The ensuing engagement with more foundational questions about the field and the discipline itself has enlarged the range of problems to be addressed and the methodological strategies that are needed to answer them, resulting in public law scholarship becoming more complex and heterogeneous. Sustained efforts at conceptual and methodological experimentation during the last 30 years has given rise, I claim, to three main theoretical conceptions, namely, constructivism, deconstructivism and reconstructivism. The first conception has received most attention within contemporary

¹ “When English administrative law is accused of being atheoretical, many read this as a reverse compliment... the terms ‘theory’ and ‘theoretical’ may contain an opprobrious resonance” (Harlow, 1994, p. 419).

² “There was a dearth of theory and a corresponding insularity and resistance to looking outside the law for guidance or to the much more theoretically sophisticated and interdisciplinary literature in the United States. A clarion call went out for more theoretically explicit administrative law scholarship. This call was answered, and in the last twenty years –especially since the early 1990s– administrative law literature has taken a marked theoretical turn” (Taggart, 2005b, p. 229).

³ “For public lawyers, ours is an age of principle”; “That theorising in public law is more explicit and extensive than ever before is plain for all to see” (Gee & Webber, 2013, pp. 708, 726); “The central role played by theory in our own time distinguishes it from previous eras where legal scholarship tended to involve analysis, exposition and systematisation of cases” (Poole, 2011, p. 24).

⁴ A good case in point is Cane (2003), which ignited a notable debate over the theorisation of public law with responses and exchanges between Craig (2003, 2005), Loughlin (2005c) and Allan (2013, pp. 333–340). Harlow, in fact, early on cautioned against “going so far in the golden realm of political philosophy that we lose sight of realities” (1981, p. 117); Gee and Webber have recently expressed similar apprehensions (2013, pp. 726–7).

theoretical writings in the field and, as might be expected, it has branched into different varieties. I call these social, moral and political constructivism (chapters 2, 3 and 4). Despite its predominance, however, deconstructivism and reconstructivism constitute two alternative theoretical programmes that cannot be reduced to constructivist conceptions (chapters 5 and 6). As I argue in the conclusion, the study of constructivism, deconstructivism and reconstructivism demonstrates that they have expanded the understanding of the subject in significant ways and that, despite the fact that they start from substantially different conceptual and methodological assumptions, it is possible to establish criteria for comparing and appraising them.

Before examining the context of emergence of the theoretical turn (chapter 1), I should first offer a preliminary characterisation of what is meant by constructivism, deconstructivism and reconstructivism. Broadly speaking, these theoretical programmes can be understood as embodying different conceptions of the subject of public law theory (viz. what is it about?), the aims of public law theory (viz. what is it for?) and the methods of public law theory (viz. how is it to be done?):

Constructivism understands public law theory as a normative undertaking, i.e. as an inquiry into the principles, ideals or values that explain and justify a favoured interpretation of public law. The main task of public law theory, consequently, is to contribute to the reinterpretation and reform of public law to make it consistent with, and bring it closer to, its justifying ideals, principles or values. Constructivism, in methodological terms, is characterised by the use of the theoretical resources of contemporary normative political theories, viz. critical social theory (chapter 2), the liberal theory of justice (chapter 3) and republican political theory (chapter 4).

Deconstructivism, by contrast, contends that constitutional theory has a tendency to become estranged from constitutional practice (i.e. the “what happens” constitution) because it fails to acknowledge constitutional change and exaggerates the role of principles within the field, creating the conditions for the unreflective reproduction of a number of myths that conceal the empirical foundations of the subject. The public law theorist, in consequence, must strive to objectively describe and explain the political realities upon which the subject is founded by deploying the methodological strategies of empirical political science and political sociology (chapter 5).

Reconstructivism, finally, argues that public law is first and foremost a cultural achievement and as such it can only be hermeneutically understood, viz. theoretical knowledge is a reconstruction of already existing practical political knowledge. The public

law theorist, in consequence, has the task to uncover and make sense of the conceptual structures of public law by situating them within the traditions of thought that have contributed to the formation of the subject. Reconstructivism, accordingly, proposes to extend to public law theory the interpretative methodological strategy characteristic of post-empiricist political theory and the historical and cultural sciences (chapter 6).

The discussion of these theoretical conceptions in ensuing chapters diverges in two important respects from the way in which this kind of analysis is commonly carried out. First, it departs from a widespread strategy that proceeds by grouping together the views of several public law theorists under some abstract and generalised characterisation of theoretical positions (“ideal types”, “schools”, “styles”, “models”, etc.) and, then, focusing the analysis on the contrast between these abstract and generalised characterisations⁵. This usual way of organising the discussion has certain advantages and, in particular, it brings to the analysis an extensive range of theorists while at the same time reducing the number of variables considered as a result of abstracting from –or downplaying– the more detailed differences between the theorists grouped within each generalised theoretical position and privileging the contrast between the tenets of these generalised theoretical positions. The following analysis proceeds instead by providing a sustained discussion of the writings of particular theorists that exemplify each theoretical conception. By analysing specific exemplars rather than abstract generalised characterisations, it is possible to attain greater levels of depth in the analysis so as to examine more thoroughly the consequences that follow from adopting a certain theoretical conception. Although more selective, this has considerable advantage when the main aim of the exercise is not provide a general survey of the material but to inquire into the kind of conceptual and methodological change brought by the theoretical turn and to assess whether it has advanced the understanding of the subject.

This leads to the second preliminary point. The present analysis diverges from the widespread tendency in the literature to privilege differences in value-positions and politico-ideological premises when distinguishing and contrasting between theoretical positions. Although ensuing chapters acknowledge the relevance of such matters, the discussion contained in them gives prominence to differences in terms of conceptual and

⁵ The generalised characterisations that are currently most frequently used in the literature are: [1] “red-light” against “green-light” theories (extended later with “amber-light” and “blue rinse”) coined by Harlow and Rawlings (1984, pp. 1–59, 1997, pp. 29–151, 2009, pp. 22–48, 56–70); [2] normativism (conservative and liberal) against functionalism elaborated mostly by Loughlin (1983, 1985, 1992a, 2005b); and [3] political against legal constitutionalism articulated primarily by Tomkins (2002a, 2003a, pp. 18–30, 2005, 2013). For the more recent talk of “models”, Gee and Webber (2010).

methodological assumptions. This explains why the present analysis treats as varieties of the same conception views that are commonly considered as opposite (viz. moral and political constructivism) and opposes views that are usually grouped together (viz. political constructivism, deconstructivism and reconstructivism). This thesis seeks to demonstrate in the conclusion that these two shifts in the strategy of analysis open the way for a more appropriate perspective for understanding and evaluating the theoretical turn and that this requires moving beyond theoretical monism and adopting the perspective of “theoretical pluralism”.

1. THE CONTEXT OF EMERGENCE OF THE THEORETICAL TURN

1. Introduction

The 1960s and 1970s opened a remarkable period of flourishing and diversification in British legal scholarship in general and within public law in particular. The expansion and professionalization of university legal studies and the increasing interest in law reform encouraged many academic lawyers to take a more reflective approach to their subject. The transformations of the administrative state and the growth of judicial review during those decades gave further urgency to the need for renovating academic work in the field of public law. It is no surprise, therefore, that in those years there was a relatively widespread dissatisfaction with the rigid, narrow and formalistic approach that until then dominated legal teaching and writing (viz. the expository or textbook tradition) that had an important impact on the development of a more theoretical scholarship within public law. The aim of this chapter is to outline the context of emergence of the theoretical turn by examining a series of studies that argued for the need for a more theoretically sophisticated public law scholarship from the 1970s into the early 1980s, opening the way for the theoretical writings examined in ensuing chapters. The chapter will first show how the interest in law reform, recent trends in contemporary legal and political thought, the expansion of judicial review and the dissatisfaction with the work of academic public lawyers prompted an interest in theory (section 2) to then consider the first attempts to delineate in programmatic terms the paths that the quest for a new public law theory should follow (section 3).

2. The increasing demand for theory

The decades that followed the post-war period brought changes in British legal scholarship and education of such magnitude that could not but have a great impact on public law (Taggart, 2005b, p. 225, 228–9 and 235). Contemporary British legal scholarship and university law schools started to take their present form during the 1960s and 1970s⁶. The

⁶ “The beginnings of modern English juristic identity can be dated to around the start of the 1960s” which was when the professionalization of “juristic speculation” really took off (Duxbury, 2005, pp. 951–2, 65–73); “It is only since the 1970s that law schools have achieved both critical mass and sufficient acceptance within the academy to start to build the capacity and the self-confidence to set a more ambitious agenda both functionally and intellectually” (Twining, 1994, p. 192). The history of the academic study of law in England before the last third of the 20th century is usually seen as a succession of false starts and disappointments (Twining, 1987, p. 263). Until this time the role of university law schools remained, in comparison to continental Europe, very limited and both law teaching and law degrees attracted considerably less prestige

sustained expansion of student numbers, law teachers, post-graduate programmes, and publishing outlets was accompanied by a greater debate concerning the research and teaching of the law, which, in turn, led a relevant section of legal scholarship to begin to deliberately distance itself from the profession. Law teaching became more varied (e.g. new post-graduate level subjects and greater degrees of curricular experimentation) and legal scholarship enjoyed a period of intellectual ferment as exemplified by the emergence of a diverse range of theoretical approaches to the law (contemporary analytical jurisprudence, socio-legal studies, critical legal studies, etc.)⁷.

This process of intellectual diversification, however, was neither unidirectional nor uncontroversial. The professional-school model remained very influential throughout the second half of the twentieth century. The new intellectual approaches to the law from the 1960s and 1970s emerged as a reaction to, and had to affirm themselves against, the constraints imposed by the bounded province of doctrinal legal studies whose focus on technical legal questions made them incapable of addressing the pressing concerns that contemporary society seemed to be posing to the law and those interested in legal subjects. A number of academic lawyers led, in particular, an attack against the descriptivism and formalism stimulated by a rather narrow conception of the law (neo-Austinian positivism) and the aims of legal science (expository tradition), which favoured an intellectually stifling type of legal literature (textbook writing)⁸. As the received academic legal tradition came under increasing criticism, the view of law as a social phenomenon of such complexity and

(Cownie & Cocks, 2009, p. 8; Twining, 1994, p. 25). This is a natural consequence of the fact that legal education and training remained until very late strictly adapted to the needs of the common law, i.e. tailored to the transmission of past practices and received ideas and to the reinforcement of the degree of cohesion and orthodoxy in the legal profession that the maintenance of a traditional and customary body of laws requires (Simpson, 1986). As “topics in English law were seen as being predominantly professional and best understood in the context of practice in the courts” (Cownie & Cocks, 2009, p. 6), apprenticeship remained the preferred method of legal education and training until very late. Unsurprisingly, then, “England was perhaps the last European country to admit the study of municipal law into its academic curriculum” (Baker, 2007, p. 170). Moreover, the professional bodies have consistently protected their role in legal education and training against the advance of academic legal studies (Lobban & Brooks, 1999), e.g. they have striven to preserve their sphere of influence in legal education not only in the vocational stage but also in the academic stage through the system of core subjects and exemptions and via conversion courses for non-law graduates (Twining, 1994, pp. 35–7). In fact, the most peculiar and distinctive traits of English legal education derived from this “dual” system where university law schools coexist with independent law schools run by the profession (*Report of the Committee on Legal Education*, 1971, p. 3).

⁷ For an influential account, Twining (1994, pp. 23–43, 141–46, 1995); a more up-to-date discussion can be found in Bradney and Cownie (2000).

⁸ See the influential writings on the subject by Twining (1970, 1972, 1987, 1994, pp. 130–46, 1997) and Sugarman (1983, 1986); for recent overviews of the broadening and diversification of legal education and the diminishing dominance of the “academic doctrinal project”, Bradney (1998) and Bradney and Cownie (2000).

richness that demanded the adoption of a multi-disciplinary and theoretically more sophisticated approach became more widespread (Twining, 1994, pp. 40, 141–6)⁹.

Very early on, a few public lawyers began to call for the broadening of the scope of public law scholarship by adopting a more reflective attitude to the field and incorporating it within the new movements in academic law. The need for a new approach within the discipline was made all the more manifest as the question of reform became more pressing in public law during the 1970s. Already in a paper on “Research and Reform in Administrative Law” (presented to the first meeting of the administrative law group of the then Society of Public Teachers of Law) by Anthony Bradley (1974), it was argued that the absence of philosophical analysis on administrative law matters “is a loss both to jurisprudence and to administrative law”, that it was necessary to ensure that “administrative law is not left out of the developing programme of socio-legal studies”, and, finally, that any “general legislative reform” in the field of administrative law presupposed a fair amount of “scholarly light to be cast on the subject” (1974, pp. 35, 43). Bradley pointed to the subjects that animated a series of papers of the 1970s that will sound the “clarion call” to public lawyers to abandon conventional wisdom in the field and turn to theory in order to articulate new perspectives able to accommodate contemporary concerns.

a. Law reform and public law

On the subject of administrative law reform, the proposals that circulated in the early 1970s –viz. two working papers by the two Law Commissions (England and Wales, and Scotland) on *Remedies in Administrative Law* (1970) and the Report from “Justice” entitled *Administration under the law* (1971)– found in John Mitchell one of their most perceptive commentators. His general claim was that these proposals were three blind mice “condemned to tinker with procedure” (1972, p. 203). According to Mitchell, any reform will end up merely tinkering with procedure as long as the question of “the philosophy or nature of administrative law” was not properly addressed and the proposals remained uninformed by “any thought on the nature, conditions and needs of government” (1972, pp. 204–5). In particular, he criticised the lack of recognition that contemporary

⁹ What was until then the distinctive trait of a few pioneering legal scholars and law schools (such as the LSE) became a more common sight to be found in some of the new plate-glass universities (e.g. Warwick, Kent) and in innovative centres of legal studies (e.g. Oxford Centre for Socio-Legal Studies), vid. Rawlings (1997, pp. 15–22). As Rawlings also points out, not only the LSE’s distinctive rejection of the “trade school” model but also its tradition in public law anticipated “socio-legal studies” and the “law in context” movement. Similarly, it has been remarked that “many aspects of what could easily be called a socio-legal approach have long been integrated into the study of public law in the UK” (Halliday, 2012, p. 143).

government was “having to deal on a larger scale planning” and that the main issue was, in consequence, to reconcile this “new pattern of government” with “individualized challenge”. This, in turn, could not be adequately dealt with if there was “no thought for the functions of groups” and the “protection of interests (as distinct from rights)” (1972, pp. 204–5). Procedural tinkering, such as the creation of a new division of the High Court, he concluded, will not do. The more recent reform proposals showed once again –as the Donoughmore Report (1931) and Franks Report (1958) did before– the incapacity to overcome the limitations imposed by an essentially “nineteenth century philosophy” (1972, pp. 204–5).

Mitchell himself had a few years before, just at the time when proposals for the creation of the Ombudsman were being discussed, posed more generally the question of “The Causes and Effects of the Absence of a System of Public Law in the United Kingdom”, i.e. a “rational system” with its “own justification” and “philosophy” (1965, p. 96). The answer lay in three related factors: the peculiar British constitutional history, the shape that British administrative law scholarship adopted in its formative years, and the absence of a philosophy of public law. Expounding the first factor, he provided an overview of how the legacy of the 17th century constitutional settlement, the principle of ministerial responsibility and the predominance of the common law courts and ordinary law –which otherwise amounted to a “happy (constitutional) history”– had the very “unhappy” consequence of impeding the emergence of a distinct system of public law (1965, pp. 96–104). Secondly, he pointed out, administrative law debates in the United Kingdom, at the “critical stage” of its early years, became confined to two issues: delegated legislation and administrative tribunals (1965, pp. 105–6). The lack of a proper reconsideration of public law resulted, unsurprisingly, in the persistent inadequacy of remedies that either foregrounded procedural matters at the cost of insufficient attention to substantive matters (privileging the “technicalities” over the “generality” of the law) or did not provide proper redress or compensation (1965, p. 102). Remedies will remain inadequate, he insisted, as long the “neglect of a fundamental consideration of the nature and purposes of judicial review” carries on (1965, pp. 106–12).

Thirdly, and perhaps most importantly, Mitchell argued that public law remained underdeveloped because of “defects of thought” that were expressed in the inability of lawyers to redefine and to evolve proper concepts in the field of public law¹⁰. This, in turn,

¹⁰ “What disturbs me deeply is our inability even to start on that process of redefinition...We have accepted, in the field of administration, a world of circular and precatory words which cannot even be said to

translated into: [1] a total failure in recognising “the real nature of rights involved” in well-known administrative law matters (e.g. planning and delegated legislation) and elaborating “rules and theories applicable to them”; [2] the failure “to a like extent to observe the changing nature of otherwise familiar institutions” (e.g. contracts and tortious liability) when involved in governmental activity and, lastly, [3] the “failure to formulate basic theories of law appropriate to the situation with which the law is faced” in the context of judicial review (1966, p. 143). Mitchell’s basic message was that the “lack of an appropriate jurisprudential thought” will not be cured while lawyers remained within the frame of a private law mindset and, unfortunately, “British jurisprudence remains essentially a philosophy of private law” (1965, p. 102).

Once the subject is thought through in its own terms, one might come to appreciate that public law is “inherently a jurisprudence of interests” and that, thereby, the basic theories in the field need to come to terms with the reality of the contemporary government and the peculiar values and interests that it concerns (1972, pp. 204–5). In order to grasp the philosophy or nature of administrative law, in other words, it is necessary to articulate a new pattern of thought that recognises the essential public character to the material and refines legal doctrine under the light of both social needs and individual justice (1966, pp. 135–43). Only a juristic thought that considers public law questions in themselves –and not through the distorting prism of private law– may find solutions for the dilemmas raised by the age-old contemporary struggles “of man and the State, the regulation of administrative activity or, if you will, the place of law in a modern society” (1966, p. 133).

b. Public law and contemporary jurisprudence

Mitchell led us from the discussion on administrative law reform to another of Bradley’s points, viz. the need for more theoretical analysis on administrative law and, consequently, the importance of establishing a connection between public law and jurisprudence. Jeffrey Jowell in his paper “Administrative Law and Jurisprudence” also complained that their “mutual isolation... has impoverished both fields” (1977, p. 55). Jowell started by noting how the best part of the jurisprudential debates of the time –which were dominated by Dworkin’s critique of Hartian jurisprudence– were concerned with the judicial and legislative functions and especially with the question of whether courts make law, i.e. with the theory of adjudication and with the question is there a right answer? This

be a world of half-law. We have had to do so because of the failures of ourselves, as lawyers, to evolve proper concepts. This situation itself increases the feeling of unease” (Mitchell, 1966, pp. 136–7).

meant that modern jurisprudence left in complete neglect “the fact that the majority of official decisions in most industrialized societies are made in forums other than the judicial”, e.g. tribunals, boards, commissions, departments, inquiries, and so on (1977, p. 55).

This crucial fact raised a number of particular problems. As these decisions cannot be guided by criteria established in advance by “overworked legislatures”, how can the appropriate criteria be established? To what extent can such decisions be guided by an “adjudicative model”? And to what degree –if at all– should such decisions be controlled through adjudication and ordinary courts? Even within the preferred area of debate in recent jurisprudence (viz. the theory of adjudication), the questions of the public lawyer remained unanswered. When the courts elaborated the “common law of public administration” by applying its standards to particular cases (e.g. natural justice, fairness, reasonableness) or when they interpreted legislative grants of power to determine if an official acted *ultra vires*, the public lawyer’s concern was not whether courts make law but, instead, the underlying “institutional boundary dispute”. What really mattered to the administrative lawyer was the determination of “the proper role of our decision-making bodies”, viz. the “question of institutional competence” (Jowell, 1977, pp. 55–6).

The public lawyer was engaged, Jowell insisted, with “institutional design”, that is to say, with the allocation of decision-making functions in a manner that was sensitive to the nature of the problem such that the appropriate “mix of decisional-referents” and “institutional technique” was chosen (1977, pp. 59–60). The question was, in short, “what problems may be determined best by courts, and other decision-making bodies” (1977, p. 61). Once we realise that given the “scope and complexity of modern British government” there will inevitably be “non-legislative institutions” that make most law, “we can then turn our attention to the kind of institution that makes it best, and the kind of control over discretion (weak or strong) that is most appropriate” (1977, p. 61). Thus, Jowell concluded, there is much to be gained by both the legal philosopher and the public lawyer if the connections between recent jurisprudence and administrative law come to be more deeply explored (1977, p. 62).

The need for theoretical analysis in the field of public law became, in fact, pressing during the late 1970s. To begin with precisely the problem of “institutional boundaries” considered by Jowell, the judiciary –after decades of displaying a deferential attitude (Jowell, 2003, pp. 376–84) marked by an exaggerated formalism which made “public law moribund in the 1940s and the 1950s” (Stevens, 2003, pp. 346–56)– assumed a new (or,

some argued, reclaimed its old) constitutional role in controlling the administration in the 1960s and this posed intricate new questions for public lawyers that required them to get involved in more foundational questions. The era of expansion of judicial review opened in the 1960s by the so called “fairness revolution” (Poole, 2011, p. 17) posed a new challenge for the public lawyer: if earlier in the twentieth century the problem was how to subject to the law and legal controls the discretionary powers of the administration, now the growth of judicial review seem to raise the problem of judicial discretion and its proper limits.

c. The fairness revolution and administrative law theory

Martin Loughlin’s paper “Procedural Fairness: a study of the crisis in administrative law theory” (1978) is one the clearest discussions on the subject from those years. In that paper he observed that the “recent upsurge of judicial activism” in administrative law has brought with it a refashioning of the basic doctrines of judicial review that required extended critical examination but, he complained, “most academic discussion of recent developments has failed to engage in such a systematic form of analysis” (1978, p. 215). To remedy this situation, Loughlin aimed to provide an analysis of these developments by following the social-theoretic strategy of critical legal thought, i.e. by inquiring into the degree of (dis)conformity between the guiding model of administrative law and the actual functioning of the relevant institutions.

The analysis should begin, consequently, by unpacking the pivotal concept of the rule of law as it contained the “conventional paradigm within which administrative law theory operates” (1978, pp. 215–6). Briefly put, this “traditional model” required that the exercise of political power followed a tripartite scheme: the legislature enacted general legislation that was implemented by the administration under the supervision of the courts, which ensured that the administration acted within the boundaries established by law. This ideal model, in historical terms, took its present shape, Loughlin argued, during the nineteenth century when the liberal conception of the “neutral state” prevailed (1978, pp. 216–7). The expansion of the “administrative state” during the 20th century, however, put the traditional model under increasing strain: the growth of social-welfare legislation, which was “not self-executing” and left “many policy issues unresolved”, placed the administration “at the central core of the governmental process and engaged in many tasks not easily reconcilable with its position in the traditional model” (1978, p. 220).

The administrative state presented a new dilemma to the courts. In the performance of their supervisory role over the administration, the courts now would get involved in controversial areas of policy that lay outside their expertise and mandate. The

courts initially arrived at a compromise solution based on a “formalist classificatory” strategy. Only those decisions (or the aspects thereof) that could be deemed to be judicial or quasi-judicial (i.e. those that resembled a judicial decision) are to be subjected to judicial review and to adjudicative-like procedural requirements in accordance to the rules of natural justice; those decisions (or the aspects thereof) that, on the contrary, pertain to “policies” being implemented (or policy issues resolved) by the administration should be subjected to parliamentary scrutiny under the principle of ministerial responsibility and not to judicial review. This strategy would avoid, in this way, an inconvenient “overjudicialisation of administrative procedures” (1978, pp. 218–22). This formalist approach proved to be, nonetheless, unworkable and the rigid classificatory solution was abandoned in favour of a more flexible approach that attended to the nature of the power exercised and the circumstances of the case, extending the scope of judicial review under the guidance of a general duty to act fairly and, thereby, inaugurating the “present era of judicial activism in administrative law” (1978, pp. 222–3).

The “informalist activist” strategy suggested by the doctrine of procedural fairness came to be, however, no less problematic. Looking closely to the relevant case law in English and Canadian law, Loughlin showed that actually the courts had been reluctant to abandon formal classifications and their traditional method of legal discourse in order to adopt the gradualist and balancing method favoured by the new doctrine of procedural fairness (1978, pp. 223–36). If the courts were to truly follow this new model they would have to adopt “a mode of argument similar to the Brandeis brief technique” (providing them with “socio-economic data” about the potential or actual effects of different alternatives measures to obtain policy ends) as the “dominant form of legal discourse” and to abandon a rule-based form of rationality in favour of notions of “instrumental rationality”, destroying what had been so far the “basis for certainty” and “the distinctive nature of the adjudicative process” (1978, p. 237).

Loughlin arrived at three conclusions. First, the reluctance of courts to abandon their reliance on some forms of classification and their traditional methods of legal discourse resulted in “a notion of procedural fairness that is largely symbolic” (1978, p. 238). Second, one should recognise that “procedural fairness, in attempting to patch over traditional theory by providing a check on the exercise of discretionary power in administration, undermines the concept of the rule of law” by destroying the value (certainty) and methods (rule-based rationality) distinctive of adjudication (1978, p. 240). The doctrine of procedural fairness could not, finally, resolve the “contradiction between

ideal and reality within the traditional model” nor was able to help in the understanding of “the complexity of the issues” that the courts had to face once “the state was required to abandon any pretence to neutrality in favour of an interventionist role” (1978, pp. 240–1).

d. The dismal performance of public law scholarship

Loughlin’s study on the crisis of administrative law theory is an early example of the new kind of questions and theoretical answers that the era of judicial activism would demand from academic public lawyers. In particular, it seemed to invite them to adopt a critical approach that explored the ideological underpinnings of public law adjudication and public law theory in times of social and political change. And the 1970s was nothing but a time of social and political upheaval. At that time a whole socio-political worldview that during the previous 30 years seemed uncontroversial –the post-war social democratic consensus– was seriously undermined after the crisis of the welfare state. This could not but present great challenges to public lawyers, encouraging them to question received wisdom in the field and search for new answers. This is precisely the context that inspired Patrick McAuslan’s article “Administrative Law and Administrative Theory: the Dismal Performance of Administrative Lawyers” (1978).

McAuslan opened this piece by remarking “it is difficult to think of a period in this century in which more insistent and more fundamental questions about the relationships between the institutions of the state and society are being asked” (1978, p. 40). These questions embraced “virtually every aspect of public affairs” and he listed many questions ranging from the role of the state in the economy to devolution and European integration. “A central issue in all these questions is the place of law and legal institutions”: what interests does law serve? What role could it play in meeting social demands and social change? Is it the case that law is, on occasion, an obstacle for social change and meeting social demands? What principles should guide it? Questions like these, he argued, should become the bread and butter of administrative lawyers, forcing public lawyers to ponder “basic questions of law and justice”, to enquire into the nature and purpose of state and society and, in sum, to elaborate novel theories of administrative law able to make sense of the history of the subject and to suggest the way(s) forward (1978, p. 40).

The landscape offered by contemporary legal scholarship presented us, McAuslan pointed out, with a disheartening spectacle. “In virtually every discipline in the social sciences” –from political philosophy and political science to sociology, economics and geography– one could find important and original contributions to such themes, proposing new theories and offering different perspectives. The only ones that remained “shamefully

and conspicuously absent from the debate” were the public lawyers whose contributions to these themes had been more than disappointing, dismal (1978, p. 41). The academic legal profession preferred, he wryly observed, to concentrate on the last case, statute or governmental report “and does not dare or care to lift its collective head from that unstimulating fare” (1978, p. 40).

After decrying the poverty of British public law theory, McAuslan inquired why so few administrative lawyers were willing to “live dangerously” and “chance their arm and philosophise as opposed to playing safe and writing case-notes?” And this question led him to embark on a general criticism of the institutional and cultural conventions that prevailed at the time. In institutional terms, he ascertained a “trilogy of constraints” that inhibited academic public lawyers and discouraged them to try their luck. First, there were publishing constraints that sprang from the limited number of publication outlets and their unimaginative editorial criteria, which privileged case-notes and statute-notes (1978, p. 42). Moreover, only the latter kind of publications put the public lawyer in the way of “editing a well-known textbook or case book or journal” or “contributing to a new or existing practitioner’s work”, which still remained as the most prestigious type of scholarly output. In contrast, the public lawyer who wrote about administrative law theory would quickly get “reputation as too ‘academic’ –meaning unsafe and unreliable” (1978, p. 42).

There were also “educational institution constraints”. The “law school and its curriculum” prompted public lawyers to concentrate their courses “overwhelmingly on nuts and bolts” having always in view “what is needed for exemptions and for practice” which were the “twin driving forces which mould the courses on administrative law” (1978, p. 42). To these two factors, a third and, perhaps, more important one had to be added, viz. the professional constraint. It was the understanding of the relationship between the academic public lawyer and the profession that which most emasculated the former. The obsession of the academic lawyer in trying to obtain the profession’s attention and approval, McAuslan suggested, had been extremely intellectually disabling for the public lawyer. Since the legal profession has been traditionally suspicious of theory, public lawyers had tried to avoid the sin of being too academic or theoretical –and even adopted an actively anti-theoretical attitude– in order to gain the practitioners’ respect¹¹.

¹¹ “The profession is suspicious of theory; academics are, in the practising profession’s eyes, too theoretical and the way to win professional acclaim is to denigrate theory. Instead of standing up to the profession and explaining and justifying the role of theory and philosophy in administrative law, most administrative lawyers are slightly shame-faced about their interest in the subject and regarded it as a giant step towards respectability when Administrative Law appeared as a title in Halsbury’s 4th Edn. If a publisher can be persuaded to publish a big practitioner’s manual on Administrative Law, a Chitty or Clerk and Lindsell, then all will be well. Instead of wanting to be different to the private lawyers, and align themselves

The habit of being non-theoretical was transfigured into an ideological position such that “the mind is shut to theory as being impractical, time-wasting and vaguely heretical” (1978, pp. 42–3). The institutional constraints got transmogrified into cultural conventions that cramped the intellectual development of academic public lawyers. Of these, two interrelated conventional assumptions about legal scholarship were the most paralysing. The first was the conventional idea that public lawyers should divorce their work from political questions and controversies, and aspire to elaborate neutral and objective commentaries on judicial decisions and legislation. This, which might be appropriate for “academic lawyers specialising in private law”, was unsuitable for the contemporary public lawyer who had as a principal task to assess the ideological content and the background philosophies and assumptions of the relevant case law, legislation and other academic writings within the field (1978, p. 43). The idea that public lawyers’ work and stance is “non-political” was illusory. It might be “non-explicit” but it is political nonetheless. The second one, is that a strictly legalistic approach –i.e. the knowledge and skills of the lawyer– was by itself adequate to address the questions that academic public lawyers should be concerned with and that, therefore, there was no need for them to cross disciplinary boundaries. The conventional views within academic public law scholarship were, in conclusion, ideologically dishonest and greatly damaging¹².

To overcome this unfortunate situation, McAuslan called public lawyers to formulate theories of administrative law that consciously and explicitly adopted a political philosophy and to stigmatise any attempt to divorce them as “hypocrisy”. This made it all the more important to insist on two virtues of the new type of public law scholarship needed, namely, its diversity and experimental nature. McAuslan considered crucial the existence of diverse approaches and theories within the field and claimed “that no one political philosophy should be considered to have a pre-eminent place in theories that need to be produced” (1978, pp. 43–44). There must be, on the contrary, “conservative theories of administrative law as much as we need Marxist theories; social democratic theories and liberal theories likewise”. It is only within the context animated by the debates and

with those in other disciplines working at the frontiers of the major problems of government, administrative lawyers, to curry respectability in the eyes of the practising profession, seek to become more and more like private lawyers –real lawyers” (McAuslan, 1978, p. 42).

¹² “By refusing to engage in open and explicit political debate, by refusing to question the assumptions and ideologies of the present administrative law and its creators, by refusing to grapple with and make use of the ideas and theories of other disciplines, we are adopting a highly conservative position. We are saying implicitly: ‘everything is basically all right; the law and the lawyers have a sufficiency knowledge and skill to put right anything that is wrong. We have no need to draw on skills and knowledge from outside our field and no benefits will be gained by doing so’. To adopt and to continue to adopt such a position does a disservice to society and in my view weakens our credibility as useful scholars in and analysts of society and its laws” (McAuslan, 1978, p. 44).

controversies furnished by such theoretical pluralism that “we can hope to grope towards a better understanding of administrative law, its role and limitations in the present and the future”. This was, in turn, a “much more chancy business”, giving these theories an experimental character that would make extremely difficult to assess when one was right or wrong and this required that space should be made in public law scholarship for more risky and uncertain undertakings (1978, pp. 43–44).

The series of programmatic articles written during the 1970s have come to be seen, in retrospective, as the “clarion call” for the theoretical turn that would ensue (Poole, 2011, p. 24; Taggart, 2005b, p. 229). Among them McAuslan’s paper on administrative law and administrative theory should be singled out. McAuslan was the first to articulate with such clarity a general critique of the predominant form of legal scholarship within the field, denouncing how it instigated the poverty of theory in public law. He attacked, in particular, its legalism and objectivism. If public lawyers were to contribute to the understanding of contemporary public law and to the debate on its role (both as a facilitator and as an obstacle) in social advancement, public lawyers had to be willing to cross disciplinary boundaries. Public lawyers should not aim to an illusory or hypocritical neutrality but engage in the critique of the ideology of judicial decisions, legislation and academic writings and explicitly elaborate the political philosophies that underpin the proposed understanding(s) of the field.

3. The quest for a new public law

In the early 1980s one finds the first writings answering to the clarion call to public lawyers to live dangerously and philosophise about their subject. In those years there was an intensified criticism of the prevailing tradition of public law manifested predominantly as a radical reappraisal of the textbook tradition. This went hand in hand with more systematic efforts to incorporate recent trends in legal thought (socio-legal studies, sociology of law, critical theory, law in context, etc.) into public law theory. The writings of the period, in sum, offer a series of early attempts at questioning and revising the basic conceptual apparatus and the methodological assumptions of traditional public law scholarship.

a. Towards a critical public law

One of the most significant among these writings is Tony Prosser’s “Towards a Critical Public Law” (1982). Reviewing the scholarship of the last decades, he found two surprising facts. First, that the flourishing of the sociology of law in Britain during the last decades was not translated into new theoretical perspectives able to displace the traditional

approach to public law. This was all the more surprising given that the difficulties of conceiving public law as a system autonomous from power and politics should have facilitated the incorporation of the work of sociologists and political scientists. Some advances had been made in the study of individual institutions, yet still “no emergence of any new governing theory or set of theories to provide structure and coherence to the development of the subject” (1982, p. 1). The lack of a new governing theory was also surprising given the “increasing awareness that the approach to public law traditionally adopted in English law schools and in leading textbooks is highly inadequate” (1982, p. 2). The awareness of the inadequacy of the theoretical frame underpinning traditional approaches within the field had not gone, as a matter of fact, beyond isolated breaks within an otherwise generally predominant tradition and, consequently, remained incapable of offering a “replacement theoretical structure for the subject” (1982, p. 2).

What rendered the traditional approach to public law inadequate was, in his view, its underlying conception of the law and the constitution. Its conception of the law –which was inherited from legal positivism– exhibited two assumptions that made it inapt. First, it had an excessively narrow conception of the domain of the legally relevant, confining the attention of public lawyers to rules contained in case law and statutes –“with an occasional nod towards statutory instruments”– ignoring the multifarious forms of modern state intervention that adopted informal devices and were subjected to informal controls. Secondly, the traditional approach assumed that “public law tends towards providing a coherent, rational system of rules applied by the courts to provide objective restraints on state activity”. This model of the law –the “*gesellschaft* conception”– became outdated as a consequence of the development of the highly interventionist modern state which brought with it a crisis in law and legal ideology. If the *gesellschaft* conception understood the role of the law as that of formally attributing equivalent individual rights according to the liberal-capitalist ideology dominant in the 19th century, the 20th century modern state demands a conception of the law as concerned with the efficient attainment of supra-individual public policy (1982, pp. 2–3).

To overcome the limitations of the traditional approach to public law, a new type theory was necessary, one which conceives public law as a wider social phenomenon whose aim, in the context of the modern state, is to legitimise rather than simply constrain the exercise of public powers (1982, p. 4). In other words, it is necessary to adopt a sociologically enlightened theory of public law that takes into account how the state has changed its functions and its “forms of legitimation”. This, in turn, supposes a different

conception of the law. Public law is not conceived as a system of rules restraining power separated from (or above) politics, but as a “legitimizing device” for state action that is associated with specific ideologies. The form of public law, in consequence, will vary according to changes in prevailing forms of state action and legitimating ideology, making necessary for public law theory to pay close attention to sociological theory (1982, pp. 4–6). The traditional approach supposed an equally outmoded view of the constitution. Under the conditions brought by the interventionist state, “the traditional principles of constitutional law appear increasingly unreal”. First, the subjection of the state to the law loses its value when abstract general rules are increasingly replaced by wide administrative powers. The principle of separation of powers becomes also difficult to square with the “growing centralisation of power” in the executive and the emergence of “new forms of multi-purpose agencies combining different functions”. Thirdly, the Parliament’s place and role in the traditional constitutional framework also becomes, as a consequence of “executive domination” and the growth of political parties, “a mere fiction” due to the evident decline in “the effectiveness of political accountability” (1982, p. 7).

A sociologically enlightened theory of public law would replace the *gesellschaft* model by the more appropriate bureaucratic-administrative model which puts the emphasis on “the attainment of political goals rather than the regulation of competing private interests” and, therefore, does not rely primarily on a formal law of abstract and general statutory norms but in a material law of purposive, concrete and particular administrative decisions exercising wide discretionary powers (1982, pp. 3, 5). This requires a “new public law” that is attuned to the novel forms of legitimation made necessary by the interventionist state. This new public law has to be critical in a double sense. First, it has to set forth an “immanent critique” by asking whether there is a coherent relationship between the state’s own legitimating claims and actual structures of state action (1982, p. 8). This new public law, however, would have to go beyond an immanent critique because the “legal ideals embodied in existing principles” turn out to be “inadequate to found any effective critique of the modern state” (1982, p. 9). Existing legal principles –viz. “common law values”– are too geared to the protection of individual rights (esp. private property) to serve as suitable foundations for the new public law. Any attempt to use as a basis any “transcendent common law values” will not do (1982, p. 13). Rather, “it is necessary to develop a theory of legitimacy; a theory of what state action is *actually* legitimate and of how power can be exercised as a basis for the critique of existing ideology and practice” (1982, pp. 9–10).

Inspired by the then very influential writings on state theory of the Frankfurt school of critical theory (especially those by Jürgen Habermas), Prosser argued that a theory of legitimacy must explicitly elaborate the conditions under which it could be ensured that state action pays sufficient consideration to the interests of all affected (participation) and that appropriate justification is given in the form of reasons for state action (accountability)¹³. Prosser's proposal was, in short, to put at the centre "the new organising concepts of participation and accountability" which he deemed, if appropriately developed, "capable of replacing such traditional concepts as the rule of law, ultra vires, natural justice, etc." as the basic conceptual apparatus of public law theory (1982, p. 13). This new public law should have been able to give an account of the then current debates on public law reform, e.g. the debate on open government and freedom of information. In terms of scope, the new theoretical frame required both to expand the boundaries of public law (e.g. to incorporate the until then underconsidered subject of "economic management") and the concerns of public lawyers, i.e. to criticise not only public forms of power but also its private or quasi-public manifestations (1982, p. 14).

b. Rival theories of administrative law

The critique of the prevailing tradition of public law became extended and systematic in the early 1980s. Programmatic articles such as Prosser's represent the attempt to outline the possible paths toward richer and broader theoretical frames for the discipline. Another form of critical response takes the shape of broad and persistent attacks on the textbook tradition in the field. There is no better illustration of the latter than the critical reviews that saluted the re-editions of the canonical textbooks on administrative law, namely, Stanley de Smith's *Judicial Review of Administrative Action* and HWR Wade's *Administrative Law*. Carol Harlow's essay "Politics and Principles: Some Rival Theories of Administrative Law" (1981) is a case in point.

Reviewing the recently published fourth edition of de Smith's textbook, Harlow acknowledged the importance that it had in establishing administrative law as a discipline ("a work of immense scholarship, de Smith proved the existence of a corpus of administrative law beyond all reasonable doubt and has done much to legitimise its study"). However, "the secret of the book's success may lie partly in its traditionalism. Its framework is the traditional framework of remedies and its emphasis is the caselaw

¹³ "I am suggesting that, rather than basing any claims for the future of public law on transcendent common-law values, the public lawyer should, as part of a broader political programme, flesh out the concepts of participation and accountability and evaluate existing institutions against them, whilst at the same time attempting to establish the conditions for their realisation" (Prosser, 1982, p. 13)

emphasis of the common lawyer” (1981, p. 115). This is why, Harlow argues, “de Smith has largely been responsible for the preoccupation with judicial review which has characterised too many academic courses”. While de Smith’s approach helped to legitimise administrative law in the eyes of the lawyer, it has enclosed it in the courtroom and overestimated the importance of law and legality, displacing the standpoint of the administrator and devaluing political and administrative institutions. Within the traditional approach, “law and administration diverge and may even come to seem antipathetic”. Stanley de Smith’s achievement was therefore ambiguous because, in spite of establishing administrative law against neo-Diceyan suspicions, it further reproduced a one-sided “legalism” (1981, p. 116).

This defect was even more pronounced in Wade’s general approach to public law – which he had the opportunity to expound as a Hamlyn lecturer in 1980– and which Harlow criticised for grossly underestimating the contested character of public law and the role of the judiciary therein. In fact, according to Harlow, Wade seemed to think that “to transfer a given question from a political to a judicial forum is automatically to sanitise it” (1981, p. 114). It has come to be recognised that it was rather naïve to believe that judicial decisions over a test of “personal sacrifice versus public deficit”, the abuse or misuse of power or the exact scope of statutory powers, left no room for doubt and conflict. This lack of realism also affected the “belief that objective and logically coherent principles of administrative law can be evolved in an ad hoc fashion by the judges” (1981, p. 115). Wade –as his more recent support for a bill of rights binding for the legislature ratified– ignored the essentially contested character of judicial review and its growth, as if they were not hunted by their own problems and risks. Wade, in Harlow’s view, prescribed more and more judicial review as if it were “a universal panacea” that he advertised “as being, like thalidomide, innocuous and entirely without side-effects” (1981, p. 114). For Harlow, in sharp contrast, it was important to insist in a cautionary note that judicial review “far from strengthening our grip on the abuse and misuse of executive power, often serves to legitimate such abuses by dressing up essentially discretionary decisions in legal language and thus lending them a spurious appearance of consistency and neutrality” (1981, p. 116).

In contrast to the leading textbooks by Wade and de Smith, the earlier textbook by JAG Griffith and H Street (1952) –whose contribution was (and arguably still is) insufficiently grasped (Harlow & Rawlings, 2014)– offered a different approach: “its subject is ‘administrative law’ rather than ‘judicial review’. It tries to set administrative law in its institutional and constitutional framework and to approach it from the standpoint of

the administrator rather than the judge” (Harlow, 1981, p. 116). Griffith also offered an alternative view of the constitution. While in his Hamlyn lectures, Wade doubted the representativeness and effectiveness of both Parliament and the legislative process and favoured the adoption of a Bill of Rights and a more prominent role for the judiciary, Harlow found in Griffith’s Chorley lecture the, perhaps more realist, view that “there is nothing either inevitable or fundamental about human rights”. Rights were, and could not but be, essentially political, the subject matter of a constant struggle against established powers. On such a view, “this is a fight in which the whole political community should be involved and if we allow the responsibility for the protection liberty to be transferred to the judiciary, we shall only succeed in enslaving ourselves” (1981, p. 113).

But if Griffith represented a promising alternative view on the expansion of judicial review, free from a naïve faith in judges, Harlow thought that Griffith’s approach was impaired by a 1950s style of positivism that would lead “to throw away all we have gained” (1981, p. 117). Thus, Harlow concluded, “none of the major textbooks is ideally suited to the new climate” of the 1980s and this, once again, threw the problem of administrative law theory into relief. Administrative lawyers, she argued, “must rethink the neo-Diceyan theoretical assumptions which underlie all modern administrative law and construct theoretical foundations more appropriate to the present mood”. An unbridled immersion in theoretical speculations also had its risks, she warned, as it might lose sight of reality. Harlow, in the end, favoured the “functional approach of a social scientist” that would, at the “theoretical level”, “restore to administrative law the unity which has recently been missing” and, at the “practical level”, “provide an evidential basis for our theoretical assumptions” (1981, pp. 117–8).

c. Judicial activism and the textbook tradition

Many of the questions raised by Harlow were further elaborated by Denis Galligan’s “Judicial Review and the Textbook Writers” (1982). This review article of the then most recent editions of *Wade* (4th edn, 1977) and *de Smith* (4th edn, 1980) became a representative critique of the legalistic and judge-centred approach of the textbook tradition in administrative law. Like Harlow, Galligan emphasized that “both books are primarily studies of judicial review” (rather than administrative law as such) and that “the approach to administrative law taken by both books is to see the subject in terms of judge-made principles of general application whose purpose is to control the exercise of power by officials” (1982, p. 259).

Galligan, as with Harlow, saw the considerable expansion of judicial review in recent years as an ideal site to assess the cogency of the leading textbooks (1982, p. 263). The selection of judicial activism as the focal point of analysis seemed appropriate not only due to the court-centred perspective taken by both textbooks but also because this subject had come to be one of the main challenges of the administrative law of the time. If earlier in the century the central problem was to subject to the rule of law the expanding discretionary powers of officials in order to protect the rights of the individuals, the growth of judicial review in the decades after the 1960s meant that to determine the province of judicial action became also central. Judicial activism, indeed, involved the risk of judicial institutions becoming as discretionary and subjective as the institutions that they sought to control (1982, p. 257). Consequently, an analysis of judicial activism placed two burdens on commentators: [1] to establish the constitutional basis of judicial review of administrative decisions (i.e. what made it legitimate?) and [2] the standards of adjudication that guide the exercise of judicial discretion, viz. what patterns of adjudication can be identified –if any– in the judicial application of the “heads” or “principles” review? (1982, pp. 261–3). Both Wade and de Smith’s analyses of recent judicial activism were unsatisfactory, on Galligan’s view, but for different reasons.

In general terms, Galligan argued, Wade seemed to think that the legitimacy of judicial review was unproblematic because the courts were operating within the principle of parliamentary sovereignty according to the *ultra vires* doctrine. This “neat constitutional arrangement” came under strain when Wade had to explain judicial activism as he had to recognise that the courts’ bold interpretations of the old principles of review were in many cases “no more than a pretence to be doing the Parliament’s will” (1982, p. 264). This had the troubling implication that “while courts pay lip-service to the will of Parliament, they are really marching to a different tune. That tune for *Wade* is the protection of the individual against power” (1982, p. 264). But this answer cannot be satisfactory, as the appeal to the protection of the individual is nothing but an appeal to a general ideal and the question is how that general ideal is to be made operative. At this point Wade harked back to a constitutional theory –“legality”– that was supposed to obtain its force from the principles of parliamentary sovereignty and the rule of law. But, Galligan noted, from Wade’s own analysis it is known that parliamentary sovereignty will not be sufficient by itself and that the rule of law was a “notoriously loose concept capable of various interpretations” (1982, p. 264). The constitutional basis of judicial review, therefore, “is

never seriously analysed” as it “straddles parliamentary sovereignty and the protection of the individual in a way that remains enigmatic” (1982, pp. 264–5).

Wade could leave unanswered the problem of the justification of judicial review because he treated concepts like legality, the rule of law, the protection of the individual, as “self-explanatory” and “self-justificatory” but, Galligan contended, “they are neither”. It is perhaps for that same reason that Wade failed “to penetrate the judicial reasoning whereby general heads of review are applied to specific situations” (1982, p. 265). Indeed, Wade never questioned what exactly provided the link between general principles and particular circumstances, and contented himself with taking each case as a direct application of a head of review, treating them as isolated and particularistic judicial decisions. This would be acceptable only to the extent that one shared Wade’s implicit assumption that “so long as judges have a vigorous attitude to review, all will be well” (1982, p. 264). Thus, Galligan concluded, the fundamental questions raised by judicial activism are never really addressed by Wade’s textbook. Indeed, it never suggests that there are limits to the legitimate exercise of judicial review nor it proposes a new understanding of the “constitutional structure”, one that is adequate to the “modern relationship” between Parliament, the executive and the courts (1982, p. 267).

If Wade’s analysis of courts’ rulings ends being too schematic and formulaic, that cannot be said of de Smith’s work, which spent considerable efforts to construct bit by bit a system of rules and principles from the mass of judicial decisions extrapolating from them normative standards that could be fruitfully used to explain the “actual practice of review” (1982, p. 268). As the demands of providing such a systematization of judicial decisions always risks over-simplifying what courts really do, de Smith, conscious of the problem, was careful to stress the discretionary and variable nature of judicial review. This explains why, on Galligan’s view, “the conflict between these two themes, the attempt to formulate general rules and ubiquitous discretion of the courts, runs throughout de Smith and is never resolved”. The clearest limitation of de Smith’s textbook, however, was the “absence of any attempt to construct a theoretical basis for administrative law” which resulted from “the way the subject ‘administrative law’ is conceived, that is, as rules created by the courts” (1982, p. 269). This case-law centred perspective that constructed the subject “almost exclusively out what courts say” made it incapable to elaborate an appropriate theoretical basis for understanding the problems that besieged judicial review in particular and administrative law more generally. Indeed, it is impossible to elaborate such theoretical basis, Galligan points out, without considering the wider implications of

the expansion of the welfare state as they have been expounded by the social sciences (political science, economics and sociology) and by a recent body of legal literature that sets forth critical perspectives to the subject (1982, p. 269).

The shortcomings that impair the textbook tradition in the field could only be overcome, in sum, if its court-centred outlook was abandoned and an explicitly theoretical and multidisciplinary tack was adopted. “Simply by reading cases”, Galligan argued, administrative lawyers would remain incapable to find the “theoretical concepts and principles” that are necessary “to give the new activism coherence and purpose”. Only a methodological overhaul would enable them to determine the province –both in terms of efficiency and legitimacy– of judicial review, and go beyond a narrow attention to the pathologies of the administrative system (“when things go wrong”), contributing to the development of “positive principles of decision-making” (1982, pp. 270, 276). To provide a programmatic illustration of the kind of theoretical undertaking needed, Galligan ended by outlining a procedural theory of judicial review articulated upon accountability and participation as organising concepts. This procedural theory, he argued, would furnish a clearer frame to negotiate the basic conflicting demands besieging judicial review: the need for the courts to both play a role in the formulation of positive principles of decisions-making (principles of good administration) and respect parliamentary sovereignty and the legitimate sphere of administrative action (1982, pp. 261–2). The consideration guiding the elaboration of the theory should be that “final policy choices are for the administrative authority, while the process of arriving at and implementing policy is a matter properly within the domain of courts” (1982, p. 270). The role of the courts, on this account, would be to ensure that the power-holder [1] be able to give admissible reasons to explain and justify the exercise of the relevant government power, i.e. accountability, and [2] has before him a full view of the relevant public interests and offered to the citizen opportunity to exercise his rights to influence the exercise of government powers, i.e. participation (1982, pp. 271–6).

d. Questioning the British public law tradition(s)

Both Harlow and Galligan, therefore, criticised the leading textbooks in administrative law in order to expose the flaws of traditional approaches to the field. This line of criticism was extended further by Loughlin, who –with the occasion of the publication of yet another edition of Wade’s textbook (5th edn, 1982)– embarked on a wide-ranging critique of the British tradition of public law. Adopting a longer time frame for the analysis, Loughlin intended to place Wade’s work in the history of British public law

scholarship and show that “Professor Wade must be viewed as a contemporary disciple of Dicey” (1983, p. 668).

Loughlin argued, in particular, that Dicey and Wade exhibited similar conceptions of juristic work (viz. legal knowledge and scholarship) and similar ideological tenets regarding the law and social reality (1983, pp. 667–9). As regards juristic work, both Dicey and Wade [1] pertained to “the tradition of analytical jurisprudence”, [2] embraced “a definite view of the boundary between law and politics”, [3] exhibited a “clear, expository and authoritative” style, and [4] aimed “to provide an account of law as a coherent system of fundamental principles embedded in our constitutional structure”. It is in this sense, that “it could even be said that Wade has done for administrative law what Dicey did for constitutional law” (1983, p. 668). What’s more, Dicey and Wade also shared similar ideological attitudes and assumptions towards the law and social reality. In respect of the law they endorsed the same conception of the common law and the judicial function. They both viewed the common law “as a system of immutable principles of right and justice and of self-evident truth” and reasoned under the implicit belief in the superiority of the common law over statutory law which did not exhibit the logic and symmetry of the former. In the field of public law this was particularly problematic since the common law inherited from its crucial formative period, in the 18th and 19th centuries, a recognisable affinity with the philosophy of laissez-faire. Crucially, Loughlin observes, these factors combine to produce “an outlook of scepticism towards administrative schemes for the collective provision of services or regulatory controls provided for by social legislation” (1983, p. 670).

In consonance with their views on the common law, Loughlin pointed out, Dicey and Wade conceived the judicial function as to give precise meaning to the principles of the (common) law “in particular cases in such a way as to maintain the logic and symmetry of the law” (1983, p. 669). Both this conception of the function of judges and the implicit suspicions towards administrative schemes and social legislation, abetted a treatment of the judicial role in public law as “non-problematic”. Within the textbook, in consequence, “judges and judgements are not criticised” and “judicial decisions are sanitised to fit Wade’s neat, methodical structure of administrative law”. Such an uncritical attitude was perhaps acceptable in Dicey’s times, but not so later. Wade, Loughlin remarks, seemed to write “as though the realist movement had never existed” (1983, p. 670). Moreover, by taking a “self-satisfied” perspective on the common law and the role of the judiciary, Wade’s court-centred and objectivist approach served the function of legitimating the status quo. Wade,

in this sense, seemed to share Dicey's conservative ideological attitude towards social reality. Wade's tendency to underplay the significance of the policy issues involved in administrative law matters derived, in sum, from three basic features of his textbook: [1] the narrow conception of administrative law –viz. as a “body of general principles which structure and limit the manner and nature of decisions-making by public bodies” (1983, p. 667)–, [2] the court-centred focus and [3] the insistence on a sharp distinction between law and politics (1983, pp. 670–1). All this firmly located Wade's work within “a tradition of complacency” about administrative law that conceives it as a system based on “the universal truth and justice of the common law” and in which judges are pictured as boldly and imaginatively applying its principles acting “as a bulwark between the citizen and the state” (1983, p. 671).

The complacent tradition was challenged, however, by a critical school that [1] emphasised the high degree of judicial discretion that actually existed, [2] criticised the judiciary for failing to accord “sufficient legal status to social legislation” and [3] exposed the “cultural, philosophical or political prejudices of the judiciary”. In spite of its important contributions, this critical school, however, was never able “to use their insights as the foundation of an alternative theory” (1983, p. 671). The reason for this, Loughlin thought, lay in its dated theoretical approach. The critical school had not developed in a substantial way its methods and aims since the 1930s and, perhaps more importantly, persisted in working “within the dominant tradition of analytical positivism and consequently have been bound by its strictures” (1983, p. 671). As the critical school has failed to displace the complacent tradition, due to its incapacity to elaborate a more capacious legal theory, administrative law theory has reached a dead end. Put in Loughlin's words, the crisis in administrative law has arisen because of the “growing recognition of the inadequacy of the dominant view exemplified by Wade and the inability of the critics to provide any coherent alternative theory” (1983, pp. 671–2).

Finally, Loughlin turned to the programmatic question of how to elaborate an adequate alternative theory. This alternative theory must “commence with a critical examination both of the way in which the subject is traditionally constructed (administrative law as a body of general principles) and of the dominant legal theory which underpins it (analytical jurisprudence)” (1983, p. 672). In particular, he argued that a “deviationist critique” offered a suitable point of departure. Making use of both the traditional construction of the subject and the traditional analytical techniques, the critic should not “rationalise and sanitise” but rather “lay bare the uncertainties, ambiguities,

disharmonies and contradictions in the law” (1983, pp. 672–3). This deviationist critique challenges the traditional approach by showing that legal disputes involve many dimensions that are constantly underplayed if not ignored. It demonstrates that the orderliness, simplicity and clarity of the traditional approach is paid at too high a price: “the price of maintaining the ‘purity’ of administrative law is that we must either ignore or distort the social, political and economic dimensions to the enterprise” (1983, p. 673).

This new critical programme supposed, in particular, two fundamental changes in the theorisation of the field. First, the narrow construction of the subject has to be abandoned in a favour of a wider conception of administrative law as the “law of public administration” (1983, p. 673). Only by abandoning the traditional court-centred conception one might be able to avoid the danger of law-centredness and remain sensitive to the socio-political contexts of disputes that hitherto remained underplayed and unarticulated. The programme required, secondly, drawing from the body of theory produced by neighbouring disciplines (philosophy of language, social theory and political theory), as it was only by incorporating the theoretical developments in the fields that explored “the intricate relationships between language, structure and power” that the public lawyer could aspire to grasp the social, political and economic dimensions of public law (1983, p. 672).

e. The predicament of the British constitution

The critique of the textbook tradition in administrative law turned into a full-blown criticism of the methodological and ideological assumptions of the dominant tradition of public law. The rejection of the legal positivism and the ideological conservatism that was seen to pervade British public law scholarship and the increasing awareness of its shortcomings, led many to the view that public law thought was in crisis and that a new public law was necessary. This sense of crisis would become yet more acute as the themes of constitutional reform and constitutional change gained salience as the 1980s advanced. The relative incapacity of constitutional law scholarship to deal with the challenges posed by recent constitutional change and the proposals of reform was also translated into an increasing dissatisfaction with the leading textbooks on the field¹⁴. The inability of

¹⁴ “With the irruption into British politics of so many constitutional issues in the 1970s –entry into the European Community, central/local government relations, Northern Ireland, electoral reform, the referendum, the Bill of Rights, the role of the trade unions and devolution– fundamental changes might have been expected in the structure of text-books of constitutional law. Yet few areas of the law have the standard texts changed less in fundamentals. Renovations and repairs have been undertaken, but the basic structure has remained intact, even though the architectural surroundings to which the building was intended to relate, no longer exist” (Bogdanor, 1987, p. 454).

constitutional law scholarship to give due consideration to recent fundamental changes seemed to derive from the incapacity to reformulate the basic theoretical foundations of constitutional law and to free itself from the grip of Dicey's framework of analysis. This critique became more insistent and widespread since 1985 –the year of the 100th anniversary of the first edition of Dicey's lectures on the law of the constitution– as the Diceyan view of and influence on constitutional law was subjected to more extensive debate (Jowell & Oliver, 1985; McAuslan & McEldowney, 1985).

The “ample recognition of the poverty of current constitutional theory” (Bogdanor, 1987, p. 463) was intimately linked to a growing awareness of the shortcomings of the British constitution itself. In fact, towards the mid-1980s there emerged a conviction that the crisis of the constitution went deeper than the usual debate on reform and put into question the legitimacy of the constitution as a whole (McAuslan & McEldowney, 1986, p. 496). The crisis of British constitution was seen as having both deep causes and an all-encompassing nature. If in the 1950s Britain still exuded confidence in the greatness of its constitutional arrangements and constitutional past, by the late 1970s and early 1980s there was a clear sense of decline. This derived from the post-war decline of Britain as an Empire and a great power in international affairs and, perhaps primarily, from Britain's “economic decline” in the 1960s and 1970s. The economic decline and the crisis of the post-war settlement were, finally, translated into a crisis of legitimacy of Britain's practices of government and the British constitution itself (Gamble, 1988). The ascent of Thatcherism, in this sense, coincided with both a crisis in the British economy and in its traditional constitutional arrangements. This opened the way for much constitutional change in the 1980s, which for the most part occurred in an unplanned and ad hoc manner (Graham & Prosser, 1988). The sense of crisis was further fed by the unconciliatory style of the Thatcherite government, which seem to pay little respect to constitutional niceties and established practices, e.g. its attack on local government, use of retroactive legislation to validate unlawful acts, little attention to consultation practices or respect of parliamentary deliberation, etc. (McAuslan & McEldowney, 1986).

The growing political and academic controversies about, on the one hand, the inadequacies of the traditional constitution and the need for constitutional reform and, on the other, the increase visibility of constitutional change and the corresponding emphasis on the changing constitution, generated a context that pushed public lawyers to change the way in which they go about doing their work (Oliver, 1989). What's more, the breakdown of the post-war consensus and the growing ideological confrontation between a front that

staunchly defended the welfare state built since the 1950s and those who favoured a reversal to market-mechanisms through privatisation and deregulation, provoked increasing disputes between local authorities and central governments, many of which could not be contained by administrative means and ended up in the courts. The legal disputes between the local and central levels of government brought about an increasing judicialisation of political matters and, many argued, made more evident the ideological bias of the courts, viz. forced to adopt a more overt political role the courts have had to take sides on questions which they are not well-prepared to deal with and which are charged with a highly ideological content. All this could not but further stimulate the quest for an alternative theory of public law, one which is not affected by the legalistic and objectivistic strictures of traditional legal scholarship within the field¹⁵.

As shown in the preceding pages, the search for a “new public law” had been building up for some time and many of the proposals and ideas that would animate the theoretical turn were foreshadowed and anticipated in these early writings of the late 1970s and early 1980s. Such process culminated, first, in the publication of the first textbooks that attempted to articulate non-traditional approaches to constitutional and administrative law in the early and mid-1980s (Craig, 1983; Harlow & Rawlings, 1984; Turpin, 1985). Harlow and Rawlings’ *Law and Administration* remains particularly representative of the orientation of this new breed of textbooks. As they made explicit in the preface to the first edition, they intended to depart from the assumptions of standard textbooks, which ignored the fundamental political and constitutional questions raised by the subject. On the contrary, they argued, the aspiration to offer an uncritical treatment stood in the way of a proper understanding of administrative law and, therefore, administrative law theory must be the starting point of any study of the subject (Harlow & Rawlings, 1984, p. xxiii).

Secondly, and more importantly, the theoretical turn prompted the use of another “literary form”, namely, long monographic essays attempting to criticise the theoretical framework underpinning traditional public law thought and proposing new alternative public law theories. This should not be surprising as the student textbook is a literary form subject to requirements of coverage, simplicity and reliability that made it a particularly

¹⁵ Public lawyers, McAuslan insisted in his 1983 Chorley Lecture, “have made no progress at all in this 50 years in understanding the modern administrative state and the need for some general theories of administrative law to explain the role of law in that state and suggest the way forward. Clearly we cannot continue to confine ourselves to legalistic analyses of cases and statutes and avoid touching on political and policy issues. In my view the time is ripe for a relook, a rethink and a rewrite on the evolution of our modern system of administrative law and its relationship to the state, policy-making and resource allocation within the state including policy-making by the judges” (McAuslan, 1983, p. 20).

inapt medium for developing novel theoretical approaches¹⁶. One of the first to be published in this cohort was Harden and Lewis' *The Noble Lie* (1986). Soon after the *Noble Lie*—in fact by the early 1990s—a number of books that are representative of the theoretical turn were published in quick succession, e.g. Paul Craig's *Public Law and Democracy in the United Kingdom and the United States of America* (1990), Martin Loughlin's *Public Law and Political Theory* (1992a) and Trevor Allan's *Law, Liberty and Justice* (1993). As it will be seen in the chapters that follow, these works and the theoretical debate they spearheaded explored and elaborated in a much deeper and comprehensive way the problems and challenges that were identified and preliminarily discussed by the prefatory writings discussed in the preceding pages.

4. Conclusion: towards the theoretical turn

The aim of this chapter has been to portray the context of emergence of the theoretical turn with a view to laying the groundwork for the ensuing discussion. More concretely, it has provided an overview of the preparatory literature that preceded the latter in order to identify the set of problems that animated it during its early years. Within the background provided by the flourishing and diversification of British legal scholarship more generally since the 1960s, these preparatory writings expressed growing dissatisfaction with the state of the discipline (i.e. the critique of the textbook tradition) and argued for the need of new theoretical approaches to the subject that were both more adequate to contemporary challenges and more attuned to recent advances in neighbouring disciplines (e.g. jurisprudence, political theory, sociology). Furthermore, this review of the relevant prefatory literature has provided us with a better sense of the concrete expectations that surrounded the theoretical writings that ensued.

To recapitulate the most salient among these. New theories of public law were expected to offer: [1] a critical stance towards traditional British public law thought (esp. Dicey's extremely influential theory of the constitution), [2] an account of the normative foundations of the subject so as to identify the shortcomings of current constitutional practice and offer guidance to future legal reform and judicial development, [3] a more critical and realist account of judicial review, identifying patterns of judicial behaviour, laying bare the judicial policies that underpin them and discussing the dangers of a more activist judicial stance, [4] a reappraisal of the place of Parliament and the mechanisms of

¹⁶ As one the main critics of the textbook tradition summed up the point, “a textbook is essentially an inappropriate medium for the launching of an untried theory: the value of a textbook rests largely on its reliability and it does not allow much room for lengthy exposition and argument—a new theory is an intellectual adventure which should not try to disguise itself in the clothes of an expositor of orthodoxy” (Twining, 1970, pp. 85–6).

political accountability in the contemporary constitution, [5] an explanation of new forms of legal-legitimation (e.g. accountability and participation) that have emerged with the expansion of the modern administrative state and [6] an account of the growing sense of crisis of the British constitution that followed the crisis of the welfare state.

Given this initial set of expectations, it was only to be expected that constructivist conceptions came to predominate. Constructivism constitutes, therefore, a natural starting for any study on the subject (chapters 2-4). Having said that, it is important to remark that constructivism was never the only game in town and, in particular, that there are two main alternative conceptions that cannot be reduced to a variety of constructivism (chapters 5 and 6). What all these novel approaches share, however, is the conviction that public law scholarship should not remain saddled to a professionally prescribed view and, thereby, it became more than ever before an open question what are the aims and the worth of public law theory. The task ahead is to critically study and assess the main answers to that question that have been produced in the last 30 years.

2. SOCIAL CONSTRUCTIVISM: FROM SOCIAL CRITIQUE TO CONSTRUCTION

1. Introduction

During the mid-1980s many academic lawyers came to the view that the British public law tradition was in crisis and that the subject had to be rethought from its very foundations. This impulse to reconsider the fundamental questions of the subject coincided with the centenary of Dicey's lectures on the *Law of the Constitution* (1885), which remained the most influential exposition on the British constitution and the foundational work of British public law scholarship. To mark this important centennial and the need to reconsider the tradition that Dicey inspired, a series of important edited collections were published to take steps towards its appraisal and reconsideration (Jowell & Oliver, 1985; McAuslan & McEldowney, 1985). Within this context, the first attempt at elaborating a comprehensive new theoretical framework for the field was Ian Harden and Norman Lewis's *The Noble Lie* (1986).

The Noble Lie remains significant as it came to be seen as the leading work within the "Sheffield school" of public law that developed a critical approach that placed open government, freedom of information and participation at the centre of the subject and was at the forefront of the debate about regulation and privatisation (Taggart, 2005a; Tomkins, 2005, p. 33 n 2). For our purposes, however, *The Noble Lie* is particularly relevant as it constitutes the first sustained effort to elaborate a constructivist conception of public law theory following the cues of social critical theory. By using the method of immanent critique, social constructivism aspires to elaborate a constitutional theory that encompasses both its moral-practical and social-scientific dimensions (section 2). On this perspective, constitutional theory must, first, give an account of the ideals of government that the constitution embodies (section 3). The emergence of the administrative state, however, raises a challenge to the requirements of legitimacy and to traditional accounts of the British constitution which can only be met by elaborating a more sophisticated theory of constitutionality and an enlarged theory of the law (section 4). Once the normative premises of the undertaking are thus laid down, the constitutional theorist must endeavour to establish the distance between what the constitution requires and actual constitutional behaviour (section 5). Finally, this critical exercise concludes by bringing together the different elements of the analysis and elaborating a reform programme orientated to

diminish the distance between constitutional discourse and constitutional practice (section 6).

2. The critical task of constitutional theory

The animating idea of the book is that British constitutional discourse is unsatisfactory because it “has become hidebound by dated concepts and outmoded political theory”. In spite of much criticism, “Dicey’s terms of debate still constitute the ruling paradigm” such that “even where Dicey’s constitutional diagnoses are disputed, there is a marked tendency to accept the contours of his investigation and with them many of the hidden theoretical assumptions”. As Dicey’s account “still occupies the high ground of British constitutional theory”, there is a danger of conflating “nineteenth-century constitutional arrangements with *the* rule of law” such that the concept of the rule of law gets frozen “into the institutional background of a particular period” (1986, pp. 3–4)¹⁷. The failure of received British constitutional thought, in other words, is due to the incapacity to displace after a century Dicey’s conception of the rule of law and the constitution despite great changes in the British state (1984, p. 213, 1986, pp. 5, 17).

Traditional constitutional theory, on this account, fails both in descriptive and normative terms. It fails in descriptive terms because it does not provide an adequate account of the “anatomy of constitutional behaviour” and in normative terms because it does not articulate the “moral sense of purpose or direction” of the British state. This latter aspect is crucial as the rule of law and the related concept of constitutionality “encapsulate a complex moral aspiration: the legitimacy of public power”, that is, these concepts are ideals of government (1986, p. 17). Furthermore, Harden and Lewis contend, traditional constitutional theory fails to provide a descriptively accurate and normatively attractive model of constitutional legitimacy due to its deficient methodological framework (1986, p. 12). What is necessary, then, is to elaborate a theoretical frame for constitutional analysis that articulates in a consistent and rigorous manner the two dimensions of constitutional theory, viz. the social scientific and the moral-practical.

Constitutional theory is, first, a social scientific activity as it aims to provide a descriptive and analytical model of constitutionally legitimate action (1986, p. 7). But, crucially, constitutional theory has also a moral-practical dimension as it is concerned –as citizens are– with the central issue of legitimacy, which involves moral aspirations that provide a moral sense of direction to the political community. The reason why these two

¹⁷ As Ian Harden puts it in a later paper, the Diceyan view of the constitution has become “so deeply embedded in the general understanding of the constitution” that to reject it seems to amount “to declare that there is no British constitution” (1991, p. 500).

different but closely associated aspects have, nevertheless, remained disconnected is due to the artificial separation between fact and value that legal positivism has promoted and the received constitutional theory embraced (1986, p. 12). The distinction between descriptive and critical theory, they argue, is tainted by an extreme empiricism that might have seemed persuasive at the time of John Austin and AV Dicey but not at the end of the twentieth century. Moreover, the underlying positivism of standard constitutional theory has reinforced a tendency to simply ignore the fundamental questions of the field, assuming that there is no need to explicitly articulate and justify the normative foundations of posited constitutional law¹⁸. Instead, constitutional scholarship must start from the realisation that “any description of the constitution needs some kind of organising or analytical framework” which has to be explicitly articulated and justified because they are “a matter of theoretical controversy” (1986, pp. 7, 12).

The task ahead is to elaborate a frame that articulates the connection between the moral-practical and the social-scientific dimensions of constitutional theory in a coherent structured way and the project of *The Noble Lie* is to elaborate that framework by making use of the method of “immanent critique” developed by contemporary critical social theory. The method of immanent critique, on this account, proposes a two-stage analysis which [1] begins by examining the claims (or expectations) of legitimacy embedded in existing constitutional and political institutions and uncovering their tensions or contradictions to then [2] expose the distance that exists between these criteria of constitutionality and current political and constitutional practice (Harden & Lewis, 1986, pp. 10–3; Lewis, 1986, pp. 104, 108). Harden and Lewis aim, in their own words, “to connect the social scientific and the citizenship activities through the adoption of the theoretical perspective of immanent critique” in order to offer a constitutional analysis that “is both more coherent and more honest than [that of] standard constitutional theory” (1986, p. 12). More importantly, the method of immanent critique furnishes “the yardstick for judging the behaviour and performance of our system of government” (1984, p. 214).

¹⁸ “The common habit of assuming an organising theory for describing laws or the constitution without articulating it and making it available for criticism unfortunately obscures debate about constitutional fundamentals. This practice is too often accompanied by a tendency to see the jurist or constitutional lawyer as merely reporting what people say and think about what they do rather than accounting for the data through critical interpretation. This ‘positivistic’ account is based upon the misconception that there is a strict separation between conceptual facts and values and fails to acknowledge that institutions and systems come into existence through human agency so that we are bound sensibly to ask why they were brought into existence and how they are operating. To reject positivistic accounts is to insist that a law or a constitution consists not necessarily or merely in posited rules or posited conduct but in a concept of shared public purposes” (Harden & Lewis, 1986, pp. 19–20; similar Lewis, 1986, pp. 100–3).

Constitutional jurisprudence, in consequence, is more than a supposedly detached description of posited law. It is an inquiry into the normative foundations of constitutional law that delves into legal theory and the theory of authority, that is, it articulates the moral aspiration that underlies the legitimacy of public power (1986, pp. 5, 16). The object of constitutional theory, on this conception, is “legitimate public action” and from this follows a distinctly normative concept of constitution, viz. “a constitution speaks to, and is the touchstone for, the legitimacy of government and governing arrangements” (Harden & Lewis, 1986, p. 7; Lewis, 1986, p. 99). *The Noble Lie* elaborates a normative constitutional theory that is, thereby, primarily focused on “collective decision-making mechanisms” rather than individual rights (1986, p. 13). This, of course, does not imply that these are unimportant but is based on the assumption that to privilege public decision-making processes is justified by the fact that “individual rights can flourish best in an atmosphere of collective well-being”, i.e. the appropriate disposition of collective decision-making is a precondition of the flourishing of individual rights (1986, pp. 55, 287). The *Noble Lie*, in other words, elaborates a non-rights-based normative constitutional theory (1986, p. 189), which puts at the centre the problem of constitutional accountability raised by the administrative state.

3. The rule of law and the problem of constitutional accountability

A constitution is the “touchstone” for the legitimacy of government and governing arrangements. Consequently, Harden and Lewis start elaborating their theory of the British constitution by spelling out the criteria of legitimacy embedded in the actually existing institutions and practices of government, which they see as revolving around the rule of law. The rule of law is taken to be, in this sense, the “master ideal” underpinning the British constitution, the “supreme constitutional principle” or “the ‘golden metwand’ of collective life”, that which is the “constitutional constancy of Britain”, its “ruling ideology” (1986, pp. 8, 13, 19)¹⁹. The traditional understanding of the rule of law remains fixated in Dicey’s formulation and, thereby, frozen in the social and political background of his times. The powerful influence of Dicey’s view of the rule of law and legal positivism has conspired to leave the foundations of the constitution largely unexamined by subsequent

¹⁹ Treating the rule of law as the master ideal or supreme constitutional principle implies considerable changes to the structure of constitutional theory. In particular, the other two basic constitutional principles in traditional neo-Diceyan accounts lose most of their former importance: whereas parliamentary sovereignty remains relevant only to the limited extent that Parliament retains a significant role in contemporary government (more about this later on), constitutional conventions almost entirely disappear from the picture as they come to be seen as just one of the many ways in which expectations of legitimacy are manifested (Harden & Lewis, 1986, pp. 9–10, 70).

constitutional scholarship (1986, p. 52). What is needed, in consequence, is to rework this notion from the realisation that “the rule of law is an ideal which transcends particular periods in a nation’s history” (1986, pp. 12–13, 17). This is a crucial step in the argument that should be emphasised. The rule of law has a primarily “symbolic” and “transcendent” character and, therefore, its contents vary according to the historical circumstances of the political community whose moral sense articulates (1986, p. 31). This requires, in turn, to uncover “the constitutional foundations of Britain” by reconceptualising the rule of law in a way that is historically conscious (1986, p. 24), viz. taking into account the varying ideals and practices of legitimate public action that it has served to signify (1986, pp. 12, 26).

The Noble Lie does not offer strictly speaking a conceptual history of the rule of law, but a highly compressed sketch of British constitutional history whose purpose is to offer a “revised” rule of law. A revised rule of law along these lines traces the evolving conceptions of legitimacy that have driven British political history in order to extract those elements that have become essential components of the contemporary constitution. The rule of law, in this analysis, refers to that “cluster of credos” that are “indispensable to our constitutional history” (1986, p. 8). The ideal of “government under law”, Harden and Lewis note, has distant roots in English history that go all the way back to the medieval idea of a “fundamental law” that became “axiomatic among the lawyers of the fourteenth and fifteenth centuries” and which was “seriously questioned” only during the Stuart era (1986, p. 23). But it is in the seventeenth century revolutionary settlement, they argue, that the real starting point of their reconceptualisation of the rule of law is to be found²⁰. Taking as cue the traditional understanding of the revolutionary constitutional settlement and the rule law, Harden and Lewis examine how its two central pillars –a sovereign elected Parliament and the common law– were transformed by the advent of modern democracy (during the 19th century) and modern administration (in the 20th century). In sum, this historical exercise has the purpose of identifying the essential content of the rule of law and to relate it to contemporary state structures and practices²¹.

After the revolutionary settlement, Parliament became the “dominant partner in the constitution”. As regards the subsequent evolution of parliamentary supremacy, Harden and Lewis note that at the beginning the consequences of a “pure theory of sovereignty”

²⁰ In a latter paper, Lewis argues further that already in the seventeenth century Parliament embodied in a limited manner the ideals of a free and open debate, such that one might say that “the ‘English Revolution’ was based upon institutions whose ideal nature was characterised by rational discourse” (Lewis, 1990, pp. 541–3).

²¹ “The task of developing a reformulated constitutional analysis which breaks open the constituent elements of the rule of law and relates them to contemporary state structures and practices is, in our view, the most urgent of those facing constitutional modernists” (Harden & Lewis, 1984, p. 215).

were not appreciated to their full extent as it was understood that the role of Parliament was to protect the rights of the subjects and to constrain royal power (1986, pp. 23, 84). More momentous were nevertheless the transformations underwent by the “principle of representation”. In its infancy, the principle of representation was not of the people and the general interest but of propertied classes and local interests. Only during the nineteenth century political representation became “democratic representation” and Parliament became really centred on national politics²². In this sense, a series of constitutional transformations in the role of Parliament –esp. via the expansion of the franchise and the emergence of party politics– ushered the advent of modern democracy during the nineteenth century without being marked by a new constitutional settlement²³.

The same “incremental and pragmatic development of British constitutional politics” can be observed in the other great modern transformation of the British state, viz. the coming of modern administration. This relatively peaceful and gradual constitutional development, which permitted the British to live through the arrival of democracy and the administrative state without engaging in major constitutional debates, has not come without costs. The most important downside of the “British genius for maintaining political stability” is that the necessary constitutional mechanisms have not been put in place²⁴. The consequent lack of appropriate “constitutional guarantees” is especially problematic in a period of “executive supremacy”, when the language of the rule of law and parliamentary supremacy has come to “disguise the reality of public power to greater or lesser extent” (1986, pp. 26–9). The continuous growth of executive power during the last century plus the lack of an appropriate process of constitutional reform have, thereby, created an acute deficit of accountability (1986, p. 4). Unless one succumbs to the

²² “The terminology of the Great Reform Act of 1832, speaking as it did of the ‘representation of the people’, attested the victory of a constitutional principle more revolutionary than the enlargement of the electorate introduced by the Act itself. However, by the mid nineteenth century representative government had come to be regarded as coincident with representative democracy. Similarly... the transformation of Parliament from its pre-revolutionary role into the central focus of national government: from its seventeenth-century position as the place where local interests were pursued it had become by the late nineteenth century the site of party government where competing national programmes were contested” (Harden & Lewis, 1986, p. 26).

²³ The absence of a constitutional moment meant that the advent of modern democracy and the new understanding of Parliament were not translated into legal form, provoking a growing mismatch between constitutional practice and constitutional form: “The essentially medieval concept of the Crown remained the basis of constitutional authority and the consequences for both law and politics were profound. The emergence of Parliament as the key political forum, of representation as the basis of political legitimacy and of the idea that executive power was an emanation of, or an agency of, Parliament were not accompanied by any corresponding legal reformulation” (Harden & Lewis, 1986, p. 192).

²⁴ “In the nineteenth century the trappings of modern democracy were superimposed on an existing constitutional structure, and a modern administration similarly grafted on to pre-existing patterns of government. Because no real crisis of legitimacy occurred, the need to pledge inalienable rights, to set firm limits to the exercise of executive power or to speak specifically to tailored forms of redress against the state was never felt to be as strong a need in Britain as elsewhere” (Harden & Lewis, 1986, p. 27).

viewpoint that the British constitution is nothing but a “noble lie” or a “fairy tale” to keep the masses loyal to its superiors and respect law and order, it is necessary to reconsider the place of Parliament within the British constitution (1984, pp. 213, 216).

Although the concept parliamentary sovereignty has still pride of place within British constitutional thought the truth is that power “has moved elsewhere while the inner nature of the rule of law has not been readdressed in institutional terms to examine processes of genuine accountability” (1986, pp. 30–1). This whole problem is a collateral consequence of the otherwise virtuous unwritten, evolutionary and pragmatic character of British constitutional development²⁵. As Bagehot did in the middle of the nineteenth century, when he showed that the dignified part of the constitution kept hidden the disguised republic that operates through its efficient part, now it is necessary to examine a further shift of power that has taken place “behind the constitutional façade” (1986, p. 34). Britain has stumbled into the “modern administrative state without design and even contrary to the inclinations of most Englishmen” (1986, p. 31) and now it is time to finally to come to grips with the challenges it poses to the system of constitutional accountability. It is the continuing force of the idea of a sovereign representative Parliament over British constitutional thought that which has concealed its loss of prestige and real power. This shows –Harden and Lewis observe– why the force of rhetoric and symbolism in constitutional thought should not be underestimated²⁶.

The deficit of accountability that besieges the contemporary British constitution leads the analysis to the other pillar of the rule of law, namely, the common law and the courts (1986, pp. 190–2). It is in the “nature and the symbolism of the common law” more than any of the other of its features that one can grasp the “peculiarly British rule of law form” (1986, p. 36). As with Parliamentary sovereignty, the common law’s notable evocative force –“the common law’ is one of the most effective of all pieces of mystification” (1986, p. 37)– has its roots in the seventeenth century constitutional settlement. The common law, Harden and Lewis remark, is traditionally seen as an element of the British constitution primarily because of its association with the protection of individual liberty, viz. the liberties of the subject grew out of the English common law, that hallowed “ordinary law of the land” whose core structure is supposed to have remained

²⁵ “It is the informality of the political system, a major advantage in accommodating political change in the nineteenth century, that now facilitates the extension of executive powers in unforeseen ways, and insulates policy-making from its environment” (Harden & Lewis, 1986, pp. 71–2).

²⁶ “The fact that it was felt necessary to disguise the diminution of parliamentary prestige is itself an important recognition of the force of rhetoric in British constitutional lore” (Harden & Lewis, 1986, p. 35).

largely untouched by parliamentary legislation²⁷. The common law protection of the liberties of the subject is supposed to, moreover, be guaranteed by the independence of the judiciary, which insulates courts from any type of executive interference. The law of the constitution is not seen, on this traditional view, as “the source but as the consequence of the rights of individuals as defined and enforced by the courts” (1986, p. 37). This characteristically Diceyan approach, however, has become highly problematic with the development of modern democracy and the administrative state. With the expansion of franchise, Parliament became a site of democratic representation and started to enact social legislation that authorised increasing inroads into the traditional common law rights. This social legislation brought with it an extensive delegation of powers to the executive, subjecting a growing portion of what was the private sphere of individuals to the discretion of administrative authorities and which the courts seemed unwilling to control in the earlier decades of the twentieth century (1986, pp. 31, 38–41).

It cannot be denied that this traditional view of the rule of law, Harden and Lewis recognise, regained some traction from the 1960s onwards, as the courts overcame their previous “judicial constitutional torpor” (1986, p. 35). The hopes for a more activist judiciary “restoring the balance”, of solving the problem of constitutional accountability have proved to be –and will remain– largely illusory. The truth, Harden and Lewis believe, is that levels of accountability remain (even after the recent judicial activism) clearly insufficient and will remain so because “in the absence of rigorous administrative law procedures the common law has little or nothing to say” (1986, p. 39). Any conceptualisation of the rule of law that is centred on the common law is condemned to be insufficient because it is centred on the protection of individual rights and interests neglecting the enforcement of public rights and interests. The shortsightedness of such an outlook can only be remedied, Harden and Lewis assert, through the adoption of an expanded conception of the law and a larger conception of constitutionality²⁸.

4. Constitutional legitimacy in the administrative state

To recapitulate the argument so far, Harden and Lewis’ main contention is that a new conceptual framework for constitutional theory is needed, such that [1] takes into account the contemporary content of the rule of law and, in particular, considers the constitutional transformations brought –and the accountability mechanisms required– by the advent of

²⁷ “Statutes were *un*common, designed to deal with some specific ‘mischief’ that required a change in the common law as expounded by the judges” (Harden & Lewis, 1986, p. 191).

²⁸ “If the rule of law amounts to a faith in the nation rendering an account of itself through law, then our concept of what constitutes the legal must be expanded to include the whole of legitimate institutional public power” (Harden & Lewis, 1986, p. 39).

modern democracy and the administrative state and [2] provides a broader conception of the law and constitutionality, that is to say, one which goes beyond the narrow scope of a common law based view of the rule of law or an otherwise court-centred conception of constitutionality. This new conceptual framework results in a “revised rule of law” which has to deal with the following quandary: any claim on legitimate public power must rest on it being democratic and the problem is that what has been so far the institutional site for democratic representation (i.e. Parliament) cannot be deemed to be the real centre of politics in the era of the administrative state. This results in a deficit of accountability that judicial review by itself cannot resolve. How can this be solved?

At this crucial point of the inquiry, Harden and Lewis undertake to determine the conceptual implications of representative democracy in way that leads them beyond the frontiers of an immanent critique, making explicit use of transcendental arguments. Although they recognise that there are different theories about what representative democracy is –and this, in turn, explains in part disagreements in constitutional theory (1986, p. 24)–, Harden and Lewis argue that there are some requirements that any political society must satisfy in order to be democratic, viz. they are implications of the “nature of democracy”, essential to the “democratic form” (1986, pp. 40–1). Let’s see how these transcendental arguments are played out in *The Noble Lie*.

The basic idea is “that *any* notion of representative government implies that choice of representative is paramount” (1986, p. 9). Drawing inspiration on Alan Gewirth’s method dialectically necessary implications, Harden and Lewis claim that a crucial logical consequence follows from taking seriously the idea that representative government requires a meaningful choice, namely, that “freedom of information is a prerequisite of a free society and any form of democratic polity” (1986, p. 41). The reasoning behind this inference seems remarkably straightforward. First, they remark, “choice in its most complete sense connotes antecedent informed deliberation between alternatives and a reasoned decision based on that deliberation” (1986, p. 43). This, in turn, means that representative democracy not only requires legitimation of the source of power but also of use of power and this requires that deliberation and choice be shaped within a political process characterised by the free circulation of available information²⁹. Representative democracy, in other words, conceptually supposes a “choice of representative” and for that choice to be meaningful there has to be access to the available relevant information

²⁹ “It must be the case that representative democracy entails choosing with the fullest information available or the game is rigged at the outset. The logic of choice also assumes that freely accessible information must characterize the political process *systematically* or the periodic choice once again runs the risk of being rigged by whoever is withholding the information” (Harden & Lewis, 1986, p. 42).

regarding the functioning of the political system. In the absence of this free flow of information about the government, there is no guarantee that there can be the ponderation between the alternatives that any choice –if it is to be a real choice– requires. The central role that choice plays within any form of democratic legitimacy, therefore, “implies an essentially open system *at all times* if the elective exercise is to make democratic sense *at any time*” (1986, pp. 9, 261).

This transcendental argument about the “nature of democracy” allows Harden and Lewis to arrive at a key contention of their constitutional theory, i.e. “that freely accessible information as a general and essential proposition [is] a necessary entailment of claims about the British constitution” (1986, p. 42)³⁰. From this insight into the democratic form, Harden and Lewis obtain a further key conclusion. A truly democratic society not only requires, as traditionally thought, a representative assembly (i.e. Parliament) that is connected to public opinion, but also the more extensive idea of an open government such that all forms of public decision be subjected to proper mechanisms of accountability: the exercise of public power must be subjected to the interplay of reasons for (justification) and against (criticism) it. Democratic government, accordingly, is a type of political system that has in-built learning processes, viz. mechanisms of constant re-examination and self-correction of policies and governmental decisions. This is why one might well say that “a revised rule of law would partake of the institutional essence of universal reason. It would partake of the universal logic of rational assessment and scientific inquiry” (1986, p. 283)³¹. Democracy of “whatever variety” is a “normative system” that brings with it –as “necessary implications”– the two master ideals of an open political system and freedom of information and, in consequence, the “aspirations to openness and accountability” are to be taken to be at the base of the British polity and constitute “the essence of the normative component of current beliefs about the rule of law” (Harden & Lewis, 1986, p. 261, 1988, p. 814; Lewis, 1986, p. 108).

This has momentous consequences for the argument about the British constitution elaborated in *The Noble Lie*. First, it explains why Harden and Lewis contend that the analysis of constitutional legitimacy must be driven by the idea that “standards of rational discursive justice need to be further imported into the political decision-making process”

³⁰ “Without freedom of information –subject to the standard set of exceptions in the interests of, for example, national security– democratic government is a contradiction in terms. Not only choice is rendered a matter of hunch but communication is always potentially distorted when one side fails to disclose to another. The matter seems to us to be beyond argument: either rational discourse is optimized or it is not” (Harden & Lewis, 1986, p. 262).

³¹ An earlier presentation of the conceptualisation of the “government as a learning process” can be found in Harden and Lewis (1984, pp. 224, 228–30).

and this means that political deliberation must be structured in accordance with standards of critical rationality that are analogous to the logic of scientific inquiry (1986, pp. 8, 56). This, in turn, explains why it is the openness/opaqueness and the existence/absence of appropriate mechanisms of accountability in the decision-making processes of the contemporary administrative state that which is the central focus of constitutional theory³². It is here that the real failure of traditional constitutional theory is clearly brought to the fore (1986, p. 71). With its focus on individual rights and their protection by the ordinary courts, the common law based conception of the rule of law operates with a narrow conception of the law which artificially separates the law from administration and leaves a great part of the operation of the machine of government beyond the reach of the law. *The Noble Lie* intends not only challenge but to displace this theoretical framework by providing a new conceptualisation of the administration (situating it within the reach of the legitimacy requirements of constitutionality) and a more appropriate concept of law (i.e. one that is not court-centred).

Traditional constitutional scholarship wrongly assumes that there is a categorical distinction between administration and adjudication when, in fact, the distinction –Harden and Lewis contend– is one of degree at most (1986, p. 46). The difference between judicial and administrative agencies, to the extent that it exists, “is not fundamental in that both apply the law to individual cases and thereby exercise a discretion” (1986, p. 45). Looked more closely, the difference seems to relate to the procedural guarantees that are attached to their exercise: “remove the judicial safeguards from ordinary courts and they will become administrative bodies. Add these safeguards to the latter and they will become courts of law in all but name” (1986, p. 46). This realisation is extremely important because the artificial contrast between administration and adjudication is that which explains both the “identification of administrative justice with the absence of law” and the “general failure to analyse the relationship between the principles underlying the rule of law and the less than accountable state of the British polity” (1986, pp. 45–6).

This challenge of the distinction between administration and adjudication, however, does not lead necessarily to the judicialisation of the administration. Once it is recognised that there is no strict distinction between law and politics, it becomes evident that a revised rule of law in the conditions of the administrative state requires the juridical reconstitution of the administration subjecting it to adequate –legally established– mechanisms of political

³² “The central theme of this book is that a revised concept of the law and constitutionality should inform a public, reasoned decision-making process so that barriers which define the spheres of influence of law, administration and politics are broken down in order to foster the deployment of resources necessary for collective learning and hence for rational and efficient policy-making” (Harden & Lewis, 1986, p. 54).

accountability. The accountability deficit that is generated by executive dominance, in other words, has to be resolved by extending the expectations of legitimation inherent to representative democracy to the administrative process³³. This can only be achieved, Harden and Lewis contend, by reconceiving administrative action as a surrogate political process, that is, a decision making process that provides adequate representation for the interests (both public and private) affected by the administrative decision³⁴.

This reconceptualisation of the administrative process, which lies at the core of any constitutional theory adequate to the conditions of the contemporary state, is to be accompanied by an expanded conception of the law. Under the traditional conception of law, and the corresponding notion of the rule of law, law and legal scholarship have their centre on the activity of the judiciary and the protection of legal individual rights. But this narrow conception of law ignores the many other functions that legal systems perform in modern societies. To expose and remedy such deficiencies, Harden and Lewis propose an enlarged concept of law by making use of social theories of law and Karl Llewellyn's law-jobs theory.

Drawing inspiration from critical social theory, they argue first that it is necessary to recognise that the formal model of law (the *Gesellschaft* form of law), which inspired Diceyan constitutional theory, is nothing but a historically specific form of law (i.e. the one adequate to the "nineteenth-century bourgeois commercial society") that has come to be displaced by a bureaucratic-administrative form of law as a consequence of the transformations of the state during the 20th century. This means, in particular, that the advent of the modern administrative state called into question both the primary focus and the conceptual basis of standard constitutional theory, displacing it from private law and individual rights to collective decision making and the determinants of the policies of the interventionist state³⁵.

Secondly, Harden and Lewis contend, Llewellyn's "law-jobs" theory provides an ideal starting point for the constitutional theorist in need of a broader conception of the

³³ "To construct institutions for accountable behaviour and open discourse and learning we require an independent model of administrative decision-making" (Harden & Lewis, 1986, p. 47).

³⁴ "The unresolved problem of regulatory reform is to perfect an interest-representation model which will import political checks into the administrative arena" (Harden & Lewis, 1986, p. 47).

³⁵ "An interventionist state renders purely private arrangements and private powers a diminishing part of law's business, for the central problem of advanced industrial societies is no longer private property but that of administration and social control. Common lawyers historically have attempted to distinguish courts from tribunals, law from regulation and justice from administration, but these distinctions, while never theoretically coherent, have now become observably untenable. Determinants of policy in the fields of planning, the environment generally, broadcasting and welfare, for example, have replaced the pristine concern with clear rights and duties to the point where scholars now speak openly of the dissolution of private law" (Harden & Lewis, 1986, p. 65). For a prior elaboration of this idea, see Lewis (1981, p. 91).

law, adequate to the conditions of the administrative state. Briefly put, the argument is that traditional theory pays appropriate consideration to only two “law-jobs” –those which are naturally associated with the social function of adjudication (i.e. dispute-settlement) and legislation (i.e. channelling of social conduct)– underestimating the importance of two other fundamental law-jobs that are central for constitutional theory, namely, the allocation of decision-making powers and the collective goals attainment. It is important to note that, here again, with the law-jobs theory, Harden and Lewis offer a sort of transcendental argument about what the law is, a type of argument that they call an “*a priori* real or essential definition” (viz. a definition that captures the “essence” of that which is defined and that is not reducible to empirical generalisations)³⁶.

The reasoning justifying this real or essential definition of law proceeds by ascertaining first the “fundamental task” of legal institutions to then identify “necessary features” that must be present if that task is to be performed. In the first step, Harden and Lewis define the fundamental task of legal institutions as preserving the unity of a social group³⁷. Secondly, they identify the law-jobs which are postulated as “necessary features of social organization”, that is to say, any social group –in order to become and remain such– has to possess institutions fulfilling four essential “law-jobs”. The first law-job correspond to the need for social institutions dedicated to “the redress of felt grievances”, i.e. mechanisms of dispute settlement (1986, pp. 66–7). These need to be complemented by mechanisms for “preventing channelling”, that is, for channelling (facilitating, guiding or re-directing) social conduct with a view to preventing conflicts that could disturb the social order. In turn, these two law-jobs presuppose a third which concerns “the establishment and allocation of the authority... required if they are to be performed” (1986, p. 68). Finally, the fourth law-job “is concerned with the ‘whither’ of the group at large: with goals, with objectives and therefore with policy” (1986, p. 68). This last necessary feature of legal institutions –their “goal orientation”– is (as with the third law-job) crucial to the

³⁶ “Real definitions purport to capture the essence of either the thing or the concept defined. They are not empirical generalizations though, of course, it is an empirical question whether the possible objects, of which they describe the essences, actually exist. But, given that no one doubts the actuality of social organizations, the law-jobs are real, fundamental and enduring” (Harden & Lewis, 1986, p. 66; also Lewis, 1986, p. 104). In fact, in an earlier paper, Lewis directly asserted –without elaborating the point– that “the epistemological foundation of the theory, almost certainly not worked out by Llewellyn, is, I believe, soundly based in the Kantian tradition” (1981, p. 92). What is clear, however, is that in this earlier presentation Lewis saw it as a primarily transcendental argument: “Quintessential, transcendent, law-stuff then is what we must seek. The approach which I have adopted in what follows is to describe, briefly, a theoretical position which I believe satisfactorily locates that transcendent quality while particularly highlighting the nature of law in its late twentieth-century form” (1981, p. 90).

³⁷ i.e. “that of becoming and remaining enough of a unity to be and remain recognizable as a group, a political entity or society” (Harden & Lewis, 1986, p. 66; Lewis, 1986, p. 104).

question of legitimacy and, in particular, is related to the achievement of (substantially and procedurally) “legitimate outcomes” (1986, p. 69).

The law-jobs theory, therefore, articulates an enlarged concept of law that not only overcomes the limitations of the narrow focus of orthodox legal theories but also dismantles its “irrational” separation between law and politics (1986, p. 52). This enlarged conception of law completes in this way the conceptual underpinnings of the constitutional theory of *The Noble Lie* by making explicit the internal connection between a theory of law and political theory. Law can be defined –summing up the analysis– as the institutional manifestation of legitimate public power³⁸. That is why, on this account, the starting point of constitutional jurisprudence is the fundamental realisation is that “legal theories are built upon implicit theories of authority” and, thereby, essentially a normative undertaking (Harden & Lewis, 1986, p. 16; Lewis, 1986, pp. 99, 105–6).

A revised conception of rule of law, one which gives due consideration to the constitutional transformations that have ensued as a consequence of the advent of modern democracy and the administrative state, has led to the need to clarify the concept of representative democracy and to emphasize the increasing importance of administrative decision-making processes for constitutional accountability. This conceptual clarification of the criteria of legitimacy of public power under contemporary conditions amounted to an examination of the normative foundations of legitimate political power, which are to be found, on this account, on the very concept of representative democracy. A constitutional theory grounded upon such normative foundations requires an expanded concept of law that goes beyond the traditional focus on courts and legislatures. This normative-conceptual approach, however, hinges on empirical-descriptive claims about the factual transfer of power that the administrative state supposed and which generates a deficit of accountability that cannot be remedied by the traditional common law based conception of the rule of law. At this juncture, the attention turns to the descriptive dimension of constitutional theory.

5. The challenge of “twilight” networked administrative decision-making

At the centre of the traditional constitutional image of British government lies Parliament and, playing a secondary or complementary role, the courts. The criteria of legitimacy based on the notions of parliamentary sovereignty, the common law and representative democracy, place on the shoulders of Parliament and the courts the responsibility to fulfil

³⁸ “In short we define law as legitimate public power and in particular its institutional manifestations” (Harden & Lewis, 1986, p. 62)

the promise of constitutional accountability. The problem with this received view, Harden and Lewis contend, is twofold. First, it offers a seriously distorted picture of how British government actually operates. Secondly, and more importantly, standard constitutional theory ignores the fact that, within an administrative state, Parliament and courts do not – and could not – provide by themselves the effective mechanisms of governmental accountability that any contemporary democracy should have in place. The legitimacy requirements, Harden and Lewis contend, go deeper than that which can be ensured through legislation and adjudication, encompassing guarantees in relation to the administrative process according to the democratic ideal of open government. A crucial part of project of *The Noble Lie* is, in consequence, to present a more realistic “cast of constitutional actors and roles” and, more concretely, to revise the standard picture of governmental action in order to make evident the serious distance between the ideals of government and actual constitutional practice. The idea is to criticise the orthodox view of constitutional behaviour and to open the way for a reconceived model of the administrative process that bridges the gap between expectations of legitimacy and constitutional practice.

Parliament offers, Harden and Lewis emphasize, the most conspicuous contrast between the perspective of the traditional constitutional lawyer and the political scientist. While in the eyes of the former Parliament is the central constitutional actor (Parliament is “in *constitutional* terms the centre of gravity of the polity”), for the political scientist, who assesses the matter “in terms of effect on policy output”, Parliament is in the “periphery”. Standard constitutional theory is built upon a highly distorted picture: “to consider Parliament first in an account of the process of making the decisions of government might seem perverse in view of the marginal role rightly ascribed to it in the political science materials” (1986, p. 81). A more realistic description of actual constitutional behaviour needs to come to terms with the advent of mass democracy. The idea that Parliament controls government, in particular, has become obsolete. “Rather it is the government which, in the normal course of events, exercises control over Parliament through the medium of party discipline” (1986, p. 83). The most telling of all symptoms is to be found in the evident decline of the effectiveness of ministerial responsibility, which has become as a matter of fact “largely fictional and increasingly irrelevant” (1986, p. 86).

But even leaving to one side the impact of party discipline in the relationship between Parliament and government, which after all might be seen as a part of the operation of contemporary democracy, the truth is that an examination of parliamentary scrutiny mechanisms (viz. questions, financial procedures, legislative procedures and select

committees) shows that Parliament cannot “fulfil the promise of constitutional accountability” (1986, pp. 90–111). Existing limitations to the kind of information that Parliament can obtain (e.g. the confidential character of policy advice and the anonymity of the civil service) in many cases seriously hamper the ability to debate on –and even to make known– the reasons behind executive policies and decisions. Even in those cases where Parliament is directly involved in a governmental decision, its role is confined to the last stages of the decision making process. As in other aspects of government, in the legislative function “the introduction of legislation into Parliament marks the completion not the beginning of the policy-making process” and, consequently, most of the key questions are, in fact, decided in the pre-legislative stage within ministerial departments or the processes of cabinet decision-making (1986, p. 101). This is why, Harden and Lewis conclude, Parliament is now largely consigned to the dignified rather than the effective elements of the Constitution (1986, p. 111).

“Orthodox constitutional theory”, however, is not only wrong about the role of Parliament but also about the “nature of the executive itself” (1986, p. 118). In particular, “the role of cabinet, and of ministers in relation to their departments, is partly a matter of constitutional myth” (1986, p. 119). It is not only the case that the growth of prime ministerial authority is detrimental to the position of the cabinet but also its supposed function as an institution that determines the overall governmental policies seems to be largely fictional given that most of its business is carried out since the post-war by cabinet committees (1986, pp. 120–4). Lacking any autonomous capacity of policy analysis³⁹, most policy decisions at the central level display a departmental bias (all the information and analysis that inform decisions come from the interested departments) and the crucial decisions about the distribution of available resources between different policy programmes result from negotiations between the Treasury and the interested department⁴⁰. As with Parliament, the role of Cabinet has now become one the dignified elements of the constitution⁴¹.

³⁹ Harden and Lewis illustrate the difficulties in remedying this shortcoming by discussing the (failed) initiatives at generating it –e.g. the Central Policy Review Staff (CPRS) and Policy Analysis and Review (PAR)– in some detail (Harden & Lewis, 1986, pp. 124–9).

⁴⁰ For a discussion on the Public Expenditure Survey Committee (PESC) and the public expenditure process more generally, see Harden and Lewis (1984, pp. 219–225, 1986, pp. 129–36).

⁴¹ Furthermore, “in relation to the strategic control of government policy as a whole (with the exception of the planning of *total* public expenditure) the dignified role of cabinet does not mask an ‘efficient secret’ at all. British constitutional arrangements lack a ‘efficient’ mechanism for rational prioritization and strategic planning: this is the real secret which the myth of collective ministerial responsibility serves to conceal” (Harden & Lewis, 1986, p. 135).

This means that the “effective level” of policy-making within central government is to be found, Harden and Lewis conclude, within ministerial departments (1984, p. 217, 1986, p. 138). But in this regard the traditional constitutional view also proves inadequate as it misrepresents the relation between ministers and civil servants by grossly underestimating the influence of the latter in policy-making. This is not because civil servants have “usurped power”, but rather it is due to a “structural feature of modern government”, viz. given the complexity and extension of ministerial responsibilities ministers must rely on civil servants to help them frame the issues and gather the relevant information⁴². There is no real distinction between policy-making and policy-implementation (or between policy and administration) and this explains why individual ministerial responsibility cannot but fail as mechanism of accountability. The persistence of these “constitutional myths” has promoted –and been reinforced by– the secretive character of British government⁴³ and its techniques of information management, i.e. promotion of policy objectives via selective disclosure of information (1986, pp. 143–5). But most worrying of all, they suggest, is that the secrecy and lack of transparency in policy making and implementation hide the extent to which a wide range of “client groups” (pressure groups that promote sectional interests) exert influence over governmental decisions. This is the biggest blindspot of traditional constitutional theory and in order to start illuminating this question it is necessary to examine “the institutions of fragmented government” (Harden & Lewis, 1986, p. 171; Lewis, 1988).

The gravest failure of the “traditional delineation of constitutional authority”, on Harden and Lewis’ account, is that it has concealed the considerable degree to which state authority is really exercised not by Parliament and the main institutions of central government, but by a “heterogeneous mass of organizations outside central government” (1986, p. 179). The crucial point to be remarked, for Harden and Lewis, is that the executive can be seen as a unity only at the cost of ignoring the ever more relevant “processes of disintegrated government” (1986, p. 153)⁴⁴. To give an account of this ignored dimension of contemporary government, however, is a quite complex task given

⁴² “The detailed work of policy-making –forecasting the likely impact of policies, assessing what is possible, at what cost, and under what sets of possible external environmental changes –is something for which ministers must rely on relationships of trust and confidence with civil servants... it is the civil service... which drafts the papers that ministers see, which filters the information reaching ministers to reduce it to manageable form and which thereby in many cases and for much of the time plays the crucial role in defining problems and possible solutions” (Harden & Lewis, 1986, p. 139).

⁴³ “That the British is one of the most secretive of democratically elected governments is now widely recognised” (Harden & Lewis, 1986, p. 143).

⁴⁴ Government has come to be conducted by a “Byzantine structure of networks of quasi-government and quasi-non-government” (Harden & Lewis, 1986, p. 154).

the sheer variety of agency types (public corporations, hybrid companies, regulatory agencies and advisory bodies), the absence of an “adequate constitutional framework and the *ad hoc*, pragmatic nature of the British method of institution building” (1986, pp. 166–74, 79)⁴⁵. This perhaps explains why the “constitutional invisibility” of non-departmental bodies persists in spite of their long history and their considerable growth in the post-war period (1986, p. 161).

What makes particularly problematic this invisibility is that it hides the extent to which these “institutions of fragmented government” are also “institutions of compromise”, which dissolve the distinction between public and private that lies at the heart of standard constitutional theory (1986, pp. 153, 171). One of the most important structural features of the contemporary state is the need for “corporatist arrangements” that derives from the fact that the implementation of governmental policies depend to a great extent on the cooperation with, and its ability to coordinate the behaviour of, private actors⁴⁶, who have in turn an interest to influence state regulatory decisions and state decisions on the allocation of resources through taxation and spending. This engenders “a general cultural preference for informal, fluid processes of elite consensus-seeking and co-optation makes it easy for networks that blur the boundary between public and private to flourish” (1986, p. 155).

In terms of constitutional theory this has a crucial consequence, namely, a partial displacement of the question of political legitimacy from the electoral process to governmental decision-making processes⁴⁷. Harden and Lewis argue, thereby, that the biggest challenge of contemporary British constitutional politics is the lack of an appropriate public framework governing the different forms of administrative agencies and their modes of action (e.g. the use of advisory or consultative process). The absence of public law standards (substantive and procedural) in these key areas makes them dependent on unchecked discretionary decisions, e.g. about whom to appoint to advisory bodies, when refer decisions such bodies, when make use of consultative processes, and so on

⁴⁵ “Choice of agency type”, Harden and Lewis observe, does not seem to respond to any identifiable logic: “even taking into account other factors such as the influence of administrative fashion, there is no satisfactory explanation available for the present pattern of non-departmental bodies nor even, in many cases, as to why a particular policy initiative was given one administrative form rather than another” (1986, p. 158).

⁴⁶ States, for example, have to rely “on ‘producer groups’ in particular to supply it with necessary information, technical expertise and judgement that could otherwise be acquired only at inordinate cost, or not at all” (Harden & Lewis, 1986, p. 156).

⁴⁷ “At the level of the legitimation of state activities, electoral success does not guarantee that a government’s specific policies will be acceptable either generally or to those whose lack of co-operation or whose resistance can hinder implementation. Bargaining and negotiation with pressure groups and affected interests may thus be ways of winning the active consent of those whose co-operation government needs and/or of avoiding conflicts that may threaten the ‘mass diffuse loyalty’ engendered by the system of electoral competition between parties” (Harden & Lewis, 1986, p. 156).

(1986, pp. 172–7). This, in turn, generates considerable access differentials between interested groups, privileging certain pressure groups –esp. those which have become a part of the relevant informal “network”– in the administrative process⁴⁸.

Furthermore, the lack of appropriate democratic accountability of governmental decisions is aggravated by the increasing relevance of contracts and self-regulation in contemporary government. As Harden and Lewis note, another important form of privatisation takes the form of “contracting-out functions previously developed by public bodies” (1986, p. 177). Although contract as a means governmental action has acquired great importance –thus, the talk about the contract state– there is no appropriate public law frame for this “process of public choice” either⁴⁹. This becomes especially problematic when these “contractual” relations concern goods or services that are not widely available in competitive markets as in these cases the contract only serves to mask an unchecked form of administrative discretion⁵⁰. Similarly, self-regulation also involves the use of private law forms, in this case private associations and corporations, to which a certain regulatory function is trusted under certain negotiated conditions between the government and the relevant private actors (e.g. a business association establishes “codes of practice” that take the place of statutory regulation). Once again, one finds public regulatory purposes being bargained and beyond the reach of constitutional accountability⁵¹.

In conclusion, a more realistic analysis of constitutional behaviour shows that the best part of actual governmental practice is under the radar of existing mechanisms of constitutional accountability, that the institutions of fragmented government and compromise dwell in “a shadowy constitutional limbo” (1986, p. 178) and that, in consequence, Britain lives under an illegitimate “private government” or “new feudalism” (1986, pp. 6–7, 224), which engenders the distinctive danger of “capture or colonization”

⁴⁸ “Considered as channels through which groups and interests can gain access to the policy process... weaknesses appear in the institutions and processes of fragmented government. The terms of access are rarely the subject of any public debate. They may be subject to unilateral and unaccountable changes and, in so far as they are negotiated, it is through processes in which those who have most to offer or threaten –on a variety of levels– get preferential treatment. ‘Issue networks’ or ‘policy communities’ are structured through a complex process of mutual accommodation and adjustment, of which differential access and marginalization are important features. Consultation can be essentially a process of exclusion and favoured groups are those who can participate in establishing agendas and setting the terms of debate before formal consultation processes begin” (Harden & Lewis, 1986, p. 179).

⁴⁹ “English law has no general concept of a ‘public law contract’ as regime to govern commercial relationships between government or other public bodies and firms” (Harden & Lewis, 1986, p. 177).

⁵⁰ “In such circumstances ‘contract’ as a legal mechanism has nothing to do with the neo-classical competitive market: it is simple an empty vessel into which the results of administrative bargaining can be poured” (Harden & Lewis, 1986, p. 177).

⁵¹ They are, in their words, “achieved by bargained arrangements without any recognition of the status of the regulatory bodies through public law mechanisms. Self-regulation thus represents the pursuit of a public purpose through means which avoid the traditional mechanism of constitutional accountability for public choices” (Harden & Lewis, 1986, p. 163).

of the state by private interests (1986, p. 147). This unveils the ineptness of a standard constitutional theory that places at the centre of constitutional legitimacy institutions and processes that have become elements of the dignified part of the constitution (Parliament, Cabinet, Ministerial responsibility). All the key features of constitutional behaviour highlighted by a realist analysis, namely, “the dominance of Parliament by the executive, the fragmentation of government and the interpenetration of public and private” demonstrate “the collapse of the empirical basis of the nineteenth-century model of constitutional legitimacy” (1986, pp. 189–90). *The Noble Lie* offers, thereby, a new map of the “real location of decision-making functions”, re-focusing constitutional theory on the administrative process and coming to terms with “the fact that to a large extent the executive has *become* the political market-place” (1986, pp. 147, 154).

6. From constitutional theory to constitutional reform

Once the normative and descriptive critique of standard constitutional theory has been completed, *The Noble Lie* ends by trying to weave them together and to “show how the gap between the master ideals and current political and constitutional practice can be bridged. This analysis leads the constitutionalist to a programme of institution-building” (1986, p. 13) that is outlined in the final part of the book, entitled “reconstitutionalizing the business of governing” (1986, p. 219). The aim of this part is to introduce and justify a reform agenda that expands the reach of the key criteria of constitutional legitimacy –openness and accountability– using as a model American public law. Two aspects about this reformist programme should be emphasized at the outset. First, as suggested by the elaboration of the method of immanent critique, the engagement with reform constitutes a core task of constitutional theory⁵². Secondly, although it supposes the advocacy for a deliberate, rational re-structuring of the British constitution that contrasts with the traditional pragmatic, *ad hoc* way in which constitutional evolution has come about –and wherefrom most of contemporary problems derive (1986, p. 179)– the principles orientating these reform proposals are those that underpin the existing constitution (i.e. the “revised rule of law”)⁵³.

⁵² “Constitutional lawyers can and should seek to identify the constitutional changes necessary to uphold the rule of law values in response to social, economic and political developments; not as an optional ‘political’ commitment, but as an essential aspect of their job” (Harden & Lewis, 1988, p. 814).

⁵³ In an earlier piece they contrast the method of immanent critique with the traditional analysis of the constitution that sees it as just an incrementally grown collection of “pragmatic responses” to particular political crises and enduring cultural modes of behaviour (Harden & Lewis, 1984, p. 215). For a later elaboration of this “institutional” strategy of constitutional reform, see Harden (1991, pp. 509–10).

One of the most serious contemporary failures of British constitutional law is that it has allowed the growth of informal networks behind public action that generate access differentials, privilege particular “client-groups” and leave unchecked administrative discretion in ever greater areas of governmental action. Yet, the contemporary state cannot dispense with the participation of interest-groups in the elaboration and implementation of policies for the reason that the achievement of many governmental goals depends on their cooperation. The solution cannot be to put an end to any sort of participation or influence of interest groups on policy-making. The solution lies, instead, in subjecting them to formal procedures and standards, opening such participation processes to public criticism in order to avoid both unjustified advantages and unchecked discretion. Here one seems to hit, however, a blind-alley as British public law has neither a general due process doctrine nor an appropriate legal protection of fundamental procedural rights⁵⁴. What is necessary, then, is to aspire to “a reformed British administrative and constitutional law” that refashions the administrative procedure as a surrogate political process⁵⁵ through the establishment of certain procedural requirements for –and procedural rights in relation to– administrative decisions (such as the production of records and the duty to justify decisions) which ensure that they satisfy the basic criteria of constitutional legitimacy (esp. openness and accountability). Particularly important, considering the risk of capture and access differentials, is to widen participation, ensuring access to the “appropriate constituencies” and, more generally, to everyone interested⁵⁶.

The incapacity to open administrative decision-making to debate and scrutiny by relevant “concerned publics” is the greatest single failure of British public law, which in its current state can neither ensure the representativeness nor the rationality of governmental decisions⁵⁷. But exactly where British public law has its greatest failure, American public law has its greatest achievement: the “unique contribution to constitutional law” by the Americans lies in the regulation of the administrative process⁵⁸. A “British Administrative Procedure Act”, therefore, fashioned under the inspiration of the American Act (which in

⁵⁴ “Neither records, open meetings, access to files nor indeed any attempt at opening up the networks of decision-making through legal restrictions on *ex parte* dealings are central features of our constitutional law” (Harden & Lewis, 1986, p. 228).

⁵⁵ This idea is taken from Richard Stewart’s critical discussion of the interest-representation model in American administrative law theory in his influential paper “The Reformation of American Administrative Law” (1976). Surprisingly, however, Harden and Lewis do not explicitly engage with the counter-arguments that Stewart raises against that approach in this piece.

⁵⁶ “Openness must mean open to all, with at least the opportunity for the ‘all’ to make a contribution” (Harden & Lewis, 1986, p. 223).

⁵⁷ “The single greatest failure of British public law is not to oversee the terms of the surrogate political process –not to ensure, merits entirely aside, that a rational foundation for decision-making exists in light of the opportunity for concerned publics to contest the issues at stake” (Harden & Lewis, 1986, p. 234).

⁵⁸ “The great American contribution is undoubtedly rule-making” (Harden & Lewis, 1986, p. 235).

spite of its defects remains the best model available for importation⁵⁹) is “a necessary precondition of satisfactory constitutional readjustment” (1986, p. 221). That said, the need to open up to scrutiny and debate governmental decisions extends to more than just rule-making including other areas such as corporate planning for example. Moreover, the richness of the American experience in the establishment of these institutions of accountability encompasses other key complementary matters like the regulation of lobbying and *ex parte* dealings by the Federal Advisory Committees Act 1974 and the Government in the Sunshine Act 1976 (1986, pp. 237–56). In particular, the American experience is of great value as a model to be followed in the central matter of freedom of information⁶⁰, which not only is at the very core of open government⁶¹ but also remains the single aspect where the actual practice of British government is at its worst in terms of constitutional legitimacy⁶².

The new regime of British administrative procedure should, in sum, institutionalize participative politics (1986, p. 303) by putting in place a series of procedural requirements widening participation, ensuring freedom of information and regulating *ex parte* dealings. But if it is to bear all its fruits, the remodelling of administrative decision-making as a surrogate political process must be accompanied by a correlative reconsideration of the foundations of judicial review and, more generally, the standards of review of administrative action. One of the most negative outcomes that the grip of Diceyan constitutional theory has had over the self-understanding of the courts is that “they have failed to develop a general theory of their proper role in structuring policy-making process” (1986, p. 197). On the standard account, the judiciary has the primary task of ensuring that the executive does not exceed the powers that are conferred by Parliament, to examine the legality (not the merits) of administrative action under the light of the authorising statute. A review –in contrast to an appeal– is, on this traditional account, concerned not with “the question of whether a particular matter has been correctly decided but whether the administrative authority in question had power to decide as it did” (1986, p. 198). This view

⁵⁹ “For all the defects of the rule-making provisions of US Federal law they constitute the single most marketable commodity currently available for producing procedural means of accountability and participation” (Harden & Lewis, 1986, p. 235).

⁶⁰ “The history of freedom of information in the United States has been a most interesting learning process, and the post-Watergate amendments made to the original 1966 Act should prove invaluable in working upon a British model” (Harden & Lewis, 1986, p. 269).

⁶¹ “Open government is in essence the principle that information held by government departments on which policies are based and decisions taken is available, with certain limited exceptions, for public analysis” (Harden & Lewis, 1986, p. 268).

⁶² “The fact that British governmental practice is among the most secretive in the western world is perhaps the clearest illustration of the contradictory nature of claim and practice within the British constitution” (Harden & Lewis, 1986, pp. 267–8).

–the doctrine of *ultra vires*– presented the control of the administration by the courts “as simply an aspect of statutory interpretation” (1986, p. 197) and was a corollary of the basic dogma of British parliamentary government, i.e. Parliament is the central political forum and the executive is an emanation and the agent of parliamentary will (1986, p. 192).

Exactly at the time when the governmental intervention experimented a decisive expansion in the early twentieth century the doctrine of *ultra vires* became almost the sole foundation of judicial review, almost entirely displacing the common law doctrine of natural justice –that imposes basic procedural requirements to any decision-making authority– but which came to be interpreted in a progressively restrictive way. This amounted to an “abdication by the courts from a general concern for administrative procedure... [and] the handling of complaints” (1986, p. 198). Recent developments in judicial review⁶³ have made, nevertheless, increasingly evident the inadequacy of the *ultra vires* doctrine to the extent that these new principles of review “cannot, without absurdity, be attributed to the intention of Parliament” (1986, p. 199). Given the lack of “a clear understanding of the nature and purpose of judicial review”, the courts have been condemned to an unprincipled back and forth between a “helpless quietism” and “active interventionism” that looks suspicious of political bias (1986, p. 203). In consonance with the overarching argument about a revised rule of law and their reform agenda, Harden and Lewis argue that the judiciary should –and, in fact, sometimes does– concern itself with the “requirement for the legitimacy of public action”, which “in logic” means that the courts have “to accept responsibility for encouraging the development of open and participative policy-making processes as the appropriate means of advancing rule of law values in modern conditions –conditions where government is multi-layered and fragmented and problems are complex and interlinked” (1986, p. 213).

The courts should replace their current principles of review –the *ultra vires* doctrine and their ritual appeal to the *Wednesbury* test– by the much more capacious and demanding hard look doctrine. Here, once again, American law offers the inspiring template: hard look is a standard of review that was developed by American courts as an intermediate solution between a soft and deferential “kid glove” standard and an excessively demanding “substantial evidence” rule in order to “guarantee that all values are genuinely considered during the policy-making process” (1986, pp. 272–5). The hard look doctrine, in other words, is grounded in the model of legitimate public action that lies at the centre of *The*

⁶³ They consider in particular to the justiciability of prerogative powers, the limits of administrative discretion, the right to be heard and public functions exercised by private bodies (Harden & Lewis, 1986, pp. 199–212).

Noble Lie, viz. an interest-representation model that understands the administrative process as a surrogate political process which extends to the executive the legitimacy requirements of openness, participation and accountability⁶⁴.

The British hard look doctrine that Harden and Lewis propose should not be narrowly construed, however, as merely a principle of judicial review. It should be seen instead as expressing a general requirement of constitutional legitimacy that extends beyond the courts to encompass all forms of control of the administration (judicial and non-judicial). Although the courts have a unique residual position of last resort in the constitutional system of accountability, judicial remedies are too limited in their scope and intensity for the needs of the contemporary administrative state⁶⁵. The overestimation of the capacities of the judiciary is the failure of constitutional theories centred on the adjudicative process and, in this sense, theories centred on the regulatory process are more promising (1986, pp. 288–9). A constitutional theory that is appropriate to contemporary conditions, in sum, must adopt an expanded concept of the law as “institution and constitution building”⁶⁶ and this “can only occur through the rejection of the notion that law’s contribution to the administrative state is primarily rule-dependent adjudication. Adjudication is in fact the least pressing concern and policy structuring the most pressing” (1986, p. 300).

7. Conclusion: the place of social constructivism

The Noble Lie represents a very distinctive contribution to British constitutional theory. In substantive terms, it presents a theoretical programme that would be further elaborated and expanded by subsequent literature produced by those associated to the “Sheffield School” on themes such as regulatory reform, accountability mechanisms, freedom of information, corporatist arrangements, the contract state, privatisation and regulatory theory (Birkinshaw, 2010; Birkinshaw, Harden, & Lewis, 1990; Graham & Prosser, 1991; Harden, 1992; Lewis & Birkinshaw, 1993; Prosser, 2010). The project of *The Noble Lie* is important

⁶⁴ “The model of decision-making which has informed the emergence of hard look has at its centre a concern that due consideration be given to all competing interests. This has entailed the belief that the public is treated unfairly when a rule-maker hides crucial decisions or the reasons for them or when there is a failure to give good faith attention to all the information and contending views relevant to the issues” (Harden & Lewis, 1986, p. 275).

⁶⁵ From the cognitive and procedural limitations of courts follow important normative restrictions to the scope of their intervention: “The courts nevertheless have a limited capacity and whereas we believe that being the least dangerous branch they must ultimately be the trustees of the constitutional compact and its accountability demands, in assessing complex regulatory programmes the scope of judicial remedies must be limited in order to avoid serious disruption. The emphasis ought instead to be placed on non-judicial methods of controlling administrative authority” (Harden & Lewis, 1986, p. 274).

⁶⁶ “Viewing law as a socially necessary set of tasks aimed at normative integration through a system of shared values we liberate its potential for institution and constitution building” (Harden & Lewis, 1986, p. 290).

for our present purposes not only because it covers such an extensive thematic ground but, more significantly, because it articulates a particular type of constructivist constitutional theory, namely, social constructivism. The most salient features of such conception must be highlighted.

Social constructivism proposes a normative constitutional theory that focuses primarily on the administrative and regulatory process and that is constructed by using preferentially materials from sociology of law and critical social theory (as developed especially by J Habermas, E Kamenka and A Tay, D Trubek, P Selznick and P Nonet). In fact, as it has been shown, it is constructed upon the sociological observation that contemporary states are characterised by executive dominance and an increasing dependence on a series of corporatist arrangements and other regulatory techniques (e.g. contracts, self-regulation, soft-law, and so forth). The predominant place that administrative and regulatory processes exhibit in contemporary states demonstrate, on this account, that constitutional theories that are centred either on Parliament (cf. chapter 4) or on courts (cf. chapter 5) are constructed upon mistaken empirical assumptions. This means that standard constitutional theory –which is built on the principle of parliamentary sovereignty or on the common law and judicial enforceable rights– is untenable. Social constructivism intends to elaborate a new, more adequate, constitutional theory which obtains its normative premises from critical social theory. In its core the normative basis of the project is built upon the idea that it is necessary to extend the key criteria of constitutional legitimacy (esp. openness and accountability) to the regulatory process. Such extended model of participatory democracy, which encompasses not only a representative legislative assembly but makes of the administrative process a surrogate political process, imposes due process standards to contemporary government rendering it both more legitimate and more rational.

One should not yield to anybody that social constructivism represents a remarkable project of constitutional theory in terms of its systematic ambitions, extensive scope and the variety of materials it tries to bring together. It has, however, significant methodological pitfalls. Although the great amplitude of its scope and the wealth of materials that it deploys make the project of considerable interest, the book falls prey to an eclecticism that accumulates more theoretical resources than are actually necessary for –i.e. really used rather only mentioned in– the argument, resulting at times overwritten, confusing and disorienting. More importantly, the argument of *The Noble Lie* is inconsistent at crucial junctures with the methodological assumptions it avows. As it has been shown, Harden

and Lewis claim to be articulating an immanent critique of the British constitutional tradition but they appeal to transcendental arguments to introduce important elements of their constitutional theory (e.g. their theory of democracy and their theory of law). It remains unclear how immanent critique (adopted as general methodological strategy for the argument) hangs together with the more essentialist methods of dialectically necessary implications (used for ascertaining the nature of democracy) and of *a priori* real or essential definitions (for explaining the theory of law). Even the theory of law that it is proposed is methodologically disjointed as it brings together without a unifying frame two seemingly incompatible ways of theorising the law, viz. a socio-historically relative theory of forms or ideal types of law (*Gesellschaft*, *Gemeinschaft* and bureaucratic-administrative law) and an *a priori* real or essential definition in terms of law-jobs.

Furthermore, at critical points, *The Noble Lie*'s argument does not seem internally consistent. In particular, the fundamental claim that the revised conception of the rule of law and the British constitution that they offer are the explicit articulation of ideals of government already embedded in actual practices of government results, on their own terms, to be false. Thus, Harden and Lewis inconsistently argue, on the one hand, that open government and freedom of information are fundamental ideals underpinning the British constitution and, on the other, that "the British is one of the most secretive of democratically elected governments" (compare sections 3 and 4 with section 5). Similarly, Harden and Lewis's depiction of British constitutional thought is in important aspects too stylised if not distorted to support the idea that they are proposing an immanent critique, e.g. their discussion of Dicey's doctrine of the rule of law (Loughlin, 1988). Finally, their reform agenda –which basically proposes the importation into British public law of various institutions from American administrative law– seems to be fairly disconnected if not in direct conflict with the fundamental tenets of current British constitutional practice as they describe it, which not only poses once more problems for their immanent critique methodology but also seems to greatly underestimate the difficulties that besiege exercises of "legal transplantation" of this magnitude⁶⁷.

Finally, it is interesting to see that Harden (1991) came to appreciate some of these difficulties and suggested interesting ways to improve the argument. First, he argued that the method of the *Noble Lie* should be seen as a variety of "constructive interpretation" in Dworkin's sense, i.e. the interpretation of the practice is sensitive to the scheme of principles that is proposed as the point or value of the practice (1991, p. 497 n 14).

⁶⁷ For recent discussion on the difficulties besieging legal transplantations within public law scholarship, (Allison, 2000, pp. 4–33).

Secondly, Harden broke down the two-step method of immanent critique into two differentiated concepts of the constitution (viz. the constitution as “principles” and the constitution as a “map of power”) that underpin two counterpoised kinds of enquiry: [1] into the “set of principles of legitimate government” following an “idealist method” and [2] into the contrast between the official map with an empirical map of power that pursues a “realist method” that tends debunk explanations based on principles (1991, pp. 491–2). But as he recognised, this move poses a problem to the theorist of the British constitution: can a constitution based on the principle of parliamentary sovereignty be understood as a set of principles? Harden’s own answer was to distinguish between the existence of constitutional limitations and its mode of enforcement so as to contend that the British constitution, as all constitutions, imposes limits on the authority of Parliament but that, on the question of enforcement, it is peculiar in that Parliament itself –rather than courts– is primarily in charge of the function of making judgements of constitutionality (1991, pp. 500–10). As it is shown in the chapters that follow, these questions loom large in contemporary theoretical debates. Is the constitution to be understood empirically as a map of power (chapter 5) or as a set of principles? If as a set of principles, what is the value of a constitution that relies primarily on Parliament for its maintenance (chapter 4)? Or is it the case that the understanding of the “constitution as principles” should make us reconsider the principle of parliamentary sovereignty and the constitutional role of courts (chapter 3)? Perhaps the problem lies in the very assumption that one can either understand the constitution in normative-idealist terms or in empirically-debunking terms (chapter 6)?

3. MORAL CONSTRUCTIVISM: FROM THE THEORY OF JUSTICE TO PUBLIC LAW

1. Introduction

A striking contrast to social constructivism, discussed in the previous chapter, is offered by those theoretical approaches usually grouped under the rubric of “common law constitutionalism” or “legal constitutionalism”. Common law constitutionalism constitutes a decided reaffirmation of a type of court-centred and rights-based public law theory that Harden and Lewis thought had been ousted by the advent of the modern administrative state. In terms of content, common law constitutionalism –as opposed to social constructivism– reaffirms a categorical distinction between justice and administration and reclaims Dicey’s importance to contemporary British public law. Common law constitutionalism, however, also differs from traditional constitutional theory as it calls into question the place of Parliament within the constitution. In this sense, both common law constitutionalism and social constructivism propose a reconsideration of the traditional understanding of the doctrine of parliamentary sovereignty, but they do it for different reasons. Whereas social constructivism questions parliamentary sovereignty mainly from empirical observations about how modern government actually operates, common law constitutionalism highlights the normative limitations to legislative supremacy that derive from the constitutional role of the judiciary. Both share the idea that at the core of the constitution lies the concept of the rule of law and that most of the pitfalls of orthodox constitutional theory spring from the legacy of legal positivism. But while social constructivism reconsiders the rule of law following the methodological cues of critical social theory, common law constitutionalism does it adopting the conceptual tools and argumentative strategies of philosophical theories of law and politics. Common law constitutionalism espouses, in particular, the normative approach that has dominated political philosophy since John Rawls’ *A Theory of Justice* (1971) and the normative jurisprudence that accompanied it, namely, the rights-based theory of law that Dworkin set forth in his *Taking Rights Seriously* (1978). Common law constitutionalism embodies, thereby, a distinctive approach to public law theory, here called moral constructivism, for which the inquiry into the foundations of public law raises distinctly moral questions which demand rights-based arguments.

In this chapter, moral constructivism will be discussed through a critical reading of Trevor Allan’s writings as they both “mark him as something of a champion of the

common law” (Laws, 2014, p. 27) and contain “perhaps the most sophisticated account of common law constitutionalism” (Poole, 2002). Allan has been developing his public law theory over a long period –since at least the mid-1980s– and has produced three book-length presentations of it during the last three decades –*Law, Liberty and Justice* (1993), *Constitutional Justice* (2001) and *The Sovereignty of Law* (2013)– providing ideal material to gauge the specific contribution that moral constructivism brings to bear in contemporary debates within British public law theory. Moreover, Allan’s constitutional theory displays more decidedly than any other the central features of common law constitutionalism. The analysis begins by presenting Allan’s general conception of constitutional theory and the rule of law (section 2) and his particular reading of British constitutionalism (section 3) to then examine the consequences that follow for the principle of parliamentary sovereignty (section 4) and the scope and principles of judicial review (section 5).

2. Constitutional justice and the rule of law

As reads the subtitle to the first book-length statement of his conception, Allan conceives public law theory as an attempt to critically engage with *The Legal Foundations of British Constitutionalism* by reconsidering them under the light of “contemporary contributions to legal and political theory” (1993, p. vii). It is an “endeavour to fuse legal doctrine and legal theory” in order to both “challenge traditional views and orthodox doctrines” and stimulate “renewed debate in Britain about constitutional fundamentals” (1993, p. vii). By adopting such “broader, more philosophical perspective” a series of familiar distinctions (e.g. written and unwritten constitutions, laws and conventions, process and substance, and so on), antinomies (e.g. parliamentary sovereignty versus the rule of law, legality versus legitimacy, democracy versus rights, and so forth) and other such “strange notions” are revealed as “unhelpful if not arbitrary” (1993, p. vii, 1, 2013, p. 1). This project aims to challenge the methodological and conceptual strictures that orthodox constitutional law has inherited from a legal positivism which, by severing public law from legal and political theory, has kept artificially separated legal doctrine from legal principle and law from politics⁶⁸. Once the strictures of legal positivism are set aside, one might reach beyond mere “technicalities” and discover the normative foundations of British constitutionalism: “the theoretical and ideological premises of public law” (1993, p. vii). As this suggests, contrary to what legal positivism has always preached, “legal interpretation entails evaluation quite as

⁶⁸ “The book seeks to alleviate the stranglehold which legal positivism has placed on modern constitutional law. In contesting the value of rigid distinctions between law and politics, or between legal doctrine and political principle, I hope also to narrow the customary gulf between public law and legal theory” (Allan, 1993, p. vii).

much as description” (1993, p. vii) and, therefore, a descriptive theory of public law is either impossible or futile. Briefly put, Allan’s work “is an exploration of the consequences for constitutional thought of emphasizing that normative or evaluative dimension of legal reasoning” (2013, p. 19).

The conceptual and methodological assumptions of Allan’s conception of constitutional theory should first be unpacked. What precisely is meant by “constitutionalism”? In general terms, Allan conceives constitutionalism –following F.A. Hayek– as “a struggle” against the conception of an unlimited sovereign power or “omnipotent state”. That is why “an insistence on there being a source of ultimate political authority, which is free from all legal restraint and from which every legal rule derives its validity, is incompatible with constitutionalism” (1993, p. 16). Constitutionalism, on this account, is a political movement that is characterised by its commitment to the political ideal of limited government. Political power is legitimate if and only if it is subjected to certain normative limitations, to “principles”⁶⁹. The main focus of this theoretical conception is the concept of the rule of law which Allan takes to signify that “set of closely interrelated principles that together make up the core of the doctrine or theory of constitutionalism” (2001, p. 1). According to the rule of law –as opposed to the “rule of men” or the “rule of the powerful”– a “constitutional government” is that in which each citizen is protected against the arbitrary will of political rulers (1993, p. 22, 2013, p. 32). The rule of law is, in negative terms, conceived as a “safeguard against arbitrary power” (2001, p. 56). In positive terms, a constitutional government is one in which individual citizens are treated in accordance to certain principles: “it is the first principle of constitutionalism that, in its interaction with the citizen, the state must satisfy the requirements of the rule of law” (2001, p. 38). Which requirements? In one line, Allan’s answer is: “The equal dignity of citizens, with its implications for fair treatment and respect for individual autonomy, is the basic premise of liberal constitutionalism, and accordingly the ultimate meaning of the rule of law” (2001, p. vii)⁷⁰.

From this basic conception follows a series of crucial consequences about the aim, nature and methods of constitutional theory. A constitutional theory whose core is the ideal of the rule of law is a theory of justice: its primary aim is to identify and clarify the

⁶⁹ There is one passage, however, where Allan puzzlingly and inconsistently seems to suggest that merely factual limitations would be enough: “the rule of law is, in principle, compatible even with absolutism, when there is an absolute ruler who conforms his mode of governance to the requirements of the division of powers and functions, as regards the actual implementation of his will” (2001, p. 31).

⁷⁰ “The book therefore defends a particular interpretation of the ideal of the rule of law, in which the autonomy and dignity of the individual citizen are treated as ultimate legal values” (Allan, 2001, p. vii).

normative requirements that a constitutional government must satisfy in their dealings with individual citizens in order to treat them fairly and pay due respect to their equal autonomy and dignity. But as it is built upon the notion of the rule of law, a constitutional theory is a “modest” theory of justice, viz. it does not extend to all the questions that an encompassing theory of justice⁷¹. In particular, such a theory of “constitutional justice” is modest in two senses. First, such a theory is not primarily about the establishment and configuration of political power, but about the way in which a (legitimate or constitutional) government should treat each individual citizen (viz. respecting its equal autonomy and dignity)⁷². Constitutional theory does not encompass (nor presuppose) a particular theory of democracy (nor, for that matter, a particular theory of government)⁷³.

This, it should be noted, makes it an individualistic conception as it puts at the centre of constitutional theory the individual and his liberties rather than the political community and its collective decision making procedures. Furthermore, this individualistic stance depicts constitutional law as primarily aimed at protecting –or making immune– a basic individual sphere of liberty from governmental intervention⁷⁴. Consequently, to adopt a constitutional perspective is to inquire into what are the limits to the pursuit of “governmental objectives” that follow from the rule of law, that is, the “set of constraints that limit the pursuit of such objectives in the interests of individual autonomy and security” (2001, p. 55). From the point of view of individual liberty, however, constitutional theory is a modest theory of justice in that it does not amount to a complete guarantee of that value (especially, it does not encompass a theory of social justice)⁷⁵.

⁷¹ “My attempt [is] to provide an account of the rule of law that remains distinct from any fully elaborated theory of *political* or *social* justice” (Allan, 2001, p. 26). As he previously put it, the idea is to construe the rule of law going beyond a merely formal conception but “without instead propounding a complete political and social philosophy” (Allan, 1993, p. 20).

⁷² “Questions of constitutional justice and the fair treatment of persons, in their individual relations with the state, are distinct from questions about the correct distribution of political power. People have moral rights to be treated with dignity and respect that apply (or so I believe) under all forms of government, whatever their arrangements for allowing access to public office or ensuring that official decisions enjoy popular support... The rule of law is a modest theory of *constitutional* justice, whose requirements any acceptable version of liberal democracy should be expected to satisfy” (Allan, 2001, pp. 28–9).

⁷³ “The rule of law is, in principle, compatible with a variety of constitutional arrangements, whether or not democratic in the sense of requiring an equal distribution of political power” (Allan, 2001, p. 288).

⁷⁴ Allan’s approach, in fact, goes beyond the widespread liberal conception that constitutional law and fundamental rights protect the rights of minorities against the dangers of a tyranny of the majority and rearticulates it in strictly individualistic terms: “the essence of constitutional justice is the insulation of the citizen from both popular prejudice and governmental hostility: it means that individuals must be treated in accordance with general principles, whose impartial application is assured by fair procedures” (Allan, 2001, p. 146).

⁷⁵ “It is true that the rule of law is not a perfect guarantee of liberty: it does not, as an independent doctrine, identify all the specific aspects of personal conduct that should be immune from governmental interference, nor amount to a fully elaborated (and inevitably controversial) theory of social justice. It does however, when properly understood, provide the foundations of the principle of equal citizenship” (Allan, 2001, p. 38).

In methodological terms, this conception understands constitutional theory as an essentially normative undertaking: it is about the principles that any constitutional government ought to respect. The rule of law is an ideal that requires government to treat fairly each individual citizen, i.e. in a way that respects his equal dignity and autonomy. As all these notions –“fairness”, “equality”, “dignity”, “autonomy” and other related– refer to moral values, a constitutional theory cannot but be essentially an exercise in political morality⁷⁶. In fact, the analysis of legal principles shows that “nothing of significance attaches to the label ‘legal’” (1993, p. 103). A legal principle is nothing but a species of moral principle (i.e. one that is offered as justification for legal rules and precedents⁷⁷) whose justificatory force depends on their connection with the normative values that ground the constitutional order (2001, p. 289). Furthermore, this conception propounds a rights-based theory of political morality as the principles of the rule of law are taken to be in the interest of individual autonomy and dignity and, thereby, can be translated into moral rights that each individual has in his relations with the state. This is the theoretical basis of the “rights-based approach to public law” that construes it “as a system of public law rights” (1993, p. 7).

But why can constitutional theory not just limit itself to describe what the (constitutional) law is and offer reports of what others think is normatively entailed by the rule of law? The reason lies, Allan argues, in the essentially practical nature of constitutional theory, by which he means that constitutional theory must “inform a practice of adjudication” (1993, p. 27). “The constitutional theorist”, in other words, “needs a more practical conception which can serve as a truly *juridical* doctrine, providing a basis for adjudication” (1993, p. 26) and this implies that “our theoretical visions must match the demands of legal practice if constitutional theory is to play its proper role” (2013, p. 13). In fact, Allan’s thesis is stronger than that as he claims that there is a “philosophic unity of the practical problems of the interpretation and application of statutes, and of legal and political theory” (1993, p. 19) and this implies that “there is no useful distinction between constitutional law and constitutional theory” (1993, p. 3). Allan justifies the thesis of the unity between theory and practice by appealing to the “interpretative nature” of legal analysis, that is, the content of the law can only be identified by making “good moral

⁷⁶ This explains why, on this account, both legal and political discourse are constituted by the same *telos*: “legal reasoning and political argument, when properly conducted, seek fundamentally the same end: each seeks to identify principles of justice and conceptions of the common good that all can endorse without loss of personal integrity” (Allan, 2001, p. 289).

⁷⁷ “A legal principle is only a moral principle whose basis in the values of the general community gives it a legitimate role in legal argument. It offers a justification of legal rules and precedents in terms of justice or the common good” (Allan, 2001, p. 292).

sense” of authoritative legal sources⁷⁸. The constitutional theorist must adopt the internal perspective of a participant (i.e. that of the lawyer or judge). She cannot –like the historian or sociologist may– adopt the external point of view of a detached observer. It is only by appealing to principles that past judicial practice can be deployed as a reason in legal discourse (2013, p. 50). Conversely, the constitutional lawyer and judge must rely (at least implicitly) on some theory of the constitution and the legal order as a whole when ascertaining what the law is in relation to a particular case, i.e. “a statement of law is only as accurate as its theoretical grasp of the pertinent standards of legality” (2001, p. 9). Here lies the need for a “constitutional philosophy, which could serve as a basis for the systematic exposition and consistent development of legal principle” (1993, p. 20).

This argument has a number of steps. It starts by pointing out the controversial character of many important questions in public law and to the fact that in all of them one finds competing interpretations of the relevant legislation and legal precedents. In order to determine what the (constitutional) law is in such cases one needs to go further than what is explicitly said in the relevant authoritative materials and consider the “basic political values” that underlie the constitutional practice as a whole, i.e. to resolve such questions of interpretation one has to appeal to a theory of what are the political values that best justify the constitutional tradition⁷⁹. On such interpretative approach, constitutional arguments – and legal arguments in general– are about “not merely what the law requires or permits, on correct analysis, but why that reading of the law is morally justified” (2013, p. 20). It is a mistake, therefore, to think that it is possible to ascertain what constitutional law is without taking a normative stance about what it ought to be or, put differently, one cannot engage in the analysis of constitutional questions without adopting normative or evaluative considerations⁸⁰. This shows both why constitutional theory is “normative all the way

⁷⁸ “There is no law or legal practice (I shall argue) separate from, or independent of, the larger debates in constitutional theory and jurisprudence over basic doctrines and their moral and political justification. We cannot identify the content of law with a merely descriptive account of judicial practice, viewed as a matter of empirical fact: it is a product of normative *judgement*, in which we attempt to make good moral sense of an array of such familiar legal ‘sources’ as Acts of Parliament, judicial precedent and influential dicta” (Allan, 2013, p. 5).

⁷⁹ “Since legal analysis, in public law, cannot sensibly be detached from its wider normative context, issues of constitutional legitimacy and legal validity are ultimately inseparable from questions of legal and political theory” (Allan, 2001, p. vii).

⁸⁰ “In the absence of conclusive ‘evidence’ to resolve such questions of interpretation, the outcome is likely to depend on the strength of a theory’s appeal on grounds of political morality... it is foolish –an unfortunate by-product of legal positivism– to believe that even descriptive analysis, where it has practical consequences, can detach itself from normative judgement and evaluation” (Allan, 2001, p. 5).

down” and why “to be a lawyer is to be, at least in part, a legal philosopher” (2013, pp. 9, 13)⁸¹.

As the core of the theory of constitutionalism resides in the ideal of the rule of law –which contains all the basic principles of constitutional government– one might express the interpretative task of the constitutional lawyer, judge and theorist with a very simple formula: “constitutional doctrine” is nothing but “a reflection of, and intimately associated with, the underlying political ideal of the rule of law” (1993, p. 2). This is why it might well be concluded “the judge is therefore driven by the nature of his office, as the constitutional theorist is directed by the nature of *his* enterprise, to seek the full meaning of the rule law in those fundamental values of personal dignity and autonomy” (1993, p. 28). On this account, constitutional theory not only informs constitutional practice, but also aims to reform it. Constitutional theory, in other words, does not leave everything as it was, but it changes constitutional doctrine by virtue of reshaping the way we think and argue about public law⁸². Every interpretation is, by necessity, a reinterpretation⁸³.

As it has been characterized hitherto, Allan’s basic conception constitutes a general or universal constitutional theory, that is, it appears to be a theory that is not tied to any particular legal system or constitutional tradition. In fact, Allan in the preface of *Constitutional Justice* claims that it is “an essay in general constitutional theory” by which he means that the book is about “the basic principles of liberal constitutionalism, broadly applicable to every liberal democracy of the familiar Western type” (2001, p. vii). Put differently, this general constitutional theory shows that there is a “natural unity” between the constitutional governments of Western democracies⁸⁴. But, as he recognizes, the book is really built upon the constitutional law of certain common law jurisdictions (esp. Britain, Australia, New Zealand, Canada and the United States): “these (common law) jurisdictions should, to that extent, be understood to *share* a common constitution, grounded in a

⁸¹ “Beneath the surface of the argument over the meaning or application of specific statutory (or Treaty) provisions lies a debate about basic principles; and we can only identify such principles, and determine their proper scope and application to particular cases, by reflecting on the moral qualities of our system of government. To *understand* a principle is to grasp its value within a larger system of ideas and values –to accord it weight as part of a grander scheme aimed at securing justice and the common good. So legal analysis cannot be detached from the fundamental questions of constitutional theory... The content of law is at least partly a matter of what it ought to be in the light of the implicit ideals and principles that confer on the constitution whatever legitimacy we take it to have”(Allan, 2013, p. 22).

⁸² “We should recognize that theoretical analysis may contribute to constitutional change by affecting the style and categories of legal thought” (Allan, 1993, p. 9).

⁸³ “Legal analysis, then, must necessarily be creative: to analyse is to reinterpret and therefore – within reasonable limits– to re-create” (Allan, 1993, p. 9).

⁸⁴ “A general commitment to certain foundational values that underlie and inform the purpose and character of constitutional government, at least as it has been understood in the Western democracies, imposes a natural unity on the relevant jurisdictions, allowing us to draw close parallels between them and identify common legal characteristics at a fundamental level” (Allan, 2001, p. 4; also 29).

broadly liberal conception of legitimate governance” (2001, p. 5). As a matter of fact, it remains crucial to appreciate that Allan’s common law constitutionalism started out first as a theory of the legal foundations of British constitutionalism and that, in this sense, there is a particular common law conception that underlies Allan’s general conception of constitutional theory. As he states in one passage, his constitutional theory is “an interpretation of the rule of law which reflects the idea of constitutional government as it pertains (primarily) to the British polity” (1993, p. 22). In fact, as any interpretative constitutional theory –Allan recognises⁸⁵– must focus on actual institutions and cannot simply become an ideal constitutional theory, one might understand why Allan previously entertained considerable doubts about the very possibility of a truly general constitutional theory⁸⁶.

3. British constitutionalism and the common law constitution

Any study of the subject, Allan contends, must start with a discussion of AV Dicey as he was the first to acknowledge “the importance of expounding a constitutional philosophy” (1993, p. 20). “Dicey’s work laid the foundations of a theory of British constitutionalism” because he was wise enough “to seek an interpretation of the rule of law which reflected the traditions and peculiarities of English common law” (1993, pp. 2, 20). Dicey’s work remains so central to the field, indeed, that competing readings of his writings reflect the larger questions that animate theoretical controversy in public law⁸⁷. While conventional readings of Dicey underscore the legal positivist who affirmed the doctrine of parliamentary sovereignty and the distinction between the law and convention, Allan intends “to defend a different Dicey –the constitutional theorist struggling to escape the shackles of the Hobbesian authoritarianism he learned from Austin” (1993, p. 2). This different reading is built upon the premise that “Dicey’s doctrine of the rule of law, with its emphasis on equality and civil liberties, seems a better starting point than parliamentary sovereignty” (1993, p. 2) or, as he later put it, “a shift of focus to Dicey’s principle of the rule of law serves to place his doctrine of parliamentary sovereignty in its proper context”

⁸⁵ “The constitutional theorist who wishes to offer an interpretation of legal and political practice must necessarily focus on existing institutions; and the contribution of ideal theory, which may recommend quite different arrangements, is therefore likely to be limited” (Allan, 1993, p. 21).

⁸⁶ “It seems doubtful whether it is possible to formulate a theory of the rule of law of universal validity –which might serve as a model for all legal systems (or even all the Western democracies) and at the same time escape the opposite extremes of formal legality and substantive interpretations of justice. But it does not follow that we cannot seek to elaborate the meaning and content of the rule of law within the context of the British polity –exploring the legal foundations of constitutionalism in the setting of contingent political institutions” (Allan, 1993, p. 21).

⁸⁷ “The continuing debate over Dicey’s endeavour is a feature of the larger terrain of theoretical controversy that, to a significant degree, constitutes our public law” (Allan, 2013, p. 11).

(2001, p. 17). Actually, Allan claims that the “great influence” of Dicey’s *Law of the Constitution* rests on his “firm grasp” of a “fundamental idea”, namely, Dicey’s realisation that within British constitutionalism “the rule of law meant essentially the rule of common law” (1993, p. 4)⁸⁸.

In the British tradition it is the common law that which embodies the principles of the rule of law and, thereby, the core of constitutionalism. This why it could be argued that British constitutionalism is the rule of ordinary common law and that the British constitution is a common law constitution. On this account, Dicey’s rule of law captures the three fundamental features of the British constitution that make it a common law constitution: [1] the independent constitutional role of the judiciary, [2] the superiority of the common law over legislation and, finally, [3] the constitutional preeminence of ordinary law. It is important to analyse each of them in more detail as they encapsulate, according to Allan, the institutional, structural and substantive elements of the legal foundations of British constitutionalism.

First, given that the common law is judge-made law, the judiciary has been given pride of place in the British constitution: “the central role of the common law in the constitutional scheme placed unique responsibility on the shoulders of the judges of the ordinary courts” (1993, p. 4). As Dicey saw earlier, individual rights that in Continental countries are protected by written constitutions, in England were inductions or generalisations drawn from decisions of ordinary courts and, in this sense, “the constitution was the result of the ordinary law of the land” (1993, pp. 4–5). This, in turn, means that the common law constitution cannot be institutionally based only upon the sovereignty of parliament. Once the constitutional role of the judiciary is made clear, “we discover the dual nature of sovereignty in the British constitution, properly understood” (2001, p. 13). One basic task of a theory of the British constitution, thereby, is to find “an appropriate reconciliation between the legislative sovereignty of Parliament, as the supreme law-maker, and the legal sovereignty of the courts, as the final arbiters of the law in particular cases” (2001, p. 3). Allan’s solution relies on the common law’s “own conception of judicial independence” (2001, p. 9): the courts, he claims, are servants of the constitutional order as a whole not of legislation or the legislature (2001, p. 3, 2013, p. 28).

⁸⁸ “In the absence of a higher ‘constitutional’ law, proclaimed in a written Constitution and venerated as a source of unique legal authority, the rule of law serves in Britain as a form of constitution. It is in this fundamental sense that Britain has a *common law constitution*: the ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law. If important liberties are given protection, and standards of justice and fairness accepted and upheld, it is ultimately because –and largely to the extent that– they find expression in the common law” (Allan, 1993, p. 4).

The difficulty in appreciating this fundamental idea has its origins, Allan remarks, in the failure to understand the subordinate role of legislation –and, correlatively, the primacy of the common law– within the constitutional order, something that Dicey saw clearly but which has since become counter-intuitive (1993, p. 5). It is counter-intuitive because, as it is well known, it follows from the doctrine of parliamentary sovereignty that common law rules may be abrogated by statutes. Nevertheless, it is the case that “the primacy Dicey accorded the common law reflects our basic constitutional arrangements much more closely than is usually understood” (1993, p. 10). The prior constitutional role of the common law over legislation, Allan argues, is expressed in two different ways. On the one hand, the doctrine of parliamentary sovereignty itself –which gives legislation its force– is nothing but a “creature of the common law and whose detailed content and limits are therefore matters of judicial law-making (It could, hardly, without circularity, be a doctrine based on statutory authority). Parliament is sovereign because the judges acknowledge its legal and political supremacy” (1993, p. 10). On the other hand, for all its “intrusive impact” in modern law and in almost “all fields of government and public affairs”, legislation remains “inferior... as a source of constitutional law” because it supposes specific interventions in a pre-existing corpus of general principles that are embedded in the common law and give the legal order its overall coherence and structure. In contrast to the common law, “statute is necessarily more piecemeal and technical” (1993, pp. 10–1). Legislation might well “supplement” or “overturn” common law principles “in specified classes of cases”, but “what it cannot do is displace the common law by providing a rival vision of the constitutional order” (1993, p. 11).

The reason for this lies in the fact that legal principles cannot be enacted nor reinforced by enactments: a principle derives its force and weight by an “intrinsic appeal to reason” and, thereby, cannot be a matter of a previous decision or assertion (1993, pp. 81–4). Whereas statutes are a matter of “enacted rules” and acts of will, the common law is a matter of “general principle” and dictates of reason⁸⁹. The common law, Allan argues, “is a *construction of reason*” (2013, p. 81). This is why statutes, in contrast to the common law, cannot be extended or applied by analogy: in accordance to a basic premise of public law, statutory powers –and, more generally, any statutory limitation to individual liberty– cannot

⁸⁹ “Whereas statutes operate by means of fiat, expressing the parliamentary will, the common law enjoins a process of reason. Subject only to the doctrine of precedent, it brings demands of principle –with all its varying degrees of weight– directly to bear on the facts of particular cases” (Allan, 1993, p. 94).

be extended beyond the words of the relevant statute (1993, pp. 81–4)⁹⁰. Statutes do not “authorize any further encroachment on traditional liberties, even by way of consistency” (1993, p. 83).

The common law is a superior source, furthermore, because it constitutes the necessary context of statutory interpretation. The common law, it is argued, is a “framework into which legislation must be fitted”⁹¹ such that the common law –and the values and principles it embodies– “must govern the interpretation of statute”⁹². Expressed with a somewhat different nuance the thesis is that it is “the courts’ responsibility” to interpret and apply statutes “in the spirit of the rule of law” (2013, p. 36). The argument is developed in three steps: [1] the application of statutes to particular cases is an interpretative exercise that requires the interpreter (e.g. via presumptions of legislative intent⁹³) to construe the particular statutory rule in accordance to its broader constitutional context; [2] this broader constitutional context is constituted by a corpus of general principles –especially among them the principles of the rule of law– that are embedded in the ordinary common law; [3] the courts in performing their essential interpretative task, in consequence, must apply statutes in a reasoned and reflective manner undertaking when necessary a creative adaptation of a statute in order to make it adequate to the requirements of the rule of law (and, mainly, to the relevant constitutional rights) in the particular circumstances of the case at hand⁹⁴. As Allan sums up, on this reading, Dicey’s rule of law “is closely connected to the substance of the common law, which is a framework of legal principles and values amounting to an enduring constitution –a common law constitution

⁹⁰ “The whole of our public law, in particular, is premised on the view that the statutory powers of officials and public authorities are confined by the words of the relevant statute, properly construed” (Allan, 1993, p. 82).

⁹¹ “Although the rules of common law are subject to legislative alteration and abrogation, there is an important sense in which the common law is superior to statute. As a body of evolving principle, the common law provides stability and continuity. Its settled doctrines and assumptions, though always open to reconsideration and challenge, constitute a framework into which legislation must be fitted” (Allan, 1993, p. 79).

⁹² “The common law embodies principles of equality and reasonableness, and traditional conceptions of individual rights, which –within appropriate limits– must govern the interpretation of statute” (Allan, 1993, p. 12, *vid.* 2001, p. 18).

⁹³ i.e. “well-established presumptions of legislative, which impose necessary, if limited, constraints on majoritarian government in the interests of liberty and equality, and in defence of individual rights and expectations” (Allan, 1993, p. 12; also 79).

⁹⁴ “Even the smallest departures from literal meaning will undermine judicial subservience to Parliament by acknowledging the scope for creative adaptation. Courts that attempt a reconciliation of public interests in the context of a particular case display a constitutional independence that denies such subservience: taken seriously, the idea of fundamental rights must qualify the nature and scope of legislative supremacy. When it is understood that judges are primarily servants of the constitution or legal order, rather mere agents of the legislature –or a legislative majority– their treatment of legislation will be reasoned and reflective, attuned to all the circumstances in which public power is employed or individual rights curtailed” (Allan, 2013, p. 28).

that provides the source of parliamentary supremacy and the context in which Acts of Parliament are construed and applied” (2013, p. 32).

The realisation that the common law –viz. the ordinary law of the land– constitutes a superior source within the constitutional order points to a third fundamental feature of the common law constitution that was also captured by Dicey’s rule of law, namely, the constitutional priority of ordinary law. The realm of ordinary law has pre-eminence in the constitutional order because “private law”, Allan argues, “constitutes the ground rules of ordinary social cooperation and, together with the criminal law, provides the basis of our ordinary liberties” (1993, p. 127). With the recognition of the “constitutional pre-eminence” of ordinary law, what comes to light is –as Allan remarks following Hayek– the “special role of the common law as itself constituting the basic order of civil society” (2001, p. 33). Put differently, this pre-eminence of ordinary law “derives from the priority traditionally given by the common law to civil society over formally constituted political authority” (2001, p. 10) and, consequently, it has momentous consequences for public law. If civil society –viz. ordinary social cooperation as legally structured by private law– has priority over the state and its authority, it follows that “it is a requirement of the rule of law that government and public authorities should respect the ordinary private law” (1993, p. 127)⁹⁵.

A characteristic manifestation of the rule of law principle of “equality before the law”, the subjection of both public authorities and private citizens to ordinary law is what really underpins Dicey’s rejection of administrative law, which has been so often “misunderstood” (1993, p. 5). Following cues from Hayek’s work, Allan reelaborates this aspect of Dicey’s rule of law by insisting on the observation that, within the British tradition, constitutional law is a “superstructure erected over a pre-existing system of law” whose primary function, in fact, is “to organise the enforcement of that law”. The “particular dignity and fundamental character” constitutional law is usually “exaggerated” (1993, p. 6). Therefore, Diceyan insistence on both the priority of ordinary law and a conception of legitimate public authority as primarily dedicated to the enforcement of the legal framework of ordinary liberty (i.e. private law and criminal law) are two sides of the same argument⁹⁶.

⁹⁵ “The constitutional status of the ordinary common law, marking the subservience of the state to an independent order of civil society, is reflected in the general principle that in fulfilment of their functions government officials and public authorities are subject, at least *prima facie*, to the normal rules of private law” (Allan, 2001, p. 42).

⁹⁶ “Dicey’s well-known emphasis on the equal subjection of public official and private citizen to the ‘ordinary law’, administered by the ordinary courts, reflects the constitutional priority of private law –a vision

Yet, as Allan recognises, “it is neither possible nor desirable, in practice, to limit government to the enforcement of rules of private and criminal law: coercive powers are often rightly used to accomplish legitimate public ends” (2001, p. 36). This explains why Allan takes as another primordial task of constitutional theory “to offer an account of the separation of powers that accommodates the exercise of government beyond the ordinary realm of private law” (1993, p. 6). Allan’s argument is in three steps: [1] the constitutional pre-eminence of private law implies that “departures” from ordinary law, such as “special” administrative powers, are to be subjected to the limitations derived from the rule of law, [2] this is why “modern administrative law has recognised the need for general principles of law which... serve to constrain the exercise of administrative powers” (1993, p. 7), [3] which depends, in turn, on the existence of an extensive judicial review of administrative action that matches with the extension of the discretionary powers that a modern government requires⁹⁷.

In conclusion, Allan’s particular conception gives pride of place to the courts within the British constitution and, consequently, two primordial tasks of the constitutional theorist are to conciliate the exalted constitutional role of judiciary with a sovereign legislature and to accommodate the existence of an expansive administration with special powers as against the constitutional primacy of ordinary law. As it will be seen later on, Allan finds the first clues to the answer in one of the first principles of the rule of law, namely, the separation of powers which requires respectively: the assertion of the legal sovereignty of independent courts and the existence of an extensive judicial review of administrative action. Ultimately, it is the place and function of the judiciary within the constitutional order –this basic institutional dimension– that which ensures the maintenance of the whole structure and content of the common law constitution⁹⁸.

This amounts to a neo-Diceyan (and not Diceyan *simpliciter*) view because is based in a selective reading of Dicey, that is, one that is centred on his doctrine of the rule of (the common) law and the role of ordinary courts, displacing his views on Parliamentary

of the state as, first and foremost, upholder of rules intended to secure the equal freedom and independence of every citizen” (Allan, 2013, p. 32).

⁹⁷ “Many readers will instinctively recoil from a doctrine which places so much trust in the judges, apparently so dependent on the wise exercise of judicial power. It seems necessary, however, to match executive discretion with judicial discretion. The discretions are complementary, rather than opposed; and exercise of the latter, if not the former, must be fully reasoned and open to public scrutiny. Modern government cannot be entirely conducted within the constraints of purpose-independent general rules. And the scope and style of judicial review –if it is to constitute a genuine protection from abuse of executive power– must reflect the discretionary nature of contemporary government” (Allan, 1993, p. 8).

⁹⁸ “The constitutional authority reserved to the superior courts ensured the supremacy of a consistent and coherent corpus of common law, binding on private citizen and public official alike: its content provided the fundamental principles of legitimate governance with which the executive must comply, and which governed the interpretation and application of statute” (Allan, 2001, pp. 17–8).

sovereignty and constitutional conventions. On Allan's account, "Dicey is himself an interpretativist, as much a natural lawyer as legal positivist" (2013, p. 11). Dicey was, he argues, an interpretativist *avant-la-lettre* and the usual ("superficial") reading that sees him merely as a legal positivist "overlooks the interpretative dimension to Dicey's analytical endeavour", viz. it does not recognise that "the analytical structure obscures a deeper interpretative substructure" (2013, pp. 51, 53). If this substructure is not uncovered, even it was unknown to Dicey himself⁹⁹, it is not possible to understand why it became such a towering figure within British constitutionalism¹⁰⁰. Allan's interpretive reading of Dicey, therefore, construes him from the general principles and political ideals of a larger general theory of constitutionalism –Dicey's rule of law becomes intertwined with the rule of law– and, thereby, the particular conception is fused into the general conception. All this supposes a relatively extensive revision of other elements of Diceyan constitutional theory.

4. Reconsidering parliamentary sovereignty

Allan's reinterpretation of Dicey helps to show that many of the problems of contemporary British constitutionalism have their origins in taking "him too literally, overlooking the core of good sense" in his writings that is hidden "beneath some more questionable dogmas. Potentially the most serious of these dogmas –and the most awesome– is that of parliamentary sovereignty" (1993, p. 1). In fact, the most revisionary aspect of this reading concerns the doctrine of parliamentary sovereignty, traditionally considered as a hallmark of both the British constitution and Diceyan constitutional theory¹⁰¹. The impossibility of reconciling Dicey's rule of law with his parliamentary sovereignty should make one appreciate –we are told– that there is no alternative but to discard his positivistic assumptions and reinterpret him to render his constitutional vision "consistent and coherent"¹⁰². Moreover, Allan claims that the "initial contradiction"

⁹⁹ "If Dicey did not know he was engaged in an interpretive endeavour along these lines... we are entitled to distinguish the text from its author's self-understanding" (Allan, 2013, p. 54).

¹⁰⁰ "Dicey's remarkable appeal and influence, making his work an almost indispensable reference point for all succeeding writers on the constitution, owe a great deal to what is implicit rather than explicit in his argument. Despite his dubious assertions of 'legal fact', suggesting a purely external, descriptive stance, Dicey's constant appeal to general principles and political ideals points to a different approach. Beneath the apparently neutral and descriptive style of discourse lies something closer to the interpretative viewpoint, seeking to integrate legal custom or practice with the political values capable of conferring legitimacy" (Allan, 2013, pp. 50–1).

¹⁰¹ "Dicey's conception of legislative supremacy has become so ingrained amongst English lawyers... that it is hard to question his doctrine without appearing to lose touch with practical reality. Until very recently, it was almost unthinkable that the courts would ever refuse to apply an Act of Parliament; and attempts to indicate necessary exceptions to the doctrine were understandably thought to be somewhat unreal, addressing 'improbable extremes'" (Allan, 1993, p. 16).

¹⁰² "Dicey's failure to provide a consistent and coherent theory of the constitution was mainly attributable to his adherence to Austinian legal positivism. It was ultimately impossible to reconcile his emphasis on the rule of law with the unlimited sovereignty of Parliament" (Allan, 1993, p. 16).

between the rule of law and parliamentary sovereignty derives from superficial readings that fail to notice that “the route to reconciliation is indicated by Dicey himself” and that, in this sense, it can be shown that he was “himself an interpretativist, as much natural lawyer as legal positivist” (2013, pp. 11, 36). In order to justify this counter-intuitive thesis, Allan deploys a complex chain of arguments.

The first argument starts from the assertion that the rule of law doctrine is a “better starting point” than parliamentary sovereignty, i.e. that the latter must be read under the light of –and as subordinate to– the former (1993, p. 2). To the extent that constitutionalism is, in general terms, incompatible with any sort of absolute power, one cannot but conclude that there is “an ultimate contradiction between unlimited legislative supremacy and constitutional government” (1993, p. 18). A constitutional government is one that is subjected to certain normative constraints (i.e. the rule of law principles and fundamental rights). Any public power that is not normatively limited, in consequence, would amount to a “tyrannical” or “totalitarian” –viz. illegitimate– power¹⁰³. Within a constitutional polity, consequently, the judge “by the nature of his office” must be guided first and foremost by the principles and values of the rule of law, viz. the judge –and after him the constitutional theorist– must exhibit an unqualified commitment to the rule of law. This is the rationale behind “the widely accepted view that, for the judge, there can be no compromise with the rule of law” (1993, pp. 27–8). Put in another way, if there is something absolute in constitutional terms –imposing an unqualified duty to be followed– that is the rule of law¹⁰⁴. But if the allegiance to the rule of law is unqualified, it follows that the judge’s “adherence to legislative supremacy must, if rational, be a qualified one” (1993, p. 18).

This has important consequences for the constitutional understanding of democracy. Due to the representative –or “majoritarian”– character of Parliament, “the legal doctrine of legislative supremacy expresses the courts’ commitment to British parliamentary democracy” (1993, p. 282) and, therefore, the unqualified commitment of the judge to rule of law means that the judge’s commitment to democracy must also be a qualified commitment¹⁰⁵. Expressing it in Dworkinian terms, Allan intends to displace a

¹⁰³ “The denial of those constraints... amounts to the abandonment of constitutionalism in favour of [a] ‘tyranny’” (Allan, 2001, pp. 139–40).

¹⁰⁴ “It is the rule of law that is truly absolute, constituting the basis of the legal order within which legislative sovereignty must be located and defined” (Allan, 2001, p. 201).

¹⁰⁵ “At the heart of the rule of law ideal is a conception of adjudication which treats legislation as the outcome of a democratic process whose legitimacy is ultimately dependent on its respecting minimum standards of justice. A judge defers to the popular will, as represented by statutes duly enacted, because his

simplistic “majoritarian” conception of democracy, that takes as democratic any majoritarian decision, by a “constitutional” conception that incorporates the normative preconditions (i.e. the rule of law principles) of authentically democratic decisions (2001, pp. 24, 262).

A constitutional understanding of the normative conditions of both legitimate public authority and the principle of democracy necessary leads to the rejection of the dogma of absolute parliamentary sovereignty as a tenet of British constitutionalism. Otherwise, “if there were ultimately no limits to legislative supremacy, as a matter of constitutional theory, it would be difficult to speak of the British polity as a constitutional state grounded in law” (1993, pp. 68–9). In the context of the British constitution this is further ratified by the realisation that legislative sovereignty is nothing but a common law doctrine, viz. its existence and content have evolved from judicial recognition as it could not without circularity be based on statutory foundation (1993, p. 10). The scope and nature of legislative supremacy, as with any other common law doctrine, is a matter to be determined by reasoned judicial deliberation “conducted in the light of its purpose and value within the overall constitutional scheme” (2001, p. 139). Accordingly, the courts should be seen “as servants of the constitutional order as whole rather than merely as instruments of a majority of elected members of the legislative assembly” (2013, p. 28).

This line of thought has come to be captured by the idea that sovereignty within the British constitution has a “dual nature”, that there is a political sovereignty that resides in Parliament as supreme law-maker and a legal sovereignty that resides in the courts, which are the final arbiters in the determination of the law (2001, pp. 3, 13). Both forms of sovereignty constitute together the twin foundations of British constitutionalism (2001, p. 201). The legal sovereignty of the courts has hitherto been obscured, however, by overdrawing the distinction between the application and interpretation of statutes. According to the “positivist orthodoxy in constitutional theory”, there is an “absolute” duty to apply a statute –such that once a statute is identified as applicable to a particular case, it must be applied with no exceptions, no matter how contrary this might be to the requirements of justice– while, at the same time, statutes may “be legitimately *interpreted* so as to accord, as far as possible, with fundamental concepts of justice” (1993, p. 266). The problem is that the distinction between interpretation and application is at best a matter of degree. When a judge interprets strictly or narrowly a statute in order to respect some principle of justice –normally through the appeal to presumptions of legislative intent– it

conception of political morality includes (we might reasonably suppose) a commitment to democracy. But it is necessarily a qualified commitment” (Allan, 1993, p. 12).

follows that the judge is not applying the statute to some range of particular cases and in the extreme this might almost exclude its application to most cases¹⁰⁶. The more important the principle of justice involved, the stronger the presumption of legislative intent will be and the narrower the range of application of the statute will become. It follows, then, that in the limiting case the judge would have to deny the statute “any application at all” (1993, p. 267). This leads Allan to the startling conclusion that there is no need for the establishment of “a constitutional court with extended powers of judicial review” for the courts could just deny the statute’s application without invalidating it¹⁰⁷.

This contention seems problematic, nevertheless, if one considers that any judicial scruple to apply a –or restrictive interpretation of– a statute on the grounds that it conflicts with some requirement of justice expressed in a presumption of parliamentary intent may always be overcome by an clear or unequivocal expression of contrary legislative will. Allan counters this by arguing that if the application of a statute amounts to an infringement of a constitutional principle that compromises its integrity, then the expression of legislative will can never be taken to be as sufficiently clear or unequivocal¹⁰⁸. A democratic legislature must always be taken intend –and be presumed to intend– to respect basic constitutional values, even if that means, ultimately, not to apply a statute in a particular case¹⁰⁹.

Some have tried to save the doctrine of absolute legislative sovereignty by arguing that in these extreme situations judges face a conflict between the legal duty to apply the statute and the moral duty to disobey outrageously unjust statutes (2001, p. 231). Allan objects that such a view suggests that judges are acting “unlawfully” when resisting violation of fundamental requirements of justice and counters it by offering two different sets of argument. First, recalling his view of statutory interpretation, he argues that the “subservient status” that such view assigns to the judiciary is incompatible with their active

¹⁰⁶ “A restrictive interpretation of statute, in defence of individual rights, necessarily limits the field of its operation; and the *most* restrictive construction may reduce it to practical impotence” (Allan, 1993, p. 17)

¹⁰⁷ “It would be sufficient for the court to deny the statute’s application to the particular circumstances of the case: there would be no need to make a declaration of invalidity. The result, however, would be much the same, the style of interpretation reflecting scale of affront to constitutional values accepted as fundamental” (Allan, 1993, p. 285). On the broader similarity between constitutional adjudication and common law adjudication, see Allan (1993, pp. 156–7).

¹⁰⁸ “It is reasonable to suppose that the more serious the infringement of settled principles, the clearer and more specific such provision must be, and that in the case of principles whose integrity is intrinsic to the constitution, as a coherent scheme of just governance, no statutory language would ever prove sufficiently clear” (Allan, 2001, p. 145).

¹⁰⁹ “Even the most egregious violation of fundamental rights, if sanctioned by a ‘literal’ construction, may properly be averted by recourse to the most important presumption of legislative intent –that Parliament intends the rule of law, as the basic charter of a free society, to be preserved. That presumption is what, in the end, distinguishes constitutionalism from totalitarianism, including the dictatorship of the majority, and enables us to square the general intent with the specific application”(Allan, 2001, p. 207).

constitutional role as interpreter of law in of cases of ordinary injustice that call for restrictive interpretation (2001, p. 231, 2013, p. 28). The other strand of argument, in contrast, is based on the different idea that these cases pose the –until then unexamined– problem of judicial resistance, which connects with the more general constitutional question of civil disobedience¹¹⁰.

The argument springs from the very idea of a constitution in a seemingly straightforward manner: as all forms of public power (no matter how wide) are granted by the constitution, it follows that all public power must be exercised respecting the principles on which the constitution is founded¹¹¹. A statute that violates “constitutional essentials”, in consequence, must be “empty” as it intends “to destroy the constitution from which the law-making powers derives” (2001, p. 219). This implies, further, that in cases like this “the judge’s resistance would be lawful, of course, because he would be acting in defence of the constitution against the attempted usurpations of the legislature” (2001, p. 220). By examining the limits of the duty of the judge (and the citizen) to obey statutes the argument shows that there cannot be a real conflict between the legal and the moral duties of the judge, but it also points further to a revised conception of law and legal validity, one that takes into account the constitutional context within which all public power must be exercised in Western liberal democracies.

The gist of the claim can be summed up by saying that as all constitutions suppose the subjection of state powers to constraints of political morality (e.g. rule of law principles), then the legitimate –or “constitutional”– exercise of legislative power must mean that the enacted law is not only legal but also morally obligatory, such that “questions of legality and legitimacy cannot be separated” (2001, p. 218). In this sense, given the appropriate constitutional frame, legal obligations are at the same time moral obligations¹¹². This revised notion of legal obligation, which goes beyond the mere satisfaction of formal conditions of validity, leads to a “constitutional conception of the law” which imposes certain “moral conditions the exercise of state power” such that the law is morally “entitled to the citizen’s assent”¹¹³. In a constitutional democracy, in other words, the laws present

¹¹⁰ “What is missing here is an account of the constitutional basis of judicial ‘disobedience’” (Allan, 1993, p. 17).

¹¹¹ “Since even the widest powers must be conferred by a constitution, which of course identify the sovereign and define the means whereby its will may be expressed, legal validity ultimately depends on compliance with basic constitutional values or assumptions” (Allan, 2001, p. 219).

¹¹² “Legal obligation is therefore interpreted as a species of moral obligation; the nature and limits of the state’s entitlement to obedience are questions of moral judgement that are always directly relevant the identification and interpretation of the content of the law” (Allan, 2001, p. 6)

¹¹³ “Our concept of ‘law’, intrinsic to the constitutional order, imposes certain moral conditions on the exercise of state power. Though very modest conditions, they underpin the general understanding that,

themselves as being legitimate enactments for the common good and, thereby, morally binding. It is for each citizen to judge in conscience if that is the case and, consequently, to decide if a particular law is entitled or not to obedience, i.e. to take it as valid or invalid¹¹⁴. The rule of law in the last resort depends, therefore, on the moral integrity of each citizen – and judge– who must defend its principles before any sort of arbitrary power¹¹⁵ and this entails, more generally, that it is “always a matter of conscience, not merely how legislation should be interpreted... but ultimately whether it should be applied at all” (1993, p. 130). This concludes in a new understanding of the judges’ (and the citizen’s) duty of “fidelity to law” such that a judge should, in accordance to the rule of law, affirm “the citizen’s justified resistance” when is necessary to protect his or her moral integrity¹¹⁶.

The central place that this constitutional theory gives to individual judges and citizens is significant. The individual judge or citizen –or better, of his or her “moral conscience”– is made the fulcrum of constitutionalism, where the “necessary connection” between both law and justice, legal and moral obligation, is operationalised: it is through the individual moral judgement of citizens and judges that the requirements of justice imposed by the rule of law are ensured in the interpretation and application of the law¹¹⁷. Although Allan believes that the legal and constitutional order –and especially the common law– should be seen as the repository of the moral values of the community, for him it is in the moral integrity of individuals that one finds the real foundations of constitutionalism and political justice¹¹⁸. As he sums up this point, the “common law does embody popular morality” but the common law does it only through the moral conscience of individual

subject to compliance with these requirements, the law imposes a moral obligation of obedience... When the law demands obedience, it asserts that the relevant obligation is morally justified, consistent with the common good, and therefore entitled to the citizen’s assent” (Allan, 2001, p. 218).

¹¹⁴ “The rule of law attributes responsibility for the identification of ‘valid’ law, in the last analysis, to the conscience of the individual citizen” (Allan, 2001, p. 7).

¹¹⁵ “The final judge of legality or constitutionality is the conscience of the individual citizen or official, whose personal integrity is ultimately what preserves the rule of law from degenerating into the exercise of arbitrary power” (Allan, 2001, p. 220).

¹¹⁶ “It is implicit in the rule of law, if rarely understood, that purported laws or policies that violate the fundamentals of constitutional justice disturb no rights and impose no obligations. In repudiating such measures, when it judges necessary, the court affirms the citizen’s justified resistance, vindicating his own reading of the constitution –an interpretation consistent with the citizen’s moral integrity that the rule of law protects and celebrates” (Allan, 2001, p. 160).

¹¹⁷ “It is the moral judgement of both private citizen and public official that in the last analysis ensures that the application and interpretation of the law in particular cases meet the standards of justice that the rule of law requires” (Allan, 2001, p. 283).

¹¹⁸ “The ultimate guarantee of justice in any political community is always the willingness of some members to repudiate oppressive laws on the ground of principle, whether or not they are themselves affected. Their independence of mind and firmness of resolve, invoking principles widely understood and embedded in the political culture, gives them a role analogous to that of a constitutional court, or its common law equivalent: they insist on conformity to law as, in accordance with their best judgement, it should be understood in the light of the fundamental values of the community” (Allan, 2001, p. 312).

judges: “popular morality contributes to the content of the common law in so far as it is filtered through the critical morality of particular judges” (1993, pp. 102–3).

5. The (re)formation of modern administrative law

Allan’s reconsideration of parliamentary sovereignty under the light of the rule of law has implications for its main “offspring”, the “ultra vires doctrine of English administrative law” (Allan, 2001, pp. 207–8). This doctrine portrays judicial review of administrative action primarily “as a means of ensuring compliance with legislative will” (1993, p. 17)¹¹⁹. From his general conception of constitutionalism and the rule of law, he intends to articulate an alternative conception of the foundations of judicial review and administrative law more generally, which supposes a complete overhaul of the doctrinal principles and distinctions within the field. The most notorious of this sweeping re-elaboration of administrative law is the substantial increase of judicial supervision it involves both in terms of the scope and intensity of review.

If the rule of law requires that governmental action be constrained by means of general laws, it follows then that (to have any real content) it entails an institutional distinction between executive, legislature and judiciary, viz. “a government which could make laws at its own pleasure, and determinate the extent of its own infractions of the laws, would not be a government under the rule of law” (1993, p. 22)¹²⁰. Further, if the law is to constitute a “bulwark” between governors and the governed, shielding the rights of the individual from those who hold political power, the law-courts must play a fundamental role in the defence of these rights (1993, p. 65). Allan intends, upon these premises, to elaborate a “rights-based approach to public law” (1993, pp. 7, 223), that is to say, “a conception of public law as protecting rights” understood as “individual entitlements which fetter the exercise of government powers” (1993, p. 9). One important aspect of this rights-based approach should be emphasized at the outset. Given that public law is conceived primarily as a limit to political power for the protection of the individual, rights

¹¹⁹ As he sums up the controversy: “The whole doctrinal basis of judicial review of administrative (or executive) action is contested by writers with varying understandings of the relationship between parliamentary sovereignty, on the one hand, and the rule of law, on the other. In its emphasis on the central place of legislative intention, the ultra vires doctrine seems a natural fit with absolutist conceptions of sovereignty; but its detractors give pride of place to common law doctrine, reflecting ideas of justice and fairness drawn from considerations of morality rather than authoritative political decision or instruction” (Allan, 2013, p. 3).

¹²⁰ The separation of powers is, in fact, one the “first principles” of the rule of law (Allan, 2001, pp. 31–7).

within this conception are to be theorised as “trumps” (or counter-majoritarian)¹²¹ and as being negative rather positive (i.e. as rights against the state)¹²². Let’s analyse the main elements of this argument in more closely.

First, Allan argues, once it is accepted that public law is “primarily concerned with the protection of individual interests”, it follows that the *raison d’être* of judicial review is first and foremost to protect individual rights against the abuse of public power (1993, p. 234)¹²³. As judicial supervisory powers should encompass no less than that which is required for this fundamental task¹²⁴, any expansion of administrative powers should be followed an expansion of the scope of judicial review in order “to match executive discretion with judicial discretion” (1993, p. 8). The necessity for this becomes evident once one realises that a distinctive feature of administrative discretion is the “intrinsic danger of arbitrary treatment that it carries”, such that discretionary executive action can only be tolerated as a “necessary evil” when it is subjected to the law under the supervision of independent courts¹²⁵. In fact, “despite Dicey’s notorious antipathy to the welfare-regulatory state”, we are told, “he was right to identify the enlargement of executive power as a potential threat to the rule of law. Widely framed or unregulated discretion creates a serious danger of arbitrariness” (2001, pp. 16, 125).

In the context of British constitutionalism, this general conception leads, on the one hand, to a particular understanding of the “law” to which administrative action is subjected and, on the other, to a revision (if not the displacement) of the doctrinal understanding of judicial review. British common law constitutionalism embraces a

¹²¹ Rights are trumps or counter-majoritarian in the sense that the “point of rights” is to “insulate the private citizen from the exercise of public power based on majority (or utilitarian) preference and prejudice” (Allan, 1993, p. 103; see also 7, 54-5)

¹²² “As the guardian of individual autonomy, the rule of law is primarily the guarantor of negative rights... negative rights against state interference are to be distinguished from such positive rights as those to certain standards of education or health provision, or to a clean or safe environment. Choices about positive rights are necessarily political, suggesting a contrast between the ‘morality of duty’ enforced by the law and the ‘morality of aspiration’ that informs the democratic process” (Allan, 2001, p. 280)

¹²³ Is difficult to exaggerate the individualistic vein of this theoretical frame. In one explanatory note Allan goes as far as to say that “the term ‘public right’, though commonly used in this context, is a misnomer in the sense that a right, if genuine, is essentially an individual interest protected even at the cost of the public interest: it acknowledges a claim *against* the majority or the general welfare based on the special importance of the individual interest it asserts” (Allan, 1993, p. 224) Nevertheless, he uses the expression “public law rights” in many places within his writings and even defines public law “as a system of public law rights” (Allan, 1993, p. 7)

¹²⁴ Thus, “an applicant is entitled to invoke the remedy of judicial review whenever his rights in public law are threatened or infringed by a public authority” (Allan, 1993, pp. 212–3)

¹²⁵ “It is the distinguishing feature of an executive agency, by contrast [to courts], that it works carries an intrinsic danger of arbitrary treatment... Discretionary executive action in the interest of the public good as a whole must, then, be accepted as a necessary evil... None the less, the inherent dangers of unfair treatment must be acknowledge and contained; and the executive is rightly made subject to the supervision of independent courts, bound to act on grounds of the general principles of the common law, or constitutional law, that supplement the general rules laid down in legislation” (Allan, 2001, p. 15).

distinctive characterisation of the law to which the administration is subjected, viz. it contains a principle of equality before the law that subjects both private persons and public officials to ordinary law of the land and the ordinary courts (1993, p. 5). As “ordinary law” refers primarily to ordinary private law, this means that the rule of law subjects governmental action to the “normal rules of private law” and, thereby, affirms the “constitutional priority of ordinary private law” (1993, pp. 5–6, 127, 2001, pp. 33, 42, 2013, p. 32). The truth is, however, that contemporary government must go beyond the realm of private law in order to fulfil its legitimate tasks and this is why “modern administrative law has recognized the need for general principles of law which, while they apply only to the ‘public sphere’, serve to constrain the exercise of administrative powers in the interests of justice or fairness to those most directly affected” (1993, p. 7, 2001, pp. 36–7)¹²⁶.

Modern administrative law constitutes a body of “principles of judicial supervision” whose primary aim is to give protection to rights of the individual so as to ensure that government complies with its general duty to treat fairly those citizens that are directly affected by its decisions (1993, p. 181). The rule of law, in this sense, not only concerns specific private law rights or constitutional rights “but the general right to fair treatment at the hands of the state” (1993, p. 212). This general right to fair treatment –which “is the converse of the public authority’s duty to treat him fairly” (1993, p. 197)– derives from the principle of equality –in the sense of “consistent application of principle”– that the rule of law demands, viz. those individuals that are particularly affected by state action have a right to ask for their “treatment at the hands of the state to be justified” (1993, p. 43, 2001, p. 40). The rule of law, in other words, imposes as a condition of constitutional legitimacy a “basic requirement of justification”, subjecting governmental action to what amounts to a “rule of reason” (2001, p. 2)¹²⁷.

This conception of the rule of law –in particular, its principle of fair treatment– has significant consequences for the understanding of the administrative law and, especially, it brings about a remarkable extension of the scope of judicial review, “circumventing” –if not “eliminating”– the best part of the received doctrines on the limits of judicial

¹²⁶ “When special powers are exercised by public authorities they must, when challenged, be shown to serve the public interest; any authorized departures from the ‘ordinary’ private law must meet the special standards of public law, which seeks to limit governmental restrictions of individual autonomy” (Allan, 2013, p. 32).

¹²⁷ “Judicial review of governmental acts and decisions therefore reinforces the requirement of moral justification: it allows the citizen to explain his grievance, by recourse to arguments of fairness and reasonableness, and obliges the state to furnish him satisfactory answers. These procedures and remedies would make little sense unless the government accepted an obligation to explain and justify its actions –an obligation whose satisfaction is a condition of legitimacy of any ultimate resort to force” (Allan, 2001, p. 9, also 85–7).

supervisory powers and in some cases even legislative limitations (2001, p. 213)¹²⁸. Doctrinal demarcations of the boundaries of judicial review –e.g. the distinctions between review and appeal, legality and merits, substance and process, law and convention, rationality and proportionality, etc.– that were traditionally conceived as categorical and exclusive are, on this account, relativized and shown to be “a matter of degree” and “elastic” (1993, pp. 7–9, 185–97, 2013, p. 14). The general requirement of fairness also entails that judicial review will exhibit variable intensity, permitting more “intensive scrutiny of executive action”, depending on the weight of the individual right affected, embracing proportionality as a general standard of review (1993, pp. 173, 188–91, 228–9, 2001, pp. 10, 42, 45, 126, 132–3). Furthermore, the new foundations of judicial review imply that there can be neither an independent theory of justiciability nor an independent theory of standing, because the legitimacy and scope of judicial review is to be determined by the rights of an individual –including the right to fair treatment– not by the nature of the power involved nor there are any grounds of review whose applicability could be differentiated from the interference with individual interests¹²⁹.

This implies, in particular, that the traditional the distinction between laws and conventions and the doctrine of political questions that postulate limits to the “judicial role” by just considering the source or mode of origin of a rule or by abstract classification of matters as essentially political or administrative without taking into account the consequences that in the particular case follow for the rights of affected individuals or the integrity of other constitutional values run against the requirements of the rule of law (1993, pp. 237–63, 2001, pp. 161–87, 2013, pp. 55–87)¹³⁰. More broadly, any type of doctrine whose animating idea “is to forge a division between the (so-called) legal and political constitutions” such as to exclude a sphere of policy-making from the purview of constitutional adjudication or judicial review (2013, p. 77) is incompatible with a rights-

¹²⁸ “The application of a principle of justice or fairness in all the circumstances inevitably circumvents, and ultimately eliminates, narrower rules which unduly circumscribe the court’s jurisdiction” (Allan, 1993, p. 196).

¹²⁹ “A rigorous view of the appropriate ambit of judicial review, limited to deciding questions of individual right, would largely dispense with separate requirements of standing, just as it does with independent doctrines of justiciability” (Allan, 1993, p. 234).

¹³⁰ “When the integrity of the rule of law itself is threatened, artificial barriers to justiciability must certainly be rejected: convention may properly ‘crystallize’ into law whenever the principles of due process and equality demand it” (Allan, 2001, p. 185). “There is no such thing as an ‘essentially political and administrative judgement’, conceived independently of all the circumstances: whether or not there are legal limits, curtailing the scope of discretionary governmental power, is a matter dependent on close analysis, focused on the actual use (or disuse) of the power under scrutiny and its consequences for those affected... Blunt-edged justiciability doctrines, which removes areas of executive powers from judicial scrutiny regardless of the consequences for those affected are inimical to the rule of law” (Allan, 2013, p. 78).

based conception of public law and the constitutionalist pledge against arbitrary power¹³¹. A “genuine public law” is based instead upon a general right to fair treatment that gives an open-ended character to the system of rights protected by the principles of administrative law, duly reflecting the contemporary circumstances of politics and the role of courts as “defenders of the ordinary citizen” against the abuse of public power¹³².

The elastic conception of jurisdiction that Allan elaborates from the general principle of fair treatment (i.e. the requirements of due process and equal treatment) implies such an extension of the scope of judicial supervision that one might wonder whether it poses into question the very separation between executive and judicial power that the rule of law demands. Despite its open and broad character, Allan argues, the “test of justice or fairness” does not blur the differentiation between the administration and the judiciary because it remains “mainly negative in its application”, i.e. it only determines whether a particular decision is unfair in the particular circumstances of the case, not what justice or fairness demand in positive terms or more generally¹³³. Put differently, the supervisory jurisdiction of courts cannot extend beyond matters of principle or right and, therefore, remains focused on the pre-existent and concrete individual rights that are affected in the particular case¹³⁴. This essentially retrospective and particularistic perspective of the law-courts contrasts with the prospective and general orientation of political and administrative authorities, which are focused on that which is desirable as a matter of public policy, in general and abstract terms (1993, pp. 7, 54–5, 231–2, 2001, p. 198).

¹³¹ This is why Dicey’s understanding of conventions, like his doctrine of parliamentary sovereignty, must be ultimately reconsidered: “taken seriously, the law-convention dichotomy, for all its popularity with constitutional lawyers, would deny the possibility of a genuine public law –or at least of public law principles fashioned in response to the growth and evolution of political power” (Allan, 1993, pp. 239, 241).

¹³² “Reflection on the role of the courts as defenders of the ordinary citizen against the abuse of executive power, however, indicates that no such set of rights could ever be exhaustive, even in principle. The circumstances of practical politics, and the infinite variety of (generally legitimate) public projects and purposes, suggest the need to acknowledge a more general, open-ended right to fair treatment at the hands of the state” (Allan, 1993, p. 8).

¹³³ “The court does not primarily determine what justice demands, but whether instead an administrative decision has been *unfairly* applied, or cause *injustice*. The separation of functions between courts and government thereby generates distinct approaches to particular instances. The court’s perspective is rightly different from that of the agency responsible for public policy; and its review jurisdiction imposes constraints on the exercise of power, in the interests of parties adversely affected, without directing its overall objectives” (Allan, 1993, p. 210).

¹³⁴ Simple illegality, therefore, does not by itself entitle a person to invoke the remedy of judicial review: “No one has a general *right* that public bodies observe the law, because such an assertion of rights is meaningless. A citizen naturally expects a public authority to conscientiously perform its duties; but his *right* is a right to fair treatment in its dealings with him. If he thinks that its policies or practices are contrary to the public interest, or contradict the intentions of Parliament –as he conceives them– he must have recourse to the political process. The courts can provide a substitute for political control only at the price of destroying the legitimacy and coherence of judicial review” (Allan, 1993, pp. 223–4), cfr. his discussion on the standing of the, in general, chiefly ideological interest of pressure groups (Allan, 2001, pp. 195–6).

6. Conclusion: the place of moral constructivism

Trevor Allan's theory of public law constitutes without doubt a fine exemplar of moral constructivism. Inspired by the liberal theories of political justice that have flourished since the 1970s, Allan has elaborated a distinctive rights-based conception of the theory of public law. Unsurprisingly, therefore, Allan's theory of constitutional justice exhibits, in contrast to social constructivism, greater levels of consistency and definition in its explanatory aim and argumentative strategies. While social constructivism is flawed by an exceedingly large object of enquiry and a muddled eclecticism in the use of materials and explanatory frames from a wide variety of sources, Allan consistently attempts to elaborate his contribution by revising a traditional account of the field (esp. Dicey's) through the lenses of contemporary writings on political philosophy (e.g. Hayek, Rawls and Scanlon) and normative jurisprudence (e.g. Dworkin, Fuller and Detmold). Moral constructivism also seems better suited than any of its competitors to explain and justify the growing importance of the discourse of rights and common law constitutionalism within British public law in the last few decades.

Moral constructivism, however, is not entirely free from problems of internal consistency in conceptual and methodological terms. There is, first, an unclear interplay and constant shifts within the argument between a general theory of constitutionalism and the rule of law that appeals to universal principles that are inherent to the notion of a constitutional government and to which all Western liberal democracies should be committed to and a particular theory of British constitutionalism and the common law constitution that appeals to a particular (neo-Diceyan) understanding of the rule of law. This produces, secondly, significant problems for the interpretative method that underpins moral constructivism because it is grounded on a distinction between interpretation and invention that assumes, to use Dworkin's terms, that one is able to distinguish, to some degree at least, between requirements of fit and requirements of justification when interpreting a particular practice, however sensitive one might suppose they are to one another in their application¹³⁵.

More problematic are the ways in which moral constructivism defines the boundaries of the subject. As it is primarily focused on the normative limitations to political power that follow from those fundamental individual rights that can be judicially enforced, moral constructivism leaves central questions undertheorised if not wholly unaddressed. To begin with, it ignores the question of the constitution of political authority

¹³⁵ For the argument about the mutual sensitivity of the requirements of fit and justice in their application, see Allan (2013, pp. 340–6).

as it only focus on what are its normative limits. Moral constructivism simply presupposes an already existent public authority and is unable to illuminate what are the conditions of its emergence and maintenance. Further, by concentrating on fundamental rights amenable to judicial enforcement it only thematises negative conditions of political legitimacy, i.e. those rights that public authority must respect (or not violate) in order to remain legitimate. Even if one concedes that the violation of such rights would make public power illegitimate something more is needed to explain what makes it legitimate in the first place (esp. a theory of democracy and modern administrative process).

The lack of a theory of the constitution of political authority and the positive conditions of legitimacy explains why moral constructivism has no theory of what makes legitimate –nor contains even a description of– modern administration, beyond the observation that administrative action pursues or implements the “majority will”, “public interests” or the “common good” (key notions that are left undertheorised). Moral constructivism, in other words, does not give any answer to the question of what is it about contemporary administrative processes that make them (or not) suitable or necessary for the realisation of public interests or the common good. As social constructivism would have us object (chapter 2), a rights-based and judge-centred theoretical approach seems simply incapable of giving any account of the increasingly prominent role of the executive and administrative agencies within contemporary governance nor to illuminate the myriad of normative puzzles raised by the regulatory state¹³⁶. In spite of Allan’s protestations against it, one might wonder whether the contemporary administration and the modern welfare state are more than anything else considered in his public law theory as sources of arbitrary decisions and limitations for individual liberty (1993, pp. 5–7, 2001, pp. 15–6, 21).

The secondary place that democracy has within this account also attest to the lack attention to the questions of the constitution of public authority and the positive conditions of political legitimacy. Democracy, in fact, is more than simply undertheorised on this conception. To the extent that it postulates the priority of the rule of law over democracy and of justice over politics¹³⁷, without offering any substantive argument to justify such an important claim, this leaves entirely unelaborated a fundamental premise of

¹³⁶ In fact, in those occasions that Allan theorises the administrative process is to argue that in those cases in which the administrative officials exercise what are in substantive terms judicial functions the rule of law requires that the exercise of these “quasi-judicial” powers to “conform to similar standards of political independence (from government or party policy influence) and fair procedure”, that is, the exercise of judicial functions by administrative agencies is legitimate “only in so far as such bodies act, for the relevant purposes, as if they were courts” (Allan, 2001, pp. 133–4).

¹³⁷ “Majority rule deserves no special political or constitutional reverence except in so far as it is truly consistent with the values of equal human dignity and individual autonomy: politics, in its ordinary institutional forms, should be the servant of justice rather than its master” (Allan, 2001, p. 25, also 75).

the argument. The only consideration that can be found on this respect is a definitional one, viz. that constitutional government is (by definition) a normatively constrained government and that these normative constraints (again by definition) are those that are imposed by the principles of justice or the rule of law. Furthermore, on this account, not only justice is given priority over democracy but the very value of democracy is said to derive from the former¹³⁸. This explains why from this perspective the purpose of judicial review is not to ensure the democratic credentials of administrative actions (viz. the subjection of the executive to the will of the people expressed by its representatives) but to, once again, subject it to the principles of the rule of law or justice¹³⁹. From these premises, it is unsurprising to read that one might regard the common law and ordinary courts (rather than legislation and parliamentary institutions) as the exemplar of “public reason”¹⁴⁰ and that “common law adjudication is sometimes superior to legislation as a means of resolving questions of justice, even when the latter is preceded by wide consultation to ascertain public opinion and stimulate public debate” (2001, p. 292).

The absence of a proper theory of contemporary administrative process and democratic politics –i.e. the lack of theory of the constitution of public authority and the positive conditions of political legitimacy– might be seen as a significant flaw if one considers that this allegedly modest constitutional theory has very immodest practical political consequences as it endorses a massive transfer of power from the legislature and the administration to the judiciary. It is only to be expected, then, that the premises of this approach and, in particular, the alleged priority of the law over politics and the undertheorisation of democracy and ordinary democratic politics will be seriously questioned both normatively and empirically. It is, as it happens, the normative strand of the critique of moral constructivism that which stirred some public law theorists to challenge it by elaborating a third variation of constructivist public law theory that intends to give a better explanation of the constitutional role of political institutions and the mechanisms of political accountability (chapter 4). For its part, the empiricist strand criticises the very idea of focusing the enquiry primarily on normative questions as it tends to overemphasize the role of principles in the understanding of the subject. If the

¹³⁸ “The main virtue of democracy lies in its contribution to justice” (Allan, 2001, p. 50).

¹³⁹ “Although the separation of powers between executive and legislature facilitates the popular control and direction of government, its primary constitutional significance lies elsewhere. While making government subservient to the wishes of the governed is generally desirable, the institutional implications of the rule of law do not depend primarily on the representative character of the legislative assembly” (Allan, 2001, p. 47).

¹⁴⁰ “When ‘public reason’ is broadly interpreted to allow appeal to competing moral viewpoints, its ‘exemplar’ may be regarded as the ordinary courts, when deciding cases at common law” (Allan, 2001, p. 290).

constitutional theorist does not want to end up reproducing political prejudice and ideologically tendentious mystifications –e.g. the myth of the neutrality of the judiciary– it needs to pay more attention to actual constitutional practice (chapter 5). Finally, one might wonder whether in fact the rationalist view of the common law and the constitution that moral constructivism propounds (i.e. the common law as “construction of reason” and the rule of law as a “rule of reason”) can be said to remain faithful to the historical self-understanding of the British political and juridical traditions (chapter 6).

4. POLITICAL CONSTRUCTIVISM: FROM THE VIRTUES OF POLITICS TO PUBLIC LAW

1. Introduction

During the 1990s moral constructivism came to be regarded as something of a new orthodoxy within the field, dominating not only public law scholarship but also constitutional practice, as it seemed to reflect better the thought of leading judges (expressed both judicially and extra-judicially) and the recent trajectory of the changing constitution. In this context several voices emerged challenging the moral constructivist conception by questioning its legalistic and liberal premises. This critical reaction to moral constructivism engendered a distinctive “political constructivist” conception of public law theory that strove to vindicate the distinctively political character of the British constitution by making use of the insights of a recent trend in the history of political thought and contemporary political theory, namely, republicanism. By starting from a different conceptualisation of the relation between liberty and political authority, political constructivism intends to provide a better reading of the British constitution, one that –it is argued– is able to capture and defend its unique character and the values that underpin it against the misinterpretations and the constitutional restructuring advocated by moral constructivism.

Political constructivism is founded upon a distinctively republican conception of liberty. It conceives liberty as a political achievement that may only be obtained through the establishment of an appropriate framework of political authority. Liberty, on this view, cannot be conceived as the absence of restraints to the extent that enjoyment of liberty is possible only under the existence of certain restraints, i.e. those imposed by a legitimate government. Furthermore, participation in public life is taken to be central to any conception of liberty and this implies, in institutional terms, that a legitimate framework of government must ensure spaces of participation and contestation. Turning to public law, political constructivism uses the lenses offered by republicanism to retrieve the values that underpin the British constitution. In particular, and in stark contrast to both critical and moral constructivism (cf. chapters 2 and 3), it reclaims the place that Parliament has traditionally enjoyed within British constitutionalism. For all their differences, however, it is important to emphasize that this so-called “political constitutionalism” constitutes just another variant of constructivism in public law theory. As a conception of public law theory, in other words, political constitutionalism is much closer to the common law

constitutionalism of Trevor Allan (chapter 3) than to the deconstructivism of a John Griffith (chapter 5) or the reconstructivism elaborated by Martin Loughlin (chapter 6). This is clearly visible in Adam Tomkins' writings which remain not only the leading contributions within this conception but constitute the more sustained effort to offer a republican reading of British constitutionalism.

Political constructivism –as all other varieties of constructivism– is a theory with a mission. In times when the British self-confidence in the “matchless constitution” has almost but completely vanished, political constructivism emerges as a passionate defence of the British constitution and its unique character. Tomkins' political constructivism, in fact, is first and foremost a theory of the nature of the British constitution. Its essential claim is that the British constitution is distinctively political, viz. it is a political constitution. What motivates this is the realisation that the British constitution is undergoing a series of changes that are eroding its distinctively political character such that it increasingly resembles a legal constitution. In these circumstances, Tomkins argues, “the political constitution, and indeed politics generally, are in need of both defending and praising” (2002a, p. 157). It is necessary to develop, in other words, a political constitutionalism in order to defend the political constitution from those that promote and celebrate this shift to the legal constitution, namely, legal constitutionalists (section 2). But in addition to a defence of the traditional British constitution by criticising the pitfalls of legal constitutionalism, it is necessary to show what is valuable in the political constitution. In this third step –the articulation of a normative justification of the value of the political constitution– political constitutionalism becomes a “republican constitutionalism”. Political constructivism, therefore, is not only a crusade against legal constitutionalism but in this normative, republican, facet, is engaged in a rescue mission (section 3). This provides new insights into both the historical formation of the British public law and its contemporary structure. Political constructivism intends, in particular, to articulate a historically sound conception of the separation of powers (section 4), a better understanding of parliamentary government (section 5) and a more rigorous understanding of the rule of law (section 6).

2. The political constitution and political constitutionalism

Political constructivism was born as a vindication of the British constitution and its traditional understanding or, put in one phrase, of “British (Diceyan) exceptionalism” (2007, p. 257). “The British constitution is a remarkable creation. It is no exaggeration to say that there is nothing quite like it anywhere else in the world” (2005, p. 1). But what is that which makes it so unique? “The purpose of all constitutions is to find ways of insisting

that the government is held to account for its actions. What is unusual about the British constitution is the way it sets about accomplishing this task” (2005, pp. 2–3). The thesis is that the British constitution is a distinctively political constitution in the sense that government is held to account mainly by political institutions (esp. Parliament) through political means (e.g. parliamentary debate, questions and scrutiny) rather than by legal institutions (i.e. courts) via legal means (viz. judicial review)¹⁴¹. This thesis is fundamentally a comparative claim¹⁴². While the “the bulk of Western constitutional practice” has tended to focus on legal controls and the ideal of the rule of law (constitutions in Europe and North America “turn their backs on politics” and look to judges “to provide the lead role in securing checks on government”), the British constitution regards politics as part of the solution rather than as part of the problem (2005, p. 3). “What is beautiful about the British constitution” is that, indeed, “it uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished” (2005, p. 3).

The thesis that the British constitution is distinctively political in the sense that it prioritises political over judicial controls –viz. that constitutional accountability is achieved politically rather than legally– is not new. On the contrary, Tomkins insists that traditional British public law scholarship has always adhered to the “political model of constitutionalism” and that it is only during the last four decades that “the tradition of the political constitution has come under increasing pressure from the rival theory of legal constitutionalism” (2003a, p. 21)¹⁴³. As he put it later, “it is not a novel argument to suggest that the British constitution is primarily political rather than legal in character –the model of the political constitution is one that I seek not to invent but to revive” (2005, p. vii). During the era of “traditional English public law” (roughly between the 1870s and the 1970s), courts were given a relatively discrete role in holding government to account as it was assumed that governmental accountability was made operative mainly through its responsibility to parliament. This is readily noticeable in the thought of the pre-eminent constitutional lawyer of the period, A V Dicey.

¹⁴¹ “That core elements of the British constitution are policed by political institutions such as parliament rather than by legal institutions such as the courts is one of the most significant facets of British constitutionalism” (Tomkins, 2009, p. 242).

¹⁴² For an early contrast between the British and the American constitutional orders, see Tomkins (2002a, pp. 169–72).

¹⁴³ It should be noted that Tomkins has lately greatly watered-down his original conceptualization of the British constitution and his distinction between a political and a legal constitution. I will disregard here this recent restatement because his “revised view” according to which the “British constitution is indeed now a ‘mixed constitution’” –in the sense, of a “contemporary mix of politics and law”– renders it so weak that, thus formulated, the thesis seems to become –if not tautological– so indisputable as to be theoretically uninteresting (2013, p. 2276).

If one considers the two main lessons that he taught us, Tomkins claims, it is clear that “Dicey’s view was that the courts should play only a limited role in public law” (2003a, p. 21). The first lesson is that the British constitutional order is made up of two components, a legal (*viz.* the laws of the constitution) and a political one (*i.e.* the conventions of the constitution). The importance of this lesson is “that it instructs us that if we aim to understand the constitution, we are going to have to look beyond the courtroom” (2002b, p. 742). As constitutional conventions refer to binding rules embodied by well-established political practices that are not legally enforceable by the courts but politically by Parliament, they already make evident both that the British constitution “is not entirely legal” and that “public law is not exclusively about law” (2003a, p. 9). The consequences of Dicey’s first lesson are more momentous than this, however, because the point it is not only that some elements of the British constitution are conventional, but rather that core elements of the constitution are conventional¹⁴⁴.

The British constitution, therefore, is not only political, it is also a conventional constitution. As it will be discussed later on, most of the central elements of the British constitution (*e.g.* the office of the Prime Minister, the Cabinet, ministerial responsibility, and so on) are creatures of convention not law. At this juncture it is important to note that the conventional character of the British constitution lends to the concept of constitutionality a peculiar semantic reach within British public law, as something may be unconstitutional without being unlawful. Behaviour may be unconstitutional, in other words, not only when it contravenes a law of the constitution –and, thus, in this case also illegal– but also when it is contrary to the sense of constitutional propriety that derive from constitutional conventions –and, thus, in this case there is a constitutional but not a legal wrong (2003a, p. 10, 2008, p. 246).

If Dicey’s doctrine of the conventions of the constitution already evinces the distinctively political character of British constitutionalism, this is ratified by his second lesson, namely, that the legal component of the constitution (*viz.* the law of the constitution) is structured upon two basic principles: parliamentary sovereignty and the rule of law. According to the principle of parliamentary sovereignty, as it is well-known, Parliament may make or unmake any law whatsoever and no court (nor anyone else for that matter) may override or set aside parliamentary legislation (2002b, p. 746). Even Dicey’s doctrine of the rule of law, which one might expect to be the site for the legal

¹⁴⁴ “It would be difficult to exaggerate the importance to the British constitution of conventions. Conventions are not add-ons, appended as an afterthought to the legal bulk of the constitution... The core of the British constitution is not legal, but political –or, in Diceyan terms, conventional” (Tomkins, 2002b, p. 743).

constitution, further confirms the discrete public law role of courts in the traditional British constitution. Firstly, Dicey gave to the rule of law a “minimal content –he defined it not only precisely, but narrowly” (2003a, p. 21). The rule of law, on his account, entailed three things: [1] that government should not act arbitrarily but in accordance to known rules, [2] that there should be equality before the law in the sense that there is no separate law applicable to public officials, and [3] that civil liberties are best protected by the ordinary courts applying ordinary common law, without requiring a bill of rights or a special code (2003a, p. 22). As a matter of fact, the Diceyan conception of the rule of law –which he deemed explicitly incompatible with a French-style administrative law system– greatly delayed the development of distinct principles of administrative law and “as a consequence, the legal constitution struggled to take hold as the animating idea of English public law” (2003a, p. 23).

From the 1970s onwards –and even more markedly since the 1990s– there has been a shift from the political to the legal constitution and, as a consequence, “the public law role of the courts has grown remarkably” (2003a, p. 23, 2009, pp. 242–3). The importance of this constitutional reconfiguration, on this account, is difficult to overstate. It implies a fundamental alteration in the character of the British constitution, amounting to a revolution¹⁴⁵ that is diluting the distinctiveness of the British constitution¹⁴⁶. The political constitution is, briefly put, facing a momentous challenge as a consequence of the progressive judicialization of constitutional politics (2003a, p. 203), a turn towards “juristocracy” or the rule by courts (2010, p. 3) that has been supported within public law scholarship by the increasingly widespread theory of legal constitutionalism.

Behind this epoch-making shift from political to legal constitutionalism¹⁴⁷, three main forces might be identified. The first is the growth of the judicial review of administrative action, which has greatly expanded the role of judges in holding the government to account. Significantly, this expansion of judicial review has accompanied a growing sense that Parliament is incapable of performing its constitutional job because the

¹⁴⁵ This “represents one of the most fundamental realignments of the constitutional order since the end of the seventeenth century. Even the emergence of democracy in the early twentieth century –significant though that was– did not rewrite the unwritten constitution to such an extent. The word is much over-used but a revolution is happening. The constitution is up for grabs, and it is the judges who are grabbing it” (Tomkins, 2003a, p. 23).

¹⁴⁶ “One of the consequences of the move from political to legal constitutionalism is that the unusual nature of the British constitution, which formerly distinguished it from the constitutional norm both elsewhere in the Commonwealth and in Europe, is being diluted” (Tomkins, 2009, p. 243).

¹⁴⁷ “The shift from political to legal constitutionalism... is the deepest structural change in British constitutionalism in our time. It is of the same order of magnitude as the shift from divine right to parliamentary monarchy in the seventeenth century and as that from the parliamentary government Walter Bagehot so brilliantly captured to the party government of the twentieth century and twenty-first centuries” (Tomkins, 2009, p. 256).

executive has grown too strong and the domination of party discipline has eroded the necessary independence of non-governmental members of Parliament. The courts, it would appear, have come to the rescue of constitutional government after the break down of the political constitution (2003a, p. 24).

The second cause is Europe. The European Union, to which Britain joined in 1972, has had a great impact on British constitutionalism and, in particular, on the principle of parliamentary sovereignty and the range of remedies available in public law (2009, pp. 252–5). The other Europe, namely, that of the Council of Europe and the European Convention on Human Rights, has also had a considerable impact on British public law, especially since the Human Rights Act 1998 made certain convention rights directly enforceable in domestic law, further elevating the constitutional role of judges (2003a, pp. 23–4, 2005, p. 8, 2009, pp. 255–8).

Thirdly, there has been a notorious decline on the British confidence in their constitution. As “in the past thirty years the British constitution has taken a real beating, coming under sustained and unprecedented criticism”, it is not surprising to find campaigners for constitutional reform from both left and right and to see that even some judges have joined the advocates of constitutional change (2005, pp. 6–7). Moreover, the example set by other Commonwealth jurisdictions that have adopted Bills of Rights (e.g. Canada and New Zealand) and the international status that American and German constitutionalism have gained in the last decades have reinforced this turning away from the political constitution (2005, pp. 8–9).

Bringing together all these diverse forces there is one simple and powerful idea, namely, “that Britain’s traditional, political manner of dealing with the problem of constitutional accountability is no longer (even if it ever was) the best method, and that a better approach would be to turn instead to the courts” (2005, p. 9). Many academic public lawyers, who by inclination tend to distrust politics and overestimate the effectiveness of judicial procedures (2003a, pp. 5, 19–20, 210–1), have enthusiastically welcomed this shift from the legal to the political constitution by articulating the theory of legal constitutionalism. This influential public law scholarship turns its back on the political nature of the subject on the assumption that law is “not only distinctive from but also superior to (mere) politics” and that it is in the court-room that constitutional government (esp. fundamental rights) is –and ought to be– guaranteed (2002a, pp. 159–62, 2005, pp. 11–5). Congruently, they adopt a particularly wide notion of what counts as a legal matter to be judicially dealt with, arguing on top of that that judges should not limit themselves to

the enforcement of specific and determinate rules but also of general and vague principles and human rights (2005, pp. 15–24).

Legal constitutionalism, Tomkins argues, is wrong on all counts. It is simply factually mistaken to assert that courts constitute the key institution –and legal accountability the most important means– in securing fundamental rights. In fact, if one considers British constitutional experience, it is obvious both that Parliament has played a key role in the protection of civil, political and social rights, sometimes against judicial resistance¹⁴⁸, and that courts “are neither as liberal nor as eager to intervene as they would be required to be... effective as a check on illiberal government” (2005, p. 30). Secondly, legal constitutionalism seems to assume that “it is only the political branches that are capable of acting arbitrarily; the courts of law, apparently, never can” (2005, p. 13). If one discards this implausible idealisation of the judiciary, then one should be wary of capricious or arbitrary judicial decisions as well, lest one ends simply replacing undue executive discretion with undue judicial discretion (2005, p. 22). Legal constitutionalism, thereby, champions an unwarranted transfer of power from elected and accountable politicians to unelected and unaccountable judges (2003a, pp. 209–11, 2005, p. 25).

Thirdly, the legal process is particularly unsuited for dealing with complex political matters. The judicial resolution of any such matter requires it to be reframed –and, therefore, distorted– in legal terms and argued in accordance to authoritative legal materials (esp. statutes and case-law) and processed as a dispute between two parties to be adjudicated (i.e. the judgement must hold whether the claimant’s case is made out or not). Access to the judicial process, moreover, is not only normatively restricted (e.g. the rules governing standing and third-party interventions) and mediated by legal counsel, but also notoriously expensive. All these factors, in sum, show that the range and variety of arguments available in judicial proceedings cannot be as open and plural as the adequate consideration of multifaceted political conflicts demand (2005, pp. 26–9).

Finally, the supposed autonomy, purity and neutrality of the law and the courts remains its most problematic premise. Actually, the plausibility of legal constitutionalism depends on a one-dimensional relation between a markedly idealised law (and courts of law) and a pronouncedly downbeat view of politics (and political institutions). On the contrary, as so many legal thinkers have shown from the legal realists to John Griffith and

¹⁴⁸ “Parliament has frequently legislated, often in face of overt judicial hostility, to extend liberty, whether it be in conferring on women the right to vote, in enacting prohibitions against discrimination, or in providing for essential welfare services, such as health care and social security... the entirety of British social justice –of the welfare state– is a creation of progressive governments enacting law in Parliament” (Tomkins, 2005, pp. 13–4).

Martin Loughlin, the relation between law and politics is too varied, complex and even contradictory to be captured by the simplistic picture offered by legal constitutionalism. In fact, “any project which is designed to uncover the one true relationship of law to politics is futile and is doomed to fail” (2002a, p. 169). Indeed, it is in the exploration of this line of scholarship –which Tomkins labels as political constitutionalism– that one might come to understand not only why legal constitutionalism is wrong, but what is that which is so precious about the political constitution that should be defended.

3. The normative element of political constitutionalism

Political constitutionalism was born as an elucidation of the distinct nature of the British constitution. In this sense, political constitutionalism is a particular constitutional theory not a general one. It is concerned specifically with “the constitution and public law of the United Kingdom; it is not an exercise in transcendental constitutionalism or in global constitutional theory” (2013, p. 2275 n 1)¹⁴⁹. Recent contemporary trends in constitutional affairs, however, are diluting the unique character of the British constitution. If this turn from the political to the legal constitution were to continue unchallenged “claims as to the unusual nature of the British constitution may not long survive” (2009, p. 259). This means, Tomkins contends, that the political constitution is in need of defending against the rise of legal constitutionalism. Actually, there is a recent line of public law scholarship –i.e. political constitutionalism– that has not only insisted on the political character of the British constitution but also shown that the legal constitutionalist project is futile. This is not enough, something more is needed. One must demonstrate that the project of legal constitutionalism “is not only futile: it is also wholly undesirable” as it both misunderstands the relation between law and politics, and undermines the values of the political constitution (2002a, p. 172). Put differently, it is necessary not only to “defend” but also “praise” the political constitution. Only once its value has been reclaimed, one may not only understand that the British constitution just happens to be a political constitution but also explain why it must remain a political constitution.

Political constitutionalism, in other words, has to be more than simply a description of the British constitution and a critique of legal constitutionalism. What is needed is the elaboration of a counter-model to legal constitutionalism that is capable of explicitly positing the normative underpinnings, the values, that ground the political constitution.

¹⁴⁹ From his earliest works, he seems sceptical about the very possibility of a universal constitutional theory: “Constitutions are not drawn up out of the ether, and neither are they based on universal principles of justice. Rather, they are the products of the specific political climates in which they were forged” (Tomkins, 2002b, p. 738).

Only this essentially normative undertaking could reveal why legal constitutionalism is not simply unfortunate but unconstitutional. Here is where Tomkins' project differs from that of others (so-called) political constitutionalists and, especially, that of John Griffith, whom Tomkins takes to be the founding figure –the author of the “seminal contribution” (2003a, p. 214), the “most important statement” (2005, p. 36)– of political constitutionalism and to whom he acknowledges “a considerable intellectual debt” (2002a, p. 157 n 1)¹⁵⁰. In Tomkins' view, the problem is that “Griffith's defence of the political constitution was entirely descriptive”, that is to say, that his objections to legal constitutionalism were “articulated solely at the level of politics and not as matters of constitutional analysis” (2005, pp. 37–8). Griffith, in other words, claimed that legal constitutionalism is “politically unwise and philosophically mistaken” but not that there is something constitutionally wrong with it (2005, pp. 37–8). Precisely here, Tomkins contends, we should take the argument to a “new level” and show that legal constitutionalism is “unconstitutional”¹⁵¹. In order to do this, the argument continues, “we need to ground the model of the political constitution normatively”, viz. rather than “a mere description of what happens” what is needed is “a prescription of what ought to happen” (2005, p. 40). This is what is novel in his project (2005, p. vii). It takes on the pending task of “grounding in theory” the model of the political constitution by unearthing and revealing the norms or values on which the political constitution is founded¹⁵².

From what has been said it is possible already to specify the kind of theory that is needed. First, the theory is to explain the norms or values on which the political constitution is based. As the political constitution is that which privileges a political solution to the main constitutional problem (i.e. holding government to account), it follows that the required theory is, in essence, an account of the value of politics. What is needed, put differently, is an explanation of why everyone should aspire to a political life, one that demonstrates that “politics is not something which we should desire to entrap within the straitjacket of the law. Politics is not a wild beast which requires to be tethered to the law or neutered by the law. Politics is something which should be celebrated, not castigated. For politics is what makes us free. Indeed, politics is what makes us human” (2002a, pp. 172–5, 2005, pp. 46–52). What is needed, then, is a theory of the “virtues of politics” and

¹⁵⁰ Besides Griffith's the other main contributions to the model of the political constitution, in his view, are to be found in the work of Loughlin, Harlow and Rawlings (Tomkins, 2003a, p. 215).

¹⁵¹ “For sure, we can show that legal constitutionalism is unwise. We can show that it is undemocratic, that it is ineffective, and that is politically undesirable. But we can also take the argument to a new level. We can also show that it is unconstitutional” (Tomkins, 2005, p. 40)

¹⁵² “The model of the political constitution was never grounded in theory. Its advocates never explained the norms or values on which the model was founded” (Tomkins, 2005, p. 40).

there is no more suitable candidate –Tomkins contends– than republican political theory as developed by thinkers such as Hannah Arendt and Philip Pettit (2002a, p. 173). Republicanism uniquely enables us to refute the assumptions of liberal constitutionalism (i.e. the normative facet of legal constitutionalism) and, at the same time, offer a more adequate understanding of freedom, rights and politics. In contrast to liberalism, republicanism helps us see that freedom cannot be enjoyed alone but is something that can only be experienced with others and that, therefore, it is “politics what makes us free” (2009, p. 172). This leads to another important difference between them in terms of the theory of rights: whereas liberalism understands rights as prior and superior to politics, republicanism conceives rights as derived from and dependent on politics¹⁵³.

The main insight that one should extract from republican thought, in other words, is that freedom is not limited by –but presupposes– a certain framework of political authority and that rights cannot be thought as prior to –but a product of– that political ordering. Conversely both freedom and rights derive from the existence of a legitimate authority. An authority is legitimate, on a republican account, when its decisions are required to track the interests of those subject to it and this means, in constitutional terms, that there should be in place an institutional structure that implements the ideal of a deliberative and inclusive government, i.e. a widely representative government that acts in a reasoned manner orientated towards the public good (2005, pp. 51–2, 61–5). More concretely, republicanism requires the establishment of mechanisms of “democratic contestation” just as the fundamental principle of “responsible government” within the British constitution requires “that the government of the day is fully and openly accountable to our representatives in Parliament”¹⁵⁴. In fact, it is in the “design of political accountability” the respect “in which the British constitution is most obviously republican” (2005, p. 65).

With this normative turn, political constructivism becomes a three-stage argument. It first elaborates a thesis about the distinctive nature of the British constitution (the political constitution thesis). Secondly, it takes a critical stance against recent trends in constitutional practice and thought (viz. by objecting to legal constitutionalism it turns into political constitutionalism). Finally, it intends to ground normatively the model of the

¹⁵³ This highlights “a central difference between liberal and republican constitutionalisms: namely that while the former conceives of rights as being natural, and superior to (or trumps over) the political order, the latter insists that rights and freedoms are utterly man-made and worldly. Republicans hold that rights are derived from the political order, are dependent on it, not superior to it. Rights are political, and carved out from politics, and are therefore fragile and require constant vigilance” (Tomkins, 2002a, p. 174).

¹⁵⁴ “This is exactly the value of thinking about British constitutionalism from a republican point of view” (Tomkins, 2005, p. 51)

political constitution by offering a species of republican constitutionalism. As it can be appreciated, the argument in its third stage has been outlined only at the level of principles, as if it were a matter of abstract theory. Tomkins' project, however, is not simply to contend that in general-theoretical terms republican constitutionalism is more attractive than its liberal opponent, rather he intends to offer, more particularly and concretely, a "republican reading of the British constitution" (2005, p. vii). To be complete, in other words, this third-stage requires the argument to return from the level of principle to the level of a historical-comparative understanding of British public law.

4. Constructing constitutional history

Public law, Tomkins observes, can be studied in two complementary ways. One might first adopt a "principled approach" and lead the inquiry by asking questions such as "what are the principles on which public power is exercised?" and "what makes the exercise of political power just or unjust?" (2003a, p. 33). Once the relevant principles have been identified, one may "then apply them to contemporary public law and use them to explain it" (2003a, p. 33). Although this approach is entirely legitimate, it carries the temptation to simply "pluck principles out of the air and optimistically declare that they form the basis of our constitution" (2003a, p. 34). To avoid this peril is of cardinal importance for a republican reading to prove that "is not an import, constructed out of ideas borrowed and transplanted from elsewhere" (2005, p. viii). This is why one must return, at this stage of the argument, to a "historical approach" that intends to grasp the nature of British public law not by focusing on the "abstract principles of constitutionalism and the like, but through an understanding of its historical development" (2003a, p. 34). Put simply, to assess whether a republican reading may, indeed, be derived "from an analysis of the values inherent within the British constitutional order" (2005, p. viii), it is necessary to have beforehand an appropriate understanding of British public law and its historical formation.

Given its peculiar nature, the British constitution –more than any other– cannot be properly understood without a "sense of history"¹⁵⁵. Paradoxically, however, its very nature also makes this task particularly difficult: "its peculiarity lies in the fact that no one historical moment trumps any other in offering authoritative constitutional meaning" (2002b, p. 739). Most constitutional orders now are built around a formal constitutional document and recognise one particular moment (or a series of moments) as central to the

¹⁵⁵ "Taking constitutional history seriously... is perhaps nowhere more important for constitutional lawyers than in Britain" (Tomkins, 2002b, p. 739). "It is a principal contention of the argument here that English public law cannot be adequately understood without a sense of history" (Tomkins, 2003a, p. 3). Actually, he notes, "all the great late-nineteenth and early-twentieth century public lawyers had an acute sense of the historical dimension of the subject" (Tomkins, 2003a, p. 34).

nation's constitutional identity that usually ensue extraordinary events in its political history (e.g. a war of independence, revolution, civil war, invasion or a dire military defeat). The British constitutional order acknowledges no such moment or series of moments but, rather, its authority is the result of a much more "amorphous" historical course: "Britain's ancient constitutional order has simply emerged out of over eight centuries of almost entirely unbroken government" (2002b, p. 740). In point of fact, Tomkins observes, the political history of Britain contains an invasion (1066), a civil war (1640s) and a revolution (1680s), but of all them happened too early. Written constitutions are an eighteenth century political invention, so it may well be said that "the unusual nature of the unwritten or uncodified British constitution is due to the timing of these events" (2002b, p. 740). As it is evident that such a long history is too much for any public lawyer to take in, how is he supposed to study his subject with a historical sense? Facing this dilemma, there is no other way to cope with the overwhelming but nevertheless indispensable historical dimension of the subject than to privilege some period(s) in the understanding of the subject¹⁵⁶.

Although the last third of nineteenth is the period of choice for most constitutional scholars (as in British studies more broadly) when it comes to locating the founding of the "modern British state", Tomkins proposes rather to place the seventeenth century at the centre of the "British constitutional order" (2002b, p. 741 n 11). Perhaps due to his awareness about the constructed character of tradition, Tomkins spends a good deal of argumentative effort in justifying the seventeenth century thesis, i.e. that the seventeenth century was the "formative period of the English constitution –our foundational moment" (2003a, p. 45, 2005, pp. 68–9). His starting point, characteristically, is to be found in a historical-comparative reflection on what makes the British constitution unique or unusual. So far it has been emphasized how unusual the British constitution is, for the most part, in terms of how it provides for mechanisms of holding the exercise of political power to account. At this juncture, however, the argument needs to extend also to how distinctive it is in terms of the prior task of providing for "the institutions that exercise political power" (2003a, p. vii).

Most written constitutions, Tomkins argues, are fashioned after an eighteenth-century political contrivance, namely, the theory of separation of powers. In accordance to this theory, the exercise of political power should be divided between a legislature that

¹⁵⁶ "How can one learn and remember eight centuries of history? It is simply too much –the fabric is so rich it suffocates. Thus, while nowhere is it more pressing to be aware of the historical dimension of the subject, nowhere is more impossible. To cope, we make things up. We make believe that, for all the historical continuity we know to be such a feature of the British constitution, some periods can be seen as more pressing than others" (Tomkins, 2002b, p. 741).

makes the laws, an executive that administers the laws and a judiciary that applies the laws. Constitutions, on this model, are to create and regulate political power by differentiating between three fundamental state powers that are to be kept institutionally separate both in terms of functions and personnel, such that it is ensured that each of these powers is independent from, and able to check and balance, the other two (2003a, pp. 36–7). The British constitution, however, does not fit this model and, in effect, most twentieth century constitutional commentators agreed that the separation of powers was not a feature of British public law. The traditional view, Tomkins summarizes, is that “English public law is based not on the separation of powers but on their fusion, the ‘efficient secret’ of the constitution, as Bagehot famously expressed it” (2003a, p. 38).

Recently, some public lawyers have challenged the traditional account and argued that the separation of powers is not only compatible with but central to British constitutional law. Tomkins claims that this revisionism should be rejected as ahistorical because it anachronistically applies an eighteenth century theory to a constitutional structure whose foundations were already developed –for the most part– during the seventeenth century¹⁵⁷. He does not believe, however, that one should go back to the traditional view. Instead, what is needed is to put the separation of powers in historical perspective and to appreciate that the distinctly English/British separation of powers is a seventeenth century notion (2003a, p. 45). How does he reach this conclusion? Just a glance to its historical formation, Tomkins believes, is enough to evince the unusual character of the British constitution and its distinct notion of the separation of powers. Stark differences surface from the very beginning. In the beginning was the Crown¹⁵⁸ and the constitutional development of Britain is the history of the struggle for establishing ways of holding royal power to some form of account, viz. is the story of the formation of a limited (or constitutional) monarchy¹⁵⁹. Even the constitutional significance of Magna Carta, which today tends to be remembered mainly as a sort of proto-bill of rights,

¹⁵⁷ “The structure of the English constitution, at least as far as the legal relationship between the institutions of State is concerned, was already largely in place by the end of the seventeenth century, secured by the Bill of Rights and the Act of Settlement. How could a seventeenth century construct (such as the English constitution) be based on an eighteenth century theory? It is a nonsense to suggest that it could be” (Tomkins, 2003a, p. 45, cf. 2005, pp. 68–92, 2009, p. 248).

¹⁵⁸ “In England power started with the Crown. Power was not conferred through the force of a revolutionary constitutional document on three institutions separate but equal, as happened in the United States at its founding at the eighteenth century. Rather, power emerged” (Tomkins, 2003a, p. 39).

¹⁵⁹ “Britain’s constitutional history is long and virtually unbroken. Practically the whole of its history over the past eight centuries (since Magna Carta) has been taken up with the same question: namely, how to subject the Crown’s government to constitutional account?... With the single exception of the mid-seventeenth century hiatus, the principal constitutional concern has been not how to remove the Crown or what to replace it with, but on the contrary how to keep it, yet at the same time how to limit it, how to control it, and how to locate it within a modern constitutional setting” (Tomkins, 2002b, p. 756).

“actually lies less in what it says about liberty and more in what it says about the Crown” (2003a, p. 40). In fact, what came to be known as the ancient constitution is the result of the endeavours to control and limit the powers of the Crown during the fourteenth and fifteenth centuries, especially by requiring the consent of Parliament for taxation and legislation (2003a, pp. 41–2). Nevertheless, it is in the challenge to the ancient constitution posed by the Stuart Kings that the roots of the modern constitutional settlement are to be found. In particular, it emerged from the crises provoked by their sustained incapacity to reach an understanding with Parliament. The confrontation between Crown and Parliament reached such levels in the 1640s that it led to a Civil War and the execution of the King (1640–2). After the relative brief Interregnum (1642–60), the monarchy was restored in 1660 but anxieties regarding religious matters and the absolutist inclinations of the Crown soon remerged, especially after a catholic ascended to the throne in 1685, leading to the Glorious Revolution and the consecration of the constitutional position of Parliament with the Bill of Rights 1689 and the Act of Settlement 1701 (2002b, pp. 757–8, 2003a, pp. 43–4, 2005, pp. 67–109).

The seventeenth century bequeathed one fundamental constitutional lesson: that neither Crown nor Parliament could rule separately as the failed experiments of personal rule (1629–1640) and the republican experiment (1649–1653) suggested and, more generally, the memory of civil war and revolution indelibly cautioned. This fundamental lesson, in constitutional terms, demonstrates that the separation of powers “English-style” resulted from “a confrontational, bi-partisan, bi-polar separation” between the only two powers that enjoy “sovereign authority” within the British constitution: Crown and Parliament (2003a, p. 46). This fundamental lesson entailed, first, that the power of the Crown can be limited and controlled as was made manifest by the fact that important royal powers were either taken away –e.g. the power of dispensing with the law– or subject to oversight –e.g. the power of levying taxes or other charges (2005, pp. 103–4, 2009, p. 244). Secondly, it also taught that it is Parliament and not the courts that can –and should– perform the principal constitutional task of holding the Crown to account. It is not only that the war was fought between Crown and Parliament, it is that courts revealed to be glaringly incapable of restraining the abuse of royal powers during the seventeenth century, as the litigation on impositions (*Bate’s case* [1606]), forced loans (*Five Knights case* [1627]), ship-money (*R v Hampden’s case* [1637]), parliamentary privilege (*Eliot’s case* [1630]) and other such matters confirmed (2003a, pp. 42–3, 2005, pp. 74–87). In all these cases, Tomkins argues, the courts found in favour of the Crown in spite of the dubious legality of its actions and even

when they clearly went against established doctrine, so if Parliament defeated the Crown it was “*despite* the courts, not *because* of them” and, concretely, “by parliamentary and military might: not through judicial review” (2003a, p. 55, 2005, p. 86).

Even those cases that are normally hailed as models of judicial heroism –Tomkins adds– when looked more closely turn out to be concerned more with questions judicial remit (*Prohibitions del Roy* [1607]) or the advancement of economic liberalism (*Case of Proclamations* [1611]) rather than with, in rigour, the affirmation of constitutional principle (2003a, pp. 56–8, 2005, pp. 70–4). Actually, Tomkins thinks one should not be surprised to find that courts were –and to a considerable extent remain– very deferential to the Crown: courts after all derive their authority from the Crown, which is the “fount of justice” and the “source of its authority”: the courts are royal courts, judges are servants of the Crown and the “judicial oath of allegiance is to the Crown –not to the constitution, not to the people, and certainly not to Parliament– but to the Crown” (2003a, p. 53, 2005, p. 120). This remains so, Tomkins claims, even after judges were given security of tenure with the Act of Settlement in 1701 (2003a, pp. 54–60, 2005, pp. 118–20).

The seventeenth century, in sum, is the story of the “failure of the common law constitution” and the “rise of the republican constitution” (2005, pp. 69, 90). The principal result of the constitutional conflicts of the seventeenth century was the establishment of –what Tomkins takes to be– the core rule, the foundation, of the British constitution, i.e. that royal government may only rule effectively with parliamentary support (and only as long as it retains it)¹⁶⁰. This came about by “Parliament’s greatest single victory in the constitutional struggles of the seventeenth century”, namely, the reassertion of parliamentary control over the supply of a government that is (and always will be) in permanent need of finance¹⁶¹. This core rule is now known as the doctrine of “responsible government” and during the next centuries it would take shape by way of the conventions of ministerial responsibility. Thus, this historical take on the seventeenth century basis of the separation of powers English-style helps already to understand why, according to the foundational rule of the British constitution, government is “constitutionally responsible *to Parliament*” (2005, p. 1). In fact, in order to have a better idea of the explanatory force of

¹⁶⁰ “At its core lies a simple –and beautiful– rule. It is a rule that has formed the foundation of the constitution since the seventeenth century” (Tomkins, 2005, pp. 1, 108).

¹⁶¹ “It was perhaps Parliament’s greatest single victory in the constitutional struggles of the seventeenth century to place itself as the major source of supply. Without parliamentary supply there can be no government: it is as simple as that. In order to secure parliamentary supply the Crown is effectively required to elicit and maintain the support of Parliament. Appointing ministers of whom Parliament disapproves or dissolving Parliament without its consent are measures simply beyond the reach of a Crown whose government is reliant on Parliament for revenue” (Tomkins, 2005, p. 107).

this historical perspective of the separation of powers is necessary to appraise how illuminating it is about the role of Parliament and its place within the British constitution. Only once Parliament has been restored to its traditional central constitutional seat, the question of the role of courts and the subjection of the executive to the law can adequately be addressed.

5. Parliamentary government

A historically grounded theory of the separation of powers within the British constitution, i.e. one that appreciates its seventeenth century basis, offers a vantage point from which the public lawyer may undo many contemporary misconceptions about the constitutional understanding of Parliament. Consider first the content and foundations of the so-called sovereignty of Parliament, which has dominated so much of constitutional thought ever since Dicey's influential lectures. What are the consequences of a bi-polar theory of the separation of powers for this doctrine? From this perspective, Tomkins argues, it becomes evident that the very phrase the sovereignty of Parliament "is a singularly unhappy one" (2003a, p. 93), one that invites not only to confusion about what precisely is sovereign according to this doctrine but obscures its real foundations. What is that which is sovereign then? It is clear that not everything that Parliament does is sovereign but only primary legislation. In essence this doctrine affirms that Acts of Parliament are the highest source of law such that no court or other body may override any (2003a, p. 102). Furthermore, Acts of Parliament are not acts of Parliament alone, as they require the consent of the Crown. The doctrine, in consequence, should be described as the legislative supremacy of Acts of the Queen-in-Parliament (2003a, p. 93, 2009, p. 246). Once the doctrine is appropriately reformulated in this manner, it becomes easier to appreciate why there could be no higher legal source in British law: with an Act of Parliament "the two sovereign authorities of England come together and agree"¹⁶².

More important for Tomkins, however, is to insist that it is a mistake to centre the constitutional understanding of Parliament upon the doctrine of the legislative supremacy of Acts of (the Queen-in-)Parliament. Actually, the excessive attention to this doctrine may explain why so many contemporary public lawyers tend to misconceive Parliament as primarily a legislature. This rather narrow view of Parliament's role and the inordinate attention to the doctrine of parliamentary sovereignty are, in fact, a recent development

¹⁶² "The answer is connected to the seventeenth century notion of the separation of powers (the 'Crown versus Parliament' thesis)... An Act of Parliament represents the legal moment when the two sovereign authorities of England come together and agree: Parliament on the one hand, and the Crown on the other. What could be a higher authority in this scheme of dual sovereignty than the formal agreement of England's two sovereigns?" (Tomkins, 2003a, p. 48).

derived from the debate generated by this doctrine after post-colonial independence and, later on, European integration (2003a, p. 94). Even so, it remains puzzling why so many lawyers would be inclined to such an unsound view that portrays Parliament as little more than a legislature. A cursory glance at how discrete is the contribution of Parliament to law-making should make anyone doubt about the soundness of taking it to be mainly a legislature. Law-making, in fact, is a multi-level process that takes place not only nationally, but also at the local, regional (e.g. Scottish Parliament and the Welsh and Northern Irish Assemblies), European and international levels. But even within the national level much legislation is not passed by Parliament (e.g. delegated legislation and Orders in Council). Finally, even in respect to primary legislation the role of Parliament is quite limited, as suggested by the fact that the legislative agenda of Parliament is controlled by the executive and that Parliament only in few occasions rejects government's bills (2003a, p. 95). All this suggests, Tomkins concludes, that "it is largely a myth that Parliament is a legislator. It does not make law" (2003b, p. 76).

To understand the central constitutional place of Parliament, Tomkins adds, one shall look not to Dicey but to that other great Victorian constitutional writer, Walter Bagehot. Bagehot offered a much more complex view of the constitutional role of Parliament and took legislation to be only one out of five functions that the House of Commons performs; the House of Lords, for its part, was more part of the dignified rather than the efficient constitution and had only two functions according to Bagehot, namely, to delay and revise (2002b, p. 753, 2003a, p. 94 n 2, 2003b, p. 56). The Commons' most important function, on Bagehot's account, is to act as a permanent electoral college that not only chooses the head of government but to which government remains accountable, as the latter might be dismissed from office at any time by the former (the function of supplying the government). In addition, Bagehot claimed that the House of Commons has the functions of expressing the mind of the people (expressive function), of laying before the nation grievances and complaints (informing function) and to teach the nation what it does not know (teaching function) (2002b, pp. 754–5, 2003b, p. 56).

Among public lawyers, Tomkins observes, it was Jennings who already in the 1930s elaborated an approach to Parliament thought principally in non-legislative terms. Jennings, in fact, clearly identified two lawyerly errors regarding Parliament. First, the emphasis on the theory –or "fiction"– of the transcendent and absolute legislative power of Parliament has obscured the real function of Parliament by stressing too strongly the legislative functions of its two Houses. Lawyers, moreover, not only misunderstand but also tend to

misallocate and over-estimate the power of Parliament as they ignore the growing power of government and that ultimately both government and Parliament must answer to public opinion, i.e. “the people” (Tomkins, 2004, pp. 775–6). Jennings, in contrast, thought that the true function of the House of Commons is –unifying what Bagehot divided into the expressive, informing and teaching functions– to act as a “theatre of battle” in which the dominant political parties struggled for governmental power, i.e. where the party in government defended government policy and where the opposition party criticised them in order to change the electorate’s mind and offer a future alternative government (Tomkins, 2004, pp. 777–8).

For Jennings, briefly put, the essential dynamic underpinning Parliament’s central constitutional role is that between government and opposition and which translates into the exposition and criticism of government actions and the discussion of proposals that the present or a future government could pursue, all which appeal to –and aspire to persuade– public opinion (Tomkins, 2004, p. 783). For all of Jennings’ insights, his account of Parliament failed to grant adequate salience to the “historical centrality to the constitution of parliamentary accountability” (Tomkins, 2004, p. 781). Jennings did not –as Bagehot did– pay due consideration to the historical development of the cardinal rule of the constitution, namely, that the Crown (and its Ministers) may rule effectively as long as its government enjoys sufficient parliamentary support. In other words, Jennings mostly focused on the dynamic between government and opposition as it unfolds within Parliament, downplaying the “more venerable and deeper dynamic” between Parliament and the Crown, which albeit not as present in quotidian political life remains, Tomkins claims, “the most potent of all Britain’s constitutional forces” (2004, p. 782).

This is precisely the virtue of the historically grounded bi-frontal conception of the separation of powers, i.e. it gives to parliamentary accountability the central place that it has enjoyed in the British constitution since the early modern era¹⁶³. Moreover, it shows –as the model of the political constitution intends to emphasize– that constitutional accountability within British constitutionalism grew out from that “elemental rule of public law” according to which the Crown must govern through Parliament. This implies, Tomkins remarks, that Parliament is the “essential vehicle through which ideas of accountability are put into practice” (2003a, p. 133) and, in this sense, the political constitution is essentially a “parliamentary constitution” (2003b, pp. 59, 61, 2009, p. 239) and political constitutionalism a “parliamentary constitutionalism” (2009, p. 245). To appreciate this

¹⁶³ “Parliament developed in early modern England as the principal institution through which the Crown and the government could be held to account” (Tomkins, 2003a, p. 92)

essential fact one needs to focus not on the legal elements of the constitution but on its conventional elements –the political constitution is mostly a conventional constitution (2002b, p. 743)– because the “modern system of political accountability” is institutionalised by the conventions of ministerial responsibility (2003a, p. 92, 2005, pp. 1–3, 2008, p. 246, 2009, p. 249). For the public lawyer this entails that in order to get a better understanding of the constitution in general and Parliament’s place within it in particular, it should focus less on teasing out the details of the laws of the constitution (i.e. Parliamentary sovereignty and the rule of law) than on obtaining an adequate grasp of the conventions of the constitution and especially those that relate to the ideal of responsible government (2002b, pp. 746–7, 2003b, p. 54).

It has already been noted, for Tomkins, the single most important victory that Parliament obtained from the 17th century constitutional settlement was “to place itself as the major source of supply”, that government for carrying out the increasingly expensive activity of governing had to rely on Parliament for revenue (2005, p. 107). But the principle that the Crown must govern through Parliament not only grew out from the rule that government must obtain from Parliament the financial resources that it needs, but also from the desideratum that the very members of government –i.e. all Ministers of the Crown– must be, by constitutional convention, members of one of the Houses of Parliament (2003a, pp. 90–1). Ministerial membership of Parliament is a principal device for holding government to account especially since the factual exercise of the powers of the Crown shifted from the king to his principal advisors during the times of the early Hanoverian kings, when the monarch ceased to attend Cabinet meetings. This explains the seemingly paradoxical tenet of the British separation of powers that requires that the main personnel of the executive must be members of Parliament, an institution that the usual conception of that doctrine associates more with legislative power. Within British constitutionalism, Parliament is the main institutional site for constitutional accountability and for that to be possible constitutional convention requires that all Ministers of the Crown and, in particular, its principal advisors (i.e. the Prime Minister and its senior colleagues in the Cabinet) be members of one of the Houses of Parliament so that they can be questioned in Parliament and required to expound and justify government policy before Parliament¹⁶⁴. The constitutional conventions of collective and individual ministerial responsibility aim to make parliamentary accountability more effective, e.g. by facilitating

¹⁶⁴ As Tomkins puts it “the English vision of the separation of power *requires* that Ministers simultaneously be parliamentarians... That is to say, ministerial membership is the device that enables Parliament to perform its constitutional function of checking the Crown’s government” (Tomkins, 2003a, pp. 50–1)

the identification of government policy, by making more difficult for Ministers to evade responsibility and so forth (2003a, pp. 135–48, 2008, pp. 248–61).

All this leads Tomkins to the conclusion that in order to give due regard to the peculiar British conception of the separation of powers and to the distinctively political character of the British constitution, one should take as the primary function of Parliament that of “holding the executive to constitutional account”. This entails, in particular, that “we should abandon the notion of that Parliament is principally a legislator. We should instead see Parliament as a scrutineer, or as a regulator, of government” (2003a, p. 54). In effect, Tomkins argues, if one considers the effective extent of Parliament’s contribution to law-making –i.e. that is government really who makes the law through Parliament– it becomes evident that even its so-called legislative function is nothing but an aspect of Parliamentary scrutiny¹⁶⁵. As important as “legislative scrutiny”, in this sense, are two other forms of parliamentary scrutiny that Tomkins takes to be essential to Parliament’s main constitutional job: [1] the “administrative scrutiny” that it exerts via the departmental select committee system, created in 1979 and recently revitalised after 1997 (2003a, pp. 162–9, 2003b, pp. 61–74, 2005, pp. 138–9), and [2] the “financial scrutiny” that is carried out mainly by the Public Accounts Committee with the support of the National Audit Office (2003b, p. 77).

Tomkins puts the notion of constitutional accountability at the centre of public law theory and, more particularly, posits that “political accountability” has been the primary mechanism for holding the government to account within the British constitutional tradition. This is that which makes the British constitution a political constitution, i.e. constitutional accountability relies on political institutions and political means (e.g. parliamentary debates, parliamentary questions and select committees) rather than on legal institutions and legal means (i.e. judicial review). The model of the political constitution is, in turn, what enables Tomkins to reclaim the preeminent role of Parliament within the British constitution, not as –is usually thought– as the sovereign legislator, but as the main vehicle for accountability. In order to see why the political constitution is a parliamentary constitution one needs to see Parliament not as a legislator but as a scrutineer of government (and, concretely, in three dimensions: legislative, administrative and financial). Once the place of Parliament and political accountability within the British constitution is

¹⁶⁵ “The legislative purpose of Parliament is not to make the law, but is rather to scrutinise the government’s legislative proposals... Parliament’s legislative function is not different from its scrutiny function, but should rather be conceived as being an aspect of it” (Tomkins, 2003b, p. 76)

clarified one is in a position to address what shape the executive, the rule of law and legal accountability take within the political constitution.

6. The rule of law

When it is said that accountability is to be the centre of constitutional theory, on Tomkins' account, it is important to point out that this is meant to convey that it is with the accountability of the Crown's government that it should be mostly concerned (2003a, p. 131). The very distinction between the political and the legal model of a constitution, he remarks, hinges on the relative prevalence of political or legal mechanisms for holding government (i.e. the executive) to account¹⁶⁶. Tomkins recognises that many think that given the doctrine of parliamentary sovereignty it is Parliament that posits the most troubling questions for constitutional accountability and that, further, this seems to chime in with the central preoccupations of some important constitutions like that of the United States. This, however, was more appropriate to the eighteenth and nineteenth centuries than to the contemporary reality of public power. The growth of the executive and its bureaucratic apparatus in the twentieth century constitutes the greatest challenge to constitutional accountability. As it happens, those constitutions that like the American constitution focused on legislative rather than executive accountability have offered feeble protection against the expansion of executive power, as the counter-terrorist measures after 2001 so patently have reminded us (2005, p. 132).

But while it may be clear that the public lawyer should concentrate his efforts predominantly on the issue of executive accountability, difficulties arise from the very beginning. How is the executive to be understood in the context of the British constitution? There is no simple answer¹⁶⁷. For the exploration of this question one needs to turn the attention to the other sovereign authority within the British constitution, namely, the Crown –the government, after all, is the Crown's government. It is common to commence any disquisition on the matter by drawing a distinction between the Crown-as-monarch, i.e. the person that is entitled to wear the Crown, and the Crown-as-executive, namely, that constellation of servants of the Crown (i.e. Ministers and Civil Servants) who by virtue of their public office exercise powers on behalf of the Crown. Although most powers of the Crown are now exercised by the Crown-as-executive, the monarch still retains the direct exercise of some powers of no little constitutional importance (e.g. the

¹⁶⁶ "The British debate between political and legal constitutionalism is primarily concerned with how –and by whom– executive powers are best held to account. Its main focus is not on arguments about the extent to which primary legislation should be subject to judicial review" (Tomkins, 2013, p. 2275 n 1).

¹⁶⁷ "British public law knows no definition of the executive as such" (Tomkins, 2006, p. 16).

appointment of the Prime Minister, dissolution of Parliament, dismissal of government and royal assent to legislation) and, more generally, she remains able to exert considerable influence on matters of constitutional significance (2002b, p. 744, 2003a, pp. 61–2, 2009, pp. 244–5).

Both the Crown-as-monarch and the Crown-as-executive constitute areas of public law heavily regulated by convention, that is, governed to a great extent by constitutional politics not by judicially enforceable rules (2006, p. 17, 2008, p. 246). In legal terms the monarch could appoint whomsoever she wishes as Prime Minister –“the office is a gift of the Queen”– but there is a well-established standard of constitutional propriety regarding the matter –she is to offer the position to the leader of the political party that commands an overall majority in the House of Commons (2002b, p. 743). One way to gauge the sizeable sphere of influence that the monarch retains, observes Tomkins, is by probing the indeterminacy of the constitutional conventions that govern the powers directly exercised by the monarch herself (Tomkins, 2002b, pp. 744–5, 2003a, pp. 62–72). The central institutions of the Crown-as-executive (i.e. the core executive) are likewise heavily regulated by convention, Tomkins remarks, as is made clear by the fact that both the office of the Prime Minister and the Cabinet are creatures of convention not law (2006, p. 18, 2008, pp. 245–7). This reiterates that the British constitution is both distinctively political and conventional such that exercise of power is regulated and checked by practices endowed with normative force but which are upheld by Parliament using mainly political means. But what then is the place of the rule of law and the courts within the British constitution?

The rule of law has within the British constitution a very precise and narrow meaning, as it can be noted already in Dicey’s own elaboration (2003a, pp. 21–3, 2005, p. 34). The perplexities that besiege the concept of the rule of law spring mainly from its wide-reaching and imprecise use in jurisprudential debates, but there is no reason why this should impinge on British public law. In this context, Tomkins argues, the rule of law has a single and simple meaning: the executive may do nothing without clear legal authorisation¹⁶⁸. Thus conceived, the rule of law doctrine expresses a “fundamental rule” of British constitutional law that has taken shape after such celebrated common law decisions as *Entick v. Carrington* [1765] and *Beatty v. Gillbanks* [1882] (2009, pp. 246–7, 2010, pp. 7–8),

¹⁶⁸ “It is in legal philosophy that the confusions arises, not in public law. In English public law the rule of law has at its core a single, simple, and clear meaning. It is a rule that concerns the powers of the executive, of government (and not of Parliament or other legislatures), and it governs the relationship of the executive to the law. The rule of law provides that *the executive may do nothing without clear legal authority first permitting its actions*”(Tomkins, 2002b, p. 78, cfr. 2007, p. 256).

but one that reveals to be, if looked more closely, a rather weak and mostly formal principle of legality (2003a, pp. 79, 170).

How may the executive obtain the necessary legal authority to carry out a certain action? Firstly, and most obviously, the government may be authorised to do something by statute and “the sovereignty of Parliament means that Parliament may confer any powers on government” (2010, p. 20). Parliament, if it is to fulfil its function within the political constitution, should subject all power-conferring legislation that affect fundamental rights to “anxious parliamentary scrutiny” ensuring that there is enough evidence that demonstrate why such power is necessary and that the power-conferring statute defines the relevant power as tightly as possible (2010, p. 20). The fragility of the rule of law as a protection is shown, however, by the fact that government –which by definition enjoys the support of a majority of seats in the House of Commons and normally may rely on politicians to be loyal to the party line– might find most of the time relatively easy to obtain extensive powers from Parliament (2003a, p. 80)¹⁶⁹. Furthermore, the requirements of the rule of law may be circumvented by a second way, as the courts might decide –in the absence of a statutory authorisation– that government is nonetheless justified under the prerogative to undertake certain action (2003a, p. 81, 2006, p. 41, 2010, p. 8). The existence of the royal prerogative –i.e. “powers the common law recognizes as vesting in the Crown” (2006, pp. 24–5)– is the most important residue of the monarchical element within Britain’s republican monarchy¹⁷⁰.

This means, Tomkins remarks, that if the rule of law is to be effective the courts must be both able and willing to rigorously supervise not only that the exercise of the executive’s statutory powers comply with the boundaries set by Parliament but also to ensure that the Crown’s prerogative powers are not abused or otherwise misused (2003a, p. 81). The judicial record on this matter, however, is rather mixed specially when it comes to the control of the prerogative powers (2003a, pp. 81–9, 2005, pp. 14, 30–1, 58–61, 118–24, 132–3, 2010, pp. 7–19). To the dismay of those who celebrate the rule of law and put great faith in the courts, there are too many instances that show that judges are prepared to grant to the executive “elastic and ill-defined powers” and subject their exercise to “modest –

¹⁶⁹ As he has reformulated this idea lately, “it is not the case that the government is always able to secure through Parliament exactly the legislative powers which it would like, but it is almost always the case that the government gets pretty much what it wants” (Tomkins, 2006, p. 41)

¹⁷⁰ “Not all power is accounted for on the face of the constitution. Some inevitably, gets overlooked or forgotten. So what do we do with it when it comes to our attention? The answer in the American constitutional order ought to be clear: power not delegated to the institutions of government is expressly stated to remain with the several States or with the people. The answer in a monarchic constitutional order is quite different. In a monarchy, power not expressly dealt with by the law of the constitution will remain with the Crown” (Tomkins, 2005, p. 58).

even superficial– review” (2003a, p. 83). What is needed, then, is a conception of judicial review that gives courts a role that respects the distinctively political character of the British constitution and entertains sober expectations about what the rule of law and judicial procedures may attain. Put differently, if one is to steer clear of an illegitimate juristocracy and be unsentimental about the real potential of the judicial protection of liberty, how is judicial review to be theorised?

The “modern law of judicial review”, Tomkins observes, is a quite recent area of the law, no more than fifty years old (2003a, p. 171). It is true that the law of judicial review makes use of remedies that date back to medieval times and of rules of natural justice that were already established by the 16th century, but until the 1960s it remained peripheral and superficial¹⁷¹. It is only in the last forty years or so that “a bits and pieces, occasional, approach” came to be transmuted into something resembling a coherent set of principles of review which prompted an expansion of both the extent to which the executive was subject to legal accountability and the degree of judicial discretion enjoyed by the courts (2003a, pp. 171–2). The remarkable growth of judicial power that this has entailed, lately reinforced by the Human Rights Act 1998, carries the risk of simply replacing executive with judicial arbitrariness. This is why Tomkins sets forth a regimented approach to judicial review that reclaims most of the traditional doctrinal categories and distinctions that have structured judicial review and is suspicious towards the more expansive notions that have accompanied the growth of judicial powers.

Tomkins’ approach to judicial review starts by reinstating forcefully, on the one hand, that it is a “review” and as such it cannot question the merits of what the executive has decided but only its legality –i.e. Tomkins reclaims the paired distinctions between review and appeal, and between legality and merits¹⁷²– and that, on the other, judicial review, as a mechanism of executive accountability, is characterised by its particularity, viz. it cannot question executive policy as such but only particular decisions taken under it or implementing it in individual instances¹⁷³. To make operative both the distinction between review and appeal (and legality and merit) and to ensure the particularity that underpin

¹⁷¹ As Tomkins notes in the first edition of the classical treatise on the subject by de Smith (1959), it was suggested that judicial review was “sporadic” and “peripheral”, but in the mid-1990s the editors of that treatise (Harry Woolf and Jeffrey Jowell) asserted that it had become both “constant” and “central” (Tomkins, 2006, p. 46).

¹⁷² “Judicial review is exactly that: it is a review not an appeal. In a claim for judicial review, the claimant is not appealing against the merits of what the administration has decided, but is rather seeking a review of the legality of what has been done, or is proposed to be done” (Tomkins, 2003a, p. 170).

¹⁷³ “It is important to remember the particularity of judicial review as a mechanism of executive accountability. The courts can never (and nor should they be able to) review government policy as such. All that can be reviewed are particular instances, decisions, or applications of government policy” (Tomkins, 2006, p. 47).

judicial review what is needed is a regimented theory of the grounds or heads of review and of the rules regulating the access to judicial review (i.e. rules of standing and intervention). As regards the former question Tomkins discusses the traditional tripartite classification of the grounds of review (viz. procedural impropriety, illegality and irrationality) by distinguishing between procedural and substantive review. How are these to be construed in accordance to the model of the political constitution?

Procedural review refers to the area of administrative law traditionally known as natural justice and which is aimed at redressing procedural impropriety. This part of the law of judicial review that sprang from two fundamental rules of natural justice, namely, the rule against bias and duty to hear the other side, has come to coalesce into a “vision of procedural fairness” (2003a, p. 172, 2006, p. 44). It seems quite logical to suppose that, given their training and professional experience, judges should be “experts at process”, expertise they acquire as practising lawyers first and then as judges conducting the proceedings before them, making them able to adequately decide procedural questions – e.g. when one should be granted the right to an oral hearing, to be legally represented, to produce evidence, to cross-examination, and so on (2010, p. 6). Yet, even when resolving questions regarding procedural propriety, the courts have encountered considerable difficulties as they have struggled to adapt rules that come from the judicial model of an adversarial procedure to the quite different decision-making contexts encompassed by the administrative process, some of which (e.g. planning decisions) cannot be adequately fitted to a trial-based vision of procedural fairness (2003a, p. 174). Much more problematic still is substantive review. In particular, the application of broad substantive standards or principles of review, under which the intensity of review might greatly vary from case to case, furnishes judges with a great deal of discretion, displacing arbitrary administrative action with arbitrary judicial decision-making¹⁷⁴.

The problem is now aggravated by the increasing use of the principle of proportionality that has accompanied the development of rights-based review in the case-law regarding Convention rights and common law constitutional rights, viz. those “constitutional rights invented by the courts through the development of the common law” (2005, pp. 20–1). The deployment of the proportionality principle most evidently

¹⁷⁴ “It is impossible to predict what the courts will hold to be unreasonable and what they will not. Such an approach to public law seeks to control the problem of executive discretion by simply replacing it with untrammelled judicial discretion. For sure, a constitution should guard against capricious or arbitrary executive action. But so too should it guard against capricious or arbitrary judicial decision-making. The creation by the courts of general principles of legality is no way to control arbitrariness in public life, as the use and abuse of the *Wednesbury* doctrine in English law has shown” (Tomkins, 2005, p. 22).

entangle judges with passing judgement on clearly political questions, such as deciding whether a state interference with a fundamental right is “necessary in a democratic society”; thus, courts have had to answer whether a certain governmental decision is justified by a “pressing social need” or is in accordance with a spirit of “pluralism, tolerance and broadmindedness” (2005, p. 21). All these questions constitute politically controversial matters that in a democratic society are to be decided via parliamentary debate and not by litigation before the courts. This leads Tomkins to the conclusion that courts might legitimately be responsible for enforcing procedural rights and “tightly defined absolute rights” (e.g. the ban on torture), but cannot legitimately decide over the intrinsically political questions concerning the protection of “qualified rights”, i.e. those that require judgements on reasonableness or proportionality (2010, pp. 3–7)¹⁷⁵.

7. Conclusion: the place of political constructivism

The writings of Adam Tomkins have had a significant impact on contemporary public law scholarship. It is greatly due to his efforts that the clash between political and legal constitutionalism has come to be seen as one of the central –if not the central– question of public law theory. More concretely, Tomkins’ arguments have imposed a greater burden of justification on those that set forth a moral constructivist position intending to ground public law theory in a conception of the limits that moral principles and the rule of law impose on politics and political powers. After his contributions it has certainly become more complicated to simply assume that it is through the judicial process that rights and liberties are better protected and constitutional government attained. In positive terms, Tomkins’ writings have successfully foregrounded the constitutional importance of Parliament and the role of parliamentary processes in holding government to account. Undeniably, political constructivism constitutes an ambitious programme within British public law as it provides [1] a distinctive understanding of the British constitution through the articulation of a model of the political constitution, [2] a unified account of recent trends of constitutional change as different manifestations of a shift from the political to the legal constitution, [3] an insightful reading of British constitutional history that both illuminates aspects of the contemporary structure of the British constitution and its

¹⁷⁵ Lately he has greatly weakened this thesis and has transformed it into a sort of balancing exercise between the *constitutional goods* of “reasonableness or proportionality” and two other important constitutional goods, namely, the government’s ability to govern and democratic (principally parliamentary) accountability. In his words, “when it comes to review on grounds of reasonableness or proportionality, we need a judicial review that is appropriately responsive to, and respectful of, these other constitutional goods and accords them due weight” in order to attain “a balanced mix of these various constitutional goods” (Tomkins, 2013, p. 2287).

trajectory, [4] a critical engagement with existing British public law scholarship (from Bagehot, Dicey, and Jennings to Griffith, Loughlin, Allan, Craig, etc.), [5] a normatively grounded reading of the British constitution based on a republican political theory that reclaims the virtues and inescapability of politics from naïve perspectives that intend to saddle it with the law. What makes political constructivism distinctive from its critical and moral counterparts is, especially, its vindication of the central role that traditional constitutional theory has granted to Parliament and that it is in politics and the processes of ordinary parliamentary politics where one should look for the normative foundations of the British constitution. This theoretical framework enables Tomkins to elaborate a new understanding of Parliament and parliamentary processes and a regimented conception of judicial review that is congruous with a parliamentary constitution, offering a stark contrast to constitutional theories that gravitate towards administrative decision-making processes (cf. chapter 2) or propose an expansive vision of the constitutional role of courts (cf. chapter 3).

Tomkins' political constructivism is beset, however, by four significant problems. The first concerns its self-positioning within British public law theory. Tomkins sees his contribution as offering the “progressive normativist” approach that British public law scholarship sorely lacked. There was, he says, a progressive school –“functionalism”– developed by scholars that had personal progressive political convictions (e.g. Robson, Jennings and more recently Griffith) but who did not elaborate theories of public law “founded on progressive values” (Tomkins, 2005, p. 39). That is why one should attempt to elaborate a normatively grounded political constitutionalism and, he suggests, there can be no better basis for that exercise than republican political theory. The problem is, however, that it remains unclear what is it about his normative political constitutionalism that is “progressive”. The early functionalists were progressive, as Tomkins himself points out, due to their commitment to think rigorously about the new institutional and legal arrangements that were required for the growing welfare state brought by the expansion of industrialisation, democracy and collectivist ideas. The functionalists clearly did not –in contrast with Tomkins– believe that one should rely mainly on ministerial responsibility or parliamentary scrutiny for ensuring good government and protecting citizens in the new context of the developing administrative state¹⁷⁶. What was required, they thought, was the creation of a full-blown *régime* of administrative law with an effective system of specialised

¹⁷⁶ As Tomkins notes, Jennings did not give a central place to collective responsibility –and gave no place to individual responsibility– in his more extensive works on Parliament and Cabinet Government (Tomkins, 2004, p. 785).

administrative jurisdiction¹⁷⁷. It is also highly doubtful, as it will become clear in the next chapter, that Griffith would have viewed himself as a political constitutionalist, descriptivist or otherwise.

A second problematic feature of Tomkins' political constructivism relates to the internal tensions affecting the seventeenth century thesis. As he recognises, any reconstruction of such long historical path as that of the British constitution imposes the need for selection and, therefore, any suggestion about what moment is (or series of moment are) to be taken as central requires a fair amount of justification. Tomkins' selection of the 17th century as the decisive period seems, looked more closely, problematic. Of course, he might be right in taking the 17th century as the republican moment within the British political tradition and his argument that the struggles of that period constitute the formative moment of the parliamentary constitution seems persuasive. What seems problematic, however, is why the "formative" moment is to be taken as the "central" moment. As Tomkins himself argues, many constitutional conventions that are central to the parliamentary constitution –e.g. the indirect exercise of royal government, the office of the Prime Minister, the Cabinet, collective and individual ministerial responsibility and so on– were originated in the 18th century and the heyday of parliamentary government was, actually, the 19th century (2002b, pp. 749, 758–60, 2003a, pp. 50, 135–6, 2006, pp. 17–8). A question poses itself quite naturally. If the point is that the British constitution is distinctively political in that it is parliamentary, it seems problematic to assume that the formative period of parliamentary government is to be privileged over the period of maturation or even the golden period of parliamentary government. As a matter of fact, by looking only the 17th century it is not possible to grasp what Tomkins takes to be the "greatest single insight" of Bagehot, namely, that the political constitution of Britain has evolved into a "Republican monarchy" (2002b, p. 752).

Thirdly, there is also an internal tension between Tomkins' political constitutionalism and his republican constitutionalism. His political constitutionalism, as it has been shown, was born as a thesis on the unique or peculiar nature of the British constitution that entailed a certain view of its historical formation and its contemporary structure. If, as Tomkins himself argues, the distinctively political character of the British constitution unfolded historically from the struggles of Parliament to subject the Crown and its government to account and by the emergence of a series of conventions (about the royal prerogative, the Crown advisors, the Prime Minister, the Cabinet, Ministerial

¹⁷⁷ For two overviews, see Mitchell (1965) and Robson (1959).

Responsibility, and so on), this view of the British constitution as a political, conventional and, ultimately, a parliamentary constitution does not fit too well with his republican reading and his republican programme of constitutional reform. The remaining importance and influence of the Crown and the monarch herself, in Tomkins' own account, is an essential part of the political constitution. The formalisation of the constitution that the abolishment of its monarchical elements would bring about –especially the abolishment of the Crown and the royal prerogative (2005, pp. 132–4, 139–40)– would not only decompose the conventional aspects of the political constitution but with the obliteration of one its sovereign authorities (without the Crown only the sovereign authority of Parliament remains) it would also alter the whole bi-polar constitutional architecture that has historically underpinned modern British public law. The parliamentary constitution supposes that there is a “Crown’s government” (that is precisely not the Parliament’s government) that is held to account. As he has insistently shown, the end of the golden period of parliamentary government came about as a consequence of the expansion of democracy and the emergence of modern political parties, because the emergence of highly organised and disciplined parties blurred the “crucial separation of Crown from Parliament” (2003a, pp. 164–5, 2005, p. 138). Indeed, his posterior unqualified embrace of republican political theory made Tomkins lose track of the very tension between democracy and parliamentary government that he thought so important to highlight in earlier writings (2002b, pp. 759–60).

Fourthly and finally, there is an important blind spot in Tomkins' public law theory. As he has cogently shown, in the British context in contrast to other constitutional orders such as the American, (monarchical) power was already in place when the constitutional struggle to subject it to account took off. This is “Britain’s oldest constitutional story”, i.e. the struggle to subject the Crown to constitutional account through Parliament (2003a, p. 39, 2005, p. 58, 2009, p. 245). It is this particular historical fact, viz. that the central question within British public law has always been the problem of the constitutional accountability of government, that which inspires his general conception of what constitutions are for. All constitutions, on Tomkins' account, must come to terms with what he calls the “reality of government”, that is, that “government is not (or at least is not always) an especially attractive occupation: it can be cynical, even dirty. One way of expressing the ‘reality of government’ is to say that those in political office are liable to try to do whatever they can politically get away with” (2010, p. 2). So, the argument continues, “the purpose of a constitution is to find ways of allowing the government to get away with

less” (2003a, p. 18) or, he also puts this, “the purpose of all constitutions is to find ways of insisting that the government is held to account” (2005, pp. 2–3). Where constitutions differ, Tomkins contends, is in how they subject the government to account: legally through courts and the judicial process or politically through Parliament and parliamentary scrutiny. This brief recapitulation of the model of political constitutionalism (and by contrast, legal constitutionalism), centred as it is in constitutional accountability, shows that this conception (and its opponent) does not address a crucial prior constitutional question: how is power generated? Of course, to subject power to constitutional account is crucial, but how is power constituted in the first place? Actually, as social constructivism (chapter 2) would observe, in contemporary societies one cannot simply assume that only governmental institutions exercise power. The reality of the corporative state, the need of governments to rely on cooperation with powerful private corporations to obtain their goals, the increasing reliance on contracts, self-regulation and networks, all point to the fact that not all political power is embodied in government and not even in state institutions more generally. One might go further, and with deconstructivism (chapter 5), wonder whether this blind spot derives from an overestimation of the role of principles in public law. Finally, one might also wonder whether, as reconstructivism would remark (chapter 6), republican political constitutionalism is a no less one-sided reading of public law discourse than liberal legal constitutionalism or, in fact, any other kind of constructivism.

5. DECONSTRUCTIVISM AND THE DEMYSTIFICATION OF PUBLIC LAW

1. Introduction

The diversification and expansion of theoretical writings that has animated the theoretical turn was inspired by the belief that the atheoretical character of public law scholarship made it unsuited to grapple with the contemporary problems and challenges of the field. From the critique of the dismal performance of public lawyers, came a call to scholars to embark on a search for the foundations of their subject. Most of those who answered this call understood the task to be undertaken as primarily normative, i.e. an inquiry into the fundamental standards that ground and give normative force to public law. Consequently, most approaches within contemporary British public law theory constitute a species of constructivism whose variations differ according to the theoretical resources that are employed (critical social theory, moral philosophy and political theory) and what is taken to be the normative centre of the field (the administrative and regulatory process, the judiciary and the common law or Parliament and political accountability). Although constructivism has been clearly predominant, it would be wrong to assume that all British public law theories could be subsumed under that category. There are at least two important alternatives which here will be called deconstructivism and reconstructivism.

The most sustained elaboration of a deconstructivist approach to public law theory is to be found in the writings of John Griffith. What is distinctive about deconstructivism is the conviction that public law theory may not only be part of the solution, but actually a part of the problem. For Griffith, the beginning of wisdom is to note that public law is a “two headed creation, like Janus” with a front towards law and another towards politics and that, thereby, public lawyers choose and distribute themselves “along the road stretching from those who are scarcely distinguishable from political scientists (or even politicians) to those who look like honest, common lawyers” (1988, pp. 834–5). Griffith has long argued for the need for the academic public lawyer to adopt the former approach, not only because the time spent in “university law schools” is to be regarded as “a time of further education, and not as a time of professional training” (1962, pp. 17–8), but also because public law and politics are “social sciences” that have the same object of inquiry, viz. the are two ways of looking at the same thing (1976b, p. 137).

Public law pertains to the exercise of power, Griffith contends, if it is not in itself a dimension of power and as such shall be studied and theorised (1982, 1995b). This points

to the crucial realisation that public law theory, as with any other discourse about and deployed within the exercise of power can be used –and, in fact, is used– as weapon in political struggles, to vie for political ends. This danger becomes manifest when prevalent theories become estranged from legal practice and contribute to disguising extant relations of power, sheltering them from analysis, criticism and reform. The primary task of the theorist is to demystify public law, to adjust our image of the constitution so that it answers to “what actually happens”. Public law theories should resist the temptation to champion particular ideals of justice or adopt other political causes since that is likely to lead them to disregard the conflictual nature of society and the complexity of the subject. Consequently, deconstructivism proposes to bring theory closer to practice by liberating public law discourse from a series of mystifications that obscure the empirical foundations of the subject, namely, popular sovereignty (section 2), parliamentary supremacy (section 3), the separation of powers (section 4), the rule of law (section 5) and the neutrality of the judiciary (section 6).

2. The liberal fallacy and the mythology of political power

Griffith’s deconstructivist conception unfolds from the observation that, within the field of public law, theories are constantly at risk of becoming estranged from practice. This pitfall springs from the inclination of public lawyers (esp. those with a more philosophical disposition) to disregard the mutable character of constitutions and to overestimate the role of principles in public law. As a consequence of the ever-changing character of constitutional practice, it often happens that a constitutional theory that had come into existence as a relatively faithful account, outlives its use-by date and ends up disfiguring reality behind a variety of “myths”, “fallacies” or “fictions”. Constitutional theory also tends to founder when facts, description and analysis are replaced by values, definitions and deductions, such that they end up telling us more about the respective author’s moral or political philosophy than about the extant arrangements of government. Public law is, thereby, constantly under the threat of becoming mystified, masking or legitimising existing power structures, rendering them invisible or otherwise immune to analysis, criticism and reform¹⁷⁸. What is needed, Griffith contends, is a public law theory grounded upon empirical foundations, breaking free from that “long-standing British tradition” in public law scholarship where “constitutional theory” becomes estranged from “the ‘what actually happens’ constitution” (1976a, pp. 204–5).

¹⁷⁸ “I think that in our society the only way to reform lies in constant exposure, in continuous demystification” (Griffith, 1981a, p. 154).

The steps of Griffith's argument should be examined more closely. There is, first, "a great danger of constitutional theory lagging far behind constitutional practice" (1951a, p. 279). We form theories about the existing arrangements of government within a certain social context but not infrequently fail to adapt the former as the latter change, even if constitutional practice is —compelled by circumstances— to evolve to cope with novel social problems¹⁷⁹. Faced with these changes the public lawyer that has come to cherish his aging views on the constitution, tends to respond not by adjusting them but by reasserting his political prejudices as a priori or even objective principles. This is why, in times of greater social change, the constitution tends to appear in the eyes of the constitutional theorist as "debauched", to have its prior "virtue" soiled as dearly held constitutional principles accumulate more and more exceptions in practice¹⁸⁰. There is no better illustration of this than the many misconceptions derived from the persistent influence of the constitutional theory of nineteenth century liberalism whose paradigmatic formulations were articulated by Victorian writers such as JS Mill, W Bagehot and AV Dicey. Their timing was, Griffith remarks, particularly significant as these writers wrote "their unhappily misleading books on the constitution" when the "foundations of the present political system" were being laid (1979, p. 2)¹⁸¹.

During the middle decades of the nineteenth century (c. 1830-1870), the foundations of the existing form of government took shape as a consequence of a series of changes in the structure of society. Among them, Griffith argues, three kinds of change are of particular importance for understanding the working of the constitution. First, at the "party level", the extensions of the franchise (1832, 1867, 1884) and the transition from parliamentary groupings to national disciplined political parties (1867, 1877). Secondly, at the "industrial level", with the joint stock company and the struggle for improving the conditions in factories, mills and mines, this period saw the growth of the working-class movement and collectivist ideas. Thirdly, at the "administrative level", the creation of the "regulatory state" that became necessary to implement the extensive reforms trying to deal with the social ills of an industrialised economy and overpopulated cities (Griffith, 1951a,

¹⁷⁹ "In this field of law far more than any other it is common to hear such expressions as 'In theory, that is correct. But what *actually happens*...' and what actually happens often as an upstart with not quite the correct educational background" (Griffith, 1951a, p. 279).

¹⁸⁰ "'Meredith', said Oscar Wilde, 'is a prose Browning'. And added 'And so is Browning'. Sometimes I feel similarly that our constitution is the opposite of what it sets out to be. But then I reflect that so probably are all constitutions. Or if they begin as honest and effective they quickly lose their honesty as the price of retaining their effectiveness" (Griffith, 1979, p. 1).

¹⁸¹ Griffith in another place specifies that these books have become particularly misleading to us now, if not so much to them then: "By way of explanation to their contemporaries and, less happily, to us, J.S. Mill, Bagehot and Dicey provided their commentaries" (Griffith, 1969, p. 385).

pp. 281–2, 1969, p. 385, 1979, p. 2; Griffith & Hartley, 1981, p. 11; Griffith & Ryle, 1989, p. 4). These are complex historical processes that “we are still struggling to understand” but whose real entity will remain beyond our grasp as long as we stay entangled by the “ghosts” of dated constitutional theory¹⁸².

Griffith intends, in particular, to exorcise the ghosts left by the liberal theory of the constitution that retains persuasive force despite the fact that “as a description of a form of government ceased to be useful” at least since the First World War (1979, p. 3)¹⁸³. The first misconception to be dispelled is the “liberal fallacy” –viz. the “fiction of a liberal ‘popular’ constitution”– which has engendered a great deal of confusion about the meaning of democracy and parliamentary sovereignty. In its nineteenth-century version, Griffith observes, the liberal fallacy urged that “the representative body was the true centre of governmental power and that the Cabinet was an executive arm –or ‘committee’ as Bagehot said– of that body from which it received its instructions” (1963, p. 27)¹⁸⁴. The idea that government is subordinated to Parliament was subsequently grounded upon a theory of democracy that portrays parliamentary government as embodying a delegation chain (“democracy by delegation”) by which the people –in whom all political power originally resides– delegate it to their representatives in Parliament who in turn, through the legislative function, instructs government what to do (Griffith & Hartley, 1981, p. 8). In one of its more recent incarnations –i.e. “democracy by discussion”– the liberal fallacy suggests that in a parliamentary democracy the widely divergent views and wills of the people are canalised by party programmes that are to be put to the electorate during elections and after which the chosen programme is translated by Parliament into laws and a “spirit of administration” that are translated into action by the Cabinet (1950, pp. 1088–9, 1981b, p. 6).

History and actual practice clearly show, Griffith contends, that “neither the people nor Parliament rules” (1950, p. 1092). Nevertheless, the fallacious idea that the people rule has become deeply ingrained in the “mythology of political power” (1981b, p. 6). It is not difficult to understand why. The theory that sovereignty resides with the people is a

¹⁸² “The theory of the constitution is full of ghosts striving to entangle us with their chains” (Griffith, 1951b, p. 436).

¹⁸³ In the following passage Griffith sums up the core elements of this theory of the constitution: “It is still quite common to hear the constitution described –even lovingly described– as a piece of machinery cleverly and subtly constructed to enable the will of the people to be transmitted through its elected representatives who make laws instructing its principal committee the Cabinet how to administer the affairs of the State, with the help of an impartial civil service and under the benevolent wisdom of neutral judiciary” (1979, pp. 5–6).

¹⁸⁴ “Confusion descended on us when, because of the growth of the franchise and a mistaken belief that Bagehot was a political analyst rather than a political philosopher, we decided that the representative body had some inherent supremacy over the elected government” (Griffith, 1956, p. 209).

“comforting” doctrine that mantles existing governing arrangements with “the appearance of a working democracy” (Griffith & Hartley, 1981, p. 8). The existing system of government appears to be able to transmute “by a kind of political alchemy or sleight of hand... the baser metal of the power struggle into the gold of democracy” (Griffith, 1981b, p. 5). This idea is to be rejected not only because it is remote from the facts but because it is positively dangerous as a cover-up for authoritarianism¹⁸⁵. In historical terms, “political power has never resided in the people” but in different groups of rulers able to wield it due to their sheer military or economic power and later, with the emergence of new methods of appointment of political rulers and the expansion of the franchise, joined by various groups with differing degrees of power and electoral bases (Griffith & Hartley, 1981, pp. 8–9).

Political parties and governments must act in the context of powerful interests and organisations (representing employers, employees, the professions, students, etc.), and cannot simply ignore the impact of what they do on public opinion more generally and on international trade (Griffith, 1963, p. 25; Griffith & Hartley, 1981, p. 26). Although the paraphernalia of contemporary politics helps to reproduce the illusion of popular sovereignty¹⁸⁶, the truth is in the “capitalist state” that smaller economic elites are gaining overwhelming political influence (Griffith, 1969, p. 390)¹⁸⁷. The weakening of the state and trade unions in the last decades due to deregulation, privatization and globalization, has made even clearer that private corporate power is today a more formidable menace than a public political power that is becoming unable to counteract the former (2000, p. 173, 2001, p. 63)¹⁸⁸. So, concludes Griffith, “we had better begin by looking at our society as it

¹⁸⁵ This became particularly clear for those who like him were formed in the inter-war period, when nineteenth century liberalism became entirely discredited: “The disillusion between the wars made many of the younger generation impatient with those who used the language of the old liberal democracies. These were seen at worst as elaborate façades deliberately constructed to fool most of the people most of the time or at best as out of date pieces of stage paraphernalia which someone had forgotten to clear away with the other impedimenta of Professor Dicey’s England... What we wanted to know in the thirties was where the reality of political and economic power lay. We were not surprised to discover that the trappings of democracy concealed rather than adorned the body politic. But who was pulling the levers, where the levers were being pulled, who were the puppets and who the puppet-masters, these were the questions to which we sought answers. We are still seeking them” (Griffith, 1979, p. 5).

¹⁸⁶ “The conversation about politics fortifies the myth that ordinary men and women participate in political power and can share in deciding what shall be done. The art of politics is to persuade people that they make decisions while ensuring that they do not. The paraphernalia of party conferences and trade union congresses, the ballyhoo of general elections, ‘juries’ on television, everything that seems to involve people in the decision-making process conduces to this illusion. And as the media of communication become more and more widespread so the illusion can be made stronger” (Griffith, 1969, p. 387).

¹⁸⁷ “The growth of authoritative, totalitarian power in both the economic and political spheres is remarkable and is becoming more blatant... More and more power is being concentrated in fewer and fewer hands as the large industrial complexes extend their empires and as the electorate has less and less say (not that it ever had much) in the political decisions of governments” (Griffith, 1969, p. 391).

¹⁸⁸ He warns to any who “puts his faith in the re-distribution of assets from the haves to the have-nots” that he will end up “bouncing his head against the hardrock of capitalism, both private and state. I simply do not believe that the haves in our society would permit what the Labour Party calls ‘a fundamental

is” and recognise that its conflictual nature derives from the fact that the capitalism “is essentially oligarchic and authoritarian in terms both of government and of the distribution of wealth” (Griffith, 1982, p. 6)¹⁸⁹. Participatory democracy is largely an “invention” which, to get any real content, would require nothing less than a revolutionary overhaul of the existing oligarchic economic and political structures and a degree of citizen participation in public affairs that is likely to prove supererogatory¹⁹⁰. That the people do not rule, however, does not mean that the people have no important role to play within the constitution. On the contrary, the people as an electorate and as a large and inarticulate body of public opinion have had a central place in British government since the middle decades of the nineteenth century. But in order to understand the role of the people, it is necessary first to understand better the place of Parliament, the core representative institution in any democracy.

3. Parliamentary government and the myth of parliamentary supremacy

On the traditional account, Parliament is a representative assembly that translates the policies favoured by the people into laws and a spirit of administration which, in turn, the government (as its “delegate” or “executive arm”) implements through administrative action. The suggestion is that government is subordinated to Parliament and that the former acts under the instructions given by the latter principally through parliamentary laws. Parliament, in this sense, it is said to govern or at least control government and is conceived as exercising a primarily legislative function. This view of the constitution is wrong in all counts¹⁹¹. Parliament does not govern nor does it control the government. In fact, Griffith contends, “it is not and never has been the function of Parliament to govern”

and irreversible shift in the balance of power and wealth in favour of working people and their families” (Griffith, 1983b, p. 798).

¹⁸⁹ “If we look at our own society, we see that it is essentially oligarchic and authoritarian in terms both of government and of the distribution of wealth. We see that this leads, naturally and inevitably, to conflicts and strains which are endemic and, however much they are changed in subject-matter over the centuries, have many constant characteristics. We see that in our society the interests of those few who control our economy appear to conflict with the interests of the many. And we call all this, in industrial and economic terms, capitalism. When, however, we look outside our society to societies where private capitalism has been overthrown and replaced, we find that there oligarchy and authoritarianism have persisted, even grown stronger” (Griffith, 1982, p. 6).

¹⁹⁰ With the liberal fallacy, Griffith states, “the stage became set for the invention of participatory democracy. For that we shall need new and remarkable institutions. We shall have to abrogate ‘the iron law of oligarchy’. We shall have to struggle not with politicians and professional bureaucrats only but also with those who seek, more or less successfully, to manipulate Governments for their own economic ends. However valuable an exercise this may be, it will be very time-consuming indeed as anyone knows who has tried to influence events through local politics or the membership of pressure or interest groups. Full participatory democracy will leave little opportunity for other, no doubt lower, pursuits” (Griffith, 1981b, p. 7).

¹⁹¹ “Parliament does not govern. Parliament does not control the Government, although events and criticisms in Parliament influence the Government. Parliament does not legislate, unless we limit that word to mean the formal assent to a legislative proposal which Parliament has examined, criticized and defended” (Griffith, 1950, pp. 1116–7).

(2001, p. 52). The idea that government is a delegate of (or otherwise subordinated to) Parliament comes from a mistaken generalisation of the quite “untypical” relation between the House of Commons and government during some years of the mid-nineteenth century but which, ever since, has always misrepresented the working of the constitution (1963, p. 27, 1979, p. 2, 1981a, p. 135).

A cursory look at constitutional practice shows how misleading is the liberal fallacy. Ministers are not “in any real sense servants of Parliament which neither appoints nor instructs them” (1950, p. 1117). They are servants of the Crown responsible to Parliament which is a different thing. It is one thing to say that government must have the confidence of Parliament and quite another to assert that Parliament in any way appoints it (1950, p. 1087). The liberal fallacy provides a false account of the electoral act and the formation of Governments. It is simply not the case that the electorate chooses first its representatives who then, assembled in Parliament, appoint or constitute government, i.e. “the Government of the day does not come into existence through indirect election” (Griffith & Hartley, 1981, p. 9). When the elector votes, she “consciously performs two functions”: she is voting both “for a party” to form the new government and “for an individual” to be her representative in Parliament (Griffith, 1950, p. 1091). A general election, in other words, is to determine both the identity of the next government and who will be the Members of the next Parliament (Griffith, 1963, p. 24; Griffith & Hartley, 1981, p. 31). Governments, in fact, “are formed, after a general election, before the House of Commons assembles” (Griffith & Hartley, 1981, p. 9). General elections often take on “the character of a personal contest between the two party leaders” because the great majority of candidates in a general election “stand as party candidates” and “the party with the largest number of seats in the House of Commons forms the Government, its leader becoming the Prime Minister” (Griffith & Hartley, 1981, p. 31; Griffith & Ryle, 1989, p. 17).

Once the character of elections is revealed another aspect of the working of the constitution can be brought into light. From the fact that the electors vote in a general election simultaneously for a party and an individual, Griffith contends, “it follows that a Member of the House of Commons has two functions to perform” in the sense that each member in addition to having a “duty to his constituency” he will also have a “duty to support” or a “duty to oppose” the “general policies of the Government” depending on whether he is a member of the majority party or a member of the opposition (1950, p. 1116). This means that Parliament cannot simply be considered as a unit. There is a cleavage between Her Majesty’s Government and Her Majesty’s Opposition that is

expressed in most parliamentary procedures. The House of Commons is really “composed of two groups, one larger than the other” which differ about what “course is best for the country” (Griffith, 1950, p. 1089; Griffith & Ryle, 1989, pp. 13–5). As the larger group is composed by “government supporters”, it follows that “the majority of the House inevitably agrees with governmental policy; if it did not, there would be a different Government” (Griffith, 1950, p. 1113). This is the “principal political consideration” when studying the working of the constitution (Griffith & Ryle, 1989, p. 4), viz. that the government is the government because its party commands a majority in Parliament whose “primary function is to sustain ministers in office” (Griffith, 2001, p. 49).

A few remarks will suffice to show how important this is to understand the constitution. First, it makes evident that the liberal fallacy contains false assumptions about the behaviour of individual Members of Parliament and the relation between government and Parliament. It fallaciously holds that “every Member considers each proposal on its merits, votes according to his own evaluation, and is free from any discipline of party” (Griffith, 1950, p. 1099), disregarding the fact that “the conflict between the Queen and Parliament has become the conflict between the party in office and the party in opposition” (Griffith & Street, 1973, p. 24). The claim that government and Parliament are in a constant struggle or vying against each other runs against the fact that the members of government are also “the most influential Members of Parliament and leaders of the political party commanding a majority in the House of Commons” (Griffith, 1950, p. 1090) and that “back-bench Members on both sides are primarily conscious of their role as supporters of their parties and of their leaders in Government or Opposition” (Griffith & Ryle, 1989, p. 13). This gives government great strength as it can rely with great confidence on the majority of Parliament consenting to its policies and proposals. This should be emphasized as “the considerable power it gives to Governments” has long been “a characteristic of the constitution” (Griffith, 1963, p. 25)¹⁹².

Secondly, Griffith claims, government is not expected to negotiate its policies with the opposition. Government is expected to act in accordance with its expressed policy and

¹⁹² One should not have a simplistic view of government’s command over the majority of the House. Governments cannot simply rely on whipping their “supporters into the proper lobbies”. They not only possess “many powerful, and more subtle, methods of persuasion” but they must rely on a majority of the House following them “on its own wish because it is of the same mind”. In most cases, “Government will not openly flout the wishes of its back-benchers and is more likely, if it cannot persuade, to drop the controversial measure”. Although there will always be some intra-party criticism however, only rarely governments face a substantial opposition from their own ranks, i.e. when there is a struggle “as to what the policy of the party shall be” that has come to the point where a dissenting group decided demonstrate that it can provoke “a political crisis in Parliament” (Griffith, 1950, pp. 1115–6, 1963, p. 25; Griffith & Street, 1973, p. 24).

accept the consequences (viz. facing criticism from the opposition and in public opinion and periodically the judgement of the electorate), rather than with a muddled and perhaps unattainable compromise acceptable to all but which nobody makes its own¹⁹³. The House of Commons is a divided chamber, one group being larger than the other, and it is not part of the duty of the former to accommodate the latter, i.e. “Government is elected to govern not to compromise with the Opposition” (1951a, p. 293). Indeed, this becomes clear once one realises that the “essence of democratic government” is not discussion and compromise but consent and that governments “stand or fall by their success in dealing with the country’s problems not by their ability to compromise with the Opposition” (1950, p. 1089). The method of Parliamentary government owes its present shape to the emergence of cabinet government, the idea of ministerial responsibility and the growth of disciplined parties with a “recognisable distinction” in their policies (1950, p. 1113). The result of these historical developments is the characteristic strength that governments possess under the constitution. General elections result in one party having more seats than any other, frequently with an overall majority. In fact, for Griffith, “it is of the essence of the constitution that the Government can command such a majority” (1950, p. 1117) as this is crucial for “efficient governing” under the constitution¹⁹⁴. Minority governments are politically and constitutionally “undesirable” not only because they make “poor administrations” but because they dislocate the regular pattern of relationship between government and Parliament, putting to the “test the flexibility of the constitution” (Griffith & Ryle, 1989, p. 17)¹⁹⁵.

It should be clear by now why, from Griffith’s perspective, it is so misleading to say that Parliament controls government. If anything, quite the opposite results to be more accurate (2001, p. 47). Of course, much depends on what is meant by “control”. If used with an “active” connotation, the suggestion is clearly false (Griffith, 1963, p. 27; Griffith & Street, 1973, p. 24). Parliament has no control over policy. Principles of policy are determined by the organs of the political party and then applied and worked out in more detail by Cabinet and central departments (Griffith, 1950, p. 1098). More generally, the

¹⁹³ “The Government exists because there is a majority and its duty is to administer the affairs of the country. It is better that it should do so in accordance with its expressed policy and be ready to accept the consequences than to attempt perpetually to find a course which will be acceptable to all and which will end by being acceptable to none” (Griffith, 1951a, pp. 293–4).

¹⁹⁴ “It is essential to the efficient governing of the country that the Government should command a clear majority over a combination of the other parties. Minority Governments, being weak, and having to compromise their actions and proposals, make poor administrators. As we have already said, consent of the minority to be governed, not compromise, is the essence of the constitution” (Griffith, 1950, pp. 1113–4).

¹⁹⁵ “Minority Governments are constitutionally and politically undesirable because instead of the Executive governing through Parliament, Parliament tries and fails to govern through the Executive” (Griffith, 1950, p. 1114).

“initiative” in governing lies not with Parliament but with government. Parliament performs primarily a “negative function” by criticising governmental action and, eventually, rejecting governmental policy (this is no small power as government may have to call for a general election after a “defeat” in the House of Commons) but it cannot –and should not– propose alternative courses of action (1950, pp. 1091–2, 1098). This is fundamental for the existing system of government. Neither Parliament nor any of its committees should be “makers of policy”, as “the Cabinet and the departments must remain the decision makers so that responsibility clearly attaches to them” (1963, p. 31)¹⁹⁶. To say that Parliament controls government is less mystifying when “control” is understood to mean “critical containment” rather than “mandatory direction”, viz. it is precisely in the scrutiny of the government by Parliament, especially through its select committees, that the latter should have some degree of independence from the former (Griffith, 1963, p. 27, 1983a, p. 52; Griffith & Street, 1973, p. 24).

In summary, the suggestion of there being any sort of supremacy or hierarchy in the relation between government and Parliament should be rejected. Government and Parliament have “different functions within the constitution and neither is supreme over the other”: while the former has the “right and duty to govern”, Parliament has the right and duty to “consider, defend and criticise” government proposals and any part of its administration (Griffith, 1950, pp. 1112, 7). Government is the one that “performs the governing function in the state”, Parliament “performs a responsive rather than an initiating function” (Griffith, 2001, pp. 49–50; Griffith & Ryle, 1989, p. 5). Parliament, in consequence, is not primarily a decision making body within the constitution but a debating forum where the parties contending for power debate in public all public matters and where government needs to secure the approval of the authority it needs for implementing its policies¹⁹⁷.

Finally, Griffith concludes, it can be stated what parliamentary government really means, i.e. “not government by Parliament, but government through Parliament” (Griffith

¹⁹⁶ “There is a very great danger in any attempt by Parliament to extend its operations into the sphere of the administration. No Minister should be able to hide his failures by pleading the instructions of his critics” (Griffith, 1951a, pp. 292–3).

¹⁹⁷ “The two Houses, therefore, cannot properly be described as governing bodies, nor correctly analysed as being institutions with initiating or law making functions within the constitution. They are better presented as forums within which the contending powers –the parties and those whom they represent, and individual Members or Peers– publicly debate the issues of the day and matters of their choosing, and through which the Government may secure the authority it needs for the implementation of its policies and the exercise of its powers. If these forums can be said to have a principal function, it is that of exercising constant scrutiny over those who have the powers of government and debating all matters brought before them from whatever source, and, through the operation of the Government’s majority in the Commons, of enabling the members of the Government to fulfil their constitutional role” (Griffith & Ryle, 1989, p. 6).

& Ryle, 1989, p. 10). This is consonant with Parliament's institutional features. Parliament is a large body that can reflect different bodies of public opinion. There is no issue that is "too big or too small for parliamentary consideration" and almost any minority interest will be able to find some "sympathetic ear" somewhere in the Commons (Griffith, 1951a, p. 295; Griffith & Ryle, 1989, p. 10). Debate is unceasing along the different parliamentary processes and the opposition is there to keep the pressure on government, all which contribute to "considerable ministerial accountability" (Griffith, 2001, pp. 48–9; Griffith & Ryle, 1989, p. 13). Parliament's constitutional role should not be overlooked. It is true that government will most of the time win the vote, but it can lose the argument and it is here that Parliament's influence on government is constitutionally decisive. Whatever the size of its majority, for government to have its way in Parliament is never easy "and ministers have lost as well as made their reputation in the process" (Griffith, 2001, p. 54; Griffith & Ryle, 1989, p. 34). Parliament "secures its influence by reflecting and by forming and conditioning public opinion" and, as long as it does, governments will have to take parliamentary debate seriously as it will bear on the result of the next general election (Griffith, 1950, pp. 1107, 1117–8; Griffith & Ryle, 1989, p. 17).

4. Modern government and the legendary separation of powers

The third misconception relates to the structure of the constitution. In this case the confusion derives from a truthful observation, namely, that there are three principal institutions that "together exercise most, though not all, of the public political power", viz. Parliament, government and the courts (Griffith & Hartley, 1981, pp. 2–3). The problems arise when this observation is integrated with the claim that there are three functions (i.e. legislative, executive or and judicial) that can be aligned to each one of these institutions such that they can be conceptualised on that basis (as the legislature, the executive and the judiciary, respectively). The "ultimate confusion" is generated, however, when a further step is taken and from this is inferred that the "legislature and only the legislature legislates, that the executive and only the executive executes, that the judiciary and only the judiciary adjudicates" (Griffith, 1995a, p. 411; Griffith & Hartley, 1981, pp. 1–2)¹⁹⁸. Indeed, the idea that "some functions were 'properly' exercisable only by the government, others by Parliament, and others by the judiciary" constitutes the necessary premise of implausible claims such as that delegated legislation amounts to an invasion by the executive into the

¹⁹⁸ "In our later sophistication we began to classify functions and so distinguished those which were legislative, executive and judicial. And then for some wild and romantic reason we leapt, like children in a frolic, to the fantastic notion that these three types of functions were in fact administered, separately and respectively, by Parliament, the Government and the Courts" (Griffith, 1956, p. 209).

rights and functions of the legislature and that administrative tribunals amount similarly to an invasion by the executive of functions of the judiciary (Griffith, 1963, pp. 32, 35).

A remarkable feature of the doctrine of the separation of powers is its *a priori* character in the sense that its account of the structure of the constitution has very little empirical content and is remarkably static or unchanging, if not impervious to historical change. It is based not on “descriptions” of what the principal institutions actually do, but on “definitions” of what a legislative or judicial function is and from that it deduces what they should do. Griffith argues that one must reject such “conceptualism” and, generally, that “we had better abandon definitions and be content with descriptions” (1997b, p. 195). Any analysis of the structure of the constitution based on the separation of powers or any such “*a priori* conceptions” is condemned to remain both “historically unsound and unsuited to modern conceptions of the nature of government” (1951b, p. 435). What is needed, then, is to eradicate this estrangement between theory and practice by acknowledging that a constitution “is a flexible instrument” that must be judged not by some abstract theories of the constitution but by the way in which it meets “the needs of the day; by a functional not an *a priori* approach” (1951a, p. 279).

A functional approach aims to grasp what actually happens (it is empirical not *a priori*) and that means, first, drawing a clear distinction between the actual and the desired. Thus, for example, the many misconceptions that have persistently beset the understanding of the constitutional place of Parliament (e.g. that Parliament rules or that it controls government) “result from a desire to give Parliament a status and a power in the government of the country far greater than it possesses in fact” (Griffith, 1950, p. 1090). The function and the interrelations of the main constitutional bodies have to be understood and judged under the light of the nature of the constitution at the time, considering its mutability, free from any *a priori* assumptions about what it should do. This does not exclude the possibility of legal criticism, but it does require that any evaluation acknowledge the (changeable) nature of the constitution as it actually is at the time (1950, p. 1092). Secondly, when trying to understand the place of any body or institution within the constitution, the functional approach suggests, the inquirer should examine first what the body actually does under the light of its purpose. When ascertaining its purpose she also needs to bear in mind its variable and relational character. The question of what is the nature of a constitutional body (e.g. what is Parliament?) cannot be answered by only considering the institution in itself *sub specie aeternitatis*, but needs to be addressed historically

in relation to the equally shifting purposes and “load of power” of the other constitutional bodies (2001, pp. 42, 64).

The shifting functions and relative strength of the main institutions constitute, Griffith remarks, both the “central events” that have animated constitutional history and the focus of constitutional debate to this day (1995b, 1997a, pp. 289, 308, 2001, p. 43). The constitution is, then, changing perpetually and considerable variations are perceptible in every decade or every few decades¹⁹⁹. There are, however, long-term patterns that have determined to a great extent the present shape of the constitution and which emerged during the middle decades of the nineteenth century (c. 1830-1870). This is particularly evident as regards the functions and relations of Parliament and government and it will become evident through examination why the traditional claims that the power of making laws is the province of Parliament and that delegated legislation involves an invasion of the executive in the rights of Parliament are both “historically unsound” and contradict the “modern notion of government” (1951a, p. 280, 1951b, p. 435, 1963, pp. 32–3).

Historically and constitutionally is it undeniable that both the idea of Parliament and of legislature not only comprises the two Houses of Parliament but also the monarch as the head of the government. Although the Queen is not a member of either House, “the ‘parley’, the conversation, is between the members of those Houses and herself” and it is “no lawyer’s quibble” (nor an “out-of-date antiquarianism”) to point to the first words of every Act of Parliament which attest that “most certainly ‘the Legislature’ involves the Queen” (Griffith, 1963, p. 33; Griffith & Hartley, 1981, p. 3; Griffith & Ryle, 1989, p. 3). Furthermore, since the emergence of the regulatory state, it has become necessary for governments to be able to secure the approval of the legislation they need to obtain the authority to pursue its new policies²⁰⁰. Contemporary democratic government, and this is particularly true of British parliamentary democracy, supposes a “strong administration” capable of acting with autonomy and able to “largely control proceedings in Parliament”²⁰¹.

¹⁹⁹ “Most recently, the Government was dominant in the immediate postwar period and during the 1980s, Parliament at its most influential during the early 1960s and the late 1970s, the Judiciary growing in strength during the 1960s, until its decline in the 1980s. The 1990s saw weak and strong Governments with correlative strong and weak Parliaments, with the Judiciary recovering some of its influence” (Griffith, 2001, p. 42).

²⁰⁰ “In many fields, but not all, new policies require new powers for their implementation. And new powers are obtained by legislation. All Governments in all countries must control the legislature. In some, such as the United Kingdom, Governments are Governments because they exercise that control. In others, such as the United States of America, the Government has more indirect means of control. But a Government that had not the means to make laws could not exercise its proper authority” (Griffith & Ryle, 1989, pp. 4–5).

²⁰¹ “Strong administration, influenced by criticism, and ultimately judged by the electorate is the only effective method of carrying on the affairs of the modern democratic State” (Griffith, 1951a, p. 294). “Ministerial government is accorded a high degree of autonomy to the extent that it can largely control

The relation between Government and Parliament started to take its present form mainly due to a series of structural social and political transformations (i.e. the expansion of the franchise, the formation of national disciplined political parties, the growth of trade unionism and collectivist ideas, etc.) that laid the foundations of the regulatory state. In the field of legislation the changes were momentous. In contrast to the preceding century, the nineteenth century appears as a period of extensive administrative reformation brought about by a new kind of legislation of general and universal application (Griffith, 1951a, pp. 282–3; Griffith & Street, 1973, p. 26). Moreover, in the years between 1830s-1870s, government became the “natural initiator of legislation” as legislation gained complexity (which, in turn, led Government to the increasing employment of draftsmen) and assumed “responsibility for a legislative programme” which came to be outlined in the Queen’s Speech (Griffith, 1951a, pp. 283–6, 292). Further, by the late 1870s, political campaigning was clearly evolving into its modern form wherein political parties inform the electorate what is their policy at a time of a general election (later on, evolving into detailed programmes), asking the voters to give them a “majority in the House of Commons” in order to be in a position to legislate the required implementing statutes (Griffith & Street, 1973, p. 26).

During the middle decades of the nineteenth century not only legislation became largely a “governmental” function²⁰², but also the very nature of government was transformed²⁰³. Government today spends a great deal of their time exercising a large number of functions and administering a wide variety of services they have inherited from previous governments²⁰⁴. With the huge expansion of its functions, government came to preside over a great bureaucratic machinery and administrative services. When new powers are needed to implement governmental policies, governments will have to come to Parliament to secure the authority it needs. Parliament, thereby, cannot be “described” or “correctly analysed” as a governing body, but it is essentially a debating body where governmental policies and bills are to be scrutinised, viz. to consider, criticise and defend

proceedings in Parliament. This is not only demonstrably true. It is the heart of the style of Parliamentary democracy from the emergence of ‘party’” (Griffith, 2001, p. 47).

²⁰² “The whole process of legislation –the preparing of the Bill, the consultation with affected interests, the drafting, the presentation to Parliament and the management of the debates– all these are governmental functions” (Griffith, 1950, pp. 1082–3, 1951a, pp. 286–91; Griffith & Street, 1973, pp. 26–8).

²⁰³ Before that “no one ‘governed’ (in the nineteenth century and twentieth centuries’ use of that term) at all” (Griffith, 1951a, p. 282, 2001, pp. 53–4).

²⁰⁴ “Governments inherit a large collection of regulatory and promotional powers under statutes which had their origins, in forms recognisable today, between 75 and 120 years ago [from 189]. The foundation years of the regulatory state, including public health and housing, were the middle decades of the nineteenth century, modern school education began in 1870, the welfare state dates from 1911” (Griffith & Ryle, 1989, p. 4).

them and it is its right to approve or reject them (Griffith, 1950, pp. 1104–12, 1951a, pp. 292, 4, 1963, pp. 33–4; Griffith & Ryle, 1989, p. 6). The legislative process is, nevertheless, laborious and protracted and the “parliamentary struggle”, whatever the size of government’s majority, is always difficult (Griffith, 2001, p. 54).

The limits on parliamentary time and the institutional features that make Parliament particularly fit as a debating body render it unable, Griffith observes, to cope with all the regulatory needs of contemporary governments. That is why “delegated legislation is a natural consequence of the increase of governmental power; it springs from the fact that detailed administrative rules cannot all be contained within the principal legislative proposal” (1951a, p. 293). The claim that delegated legislation is unconstitutional (or otherwise undesirable) by appealing to a priori conceptions like the separations of powers or parliamentary sovereignty simply fails to come to terms with the fact that delegated legislation is inevitable in the conditions of modern society (1951a, pp. 280, 293). Even worse, these a priori conceptions –lacking adequate empirical and historical basis– end up asking that Parliament should do more than it can and is suited for, thwarting “the necessary adaptation of Parliament to new developments” (1951b, p. 435). The real question, therefore, is what provisions of a legislative initiative should be considered by Parliament and what should be left to delegated legislation (1963, pp. 33–4).

Under a functionalist approach, the guiding criteria in establishing what should be subject to parliamentary scrutiny should attend to Parliament’s constitutional role, its institutional capacities and the regulatory needs of contemporary society. In very rough terms, Parliament –if it is to perform its function in accordance with what it is institutionally fit for– should have enough opportunity for criticism of the “broad principles” of a legislative initiative, viz. to scrutinise the proposal “as a formulation of policy” and the respective “plan for implementing that policy” (1951a, pp. 294–6). Usually this is expressed by saying that delegated legislation should concern itself with “procedure” and “matters of detail”, but such “statement of principle, however, only poses the problem in a different form” (1951a, p. 296). The analysis can only be carried further, Griffith contends, by considering them as applied in concrete and detailed case studies²⁰⁵. What a close examination of particular cases show is that many practical difficulties in drawing the line between what should be delegated or not lies in the need to compromise between “two different conceptions of the purpose of legislative material”: [1] as a basis for future

²⁰⁵ Consequently, he offers an analysis of “three different types of government activity” that are clearly representative of the legislation that regulatory state brought about (Griffith, 1951b, pp. 425–34), namely, the regulation of factory conditions (cotton-cloth factories), standards for a profession (register of patent agents) and social welfare (national insurance).

administrative action, which governments instinctively adopt, and [2] as enabling Parliament to exercise its “critical function”, i.e. to provide adequate levels of scrutiny of governmental policy (1951b, pp. 434–5).

All this should not be taken to mean that what Parliament cannot consider or scrutinise “should go unexamined” nor that government departments alone should be responsible for the “elaboration and implementation” of these procedural and technical details (1951b, p. 436). Once it is made manifest that “Parliament, however reformed, cannot alone perform the necessary controlling function”, the need for complementary scrutiny mechanisms becomes evident. While these new institutional methods are devised, considerable progress can be made by extending, enforcing and institutionalising the “practice of consultation” with expert advisory bodies (both statutory and other) and affected interests (1950, pp. 1119–20, 1951a, p. 294, 1951b, p. 436, 1983a, p. 53).

The “great growth of governmental activity” that characterised the regulatory state also required new type of institutions, i.e. administrative tribunals, which mixed up administrative and judicial functions (1956, p. 209, 1976a, p. 203). As with delegated legislation, “the traditionalists attacked administrative tribunals as being an invasion by the Executive of the functions of the judiciary” (1963, p. 35). Administrative tribunals, undeniably, often decide questions that are undistinguishable from those that come to courts (e.g. whether the rights of a private person were interfered with by a public authority acting beyond its statutory powers). By the 1950s, however, administrative tribunals became “accepted into the system of justice and judicial decision-making to a remarkable extent by those affected”. Further, Griffith contends, the Franks Committee report (1957) not only promoted “valuable” reforms to improve administrative justice but documented the “general good record of tribunals in the past” such it might now definitively be said that “Dicey’s spectre has been challenged, talked to and found not to exist” (1963, p. 36). Once it is established that no institution has “a constitutional right” to determine all adjudicative questions, it becomes clear that the allocation of particular adjudicative powers is not to be (nor could be) decided by an a priori classificatory approach, but by a functional consideration of the practical differences that it would bring about, (e.g. relative speed, cheapness, expertness, formality, publicity, comprehensiveness, appealability, coherence). Seen from this functional perspective, Griffith concludes, there are no clear instances in the whole range of administrative tribunals where courts could be expected to “perform the function better than the tribunals” (1963, p. 35). There is, however, little hope that the questions raised by administrative tribunals will be properly addressed even if

the confusions generated by the separation of powers are set aside. There are two other misconceptions obfuscating not only the subject of administrative tribunals but the whole range of questions arising from the relationship between the government and the courts, as they propagate a highly idealised and illusory view of both the judicial function and the law, namely, the rule of law and the neutrality of the judiciary.

5. Politics dressed as legality: the constitution and the rule of law

The relationship between the government and the law, according to Griffith, has been long obscured by the persistent inclination to hold a priori conceptions of the nature of the law and the apolitical character of the judiciary. From a functionalist perspective, the analysis of the relation of government and the law and the nature of judicial function leads to quite different conclusions. The contrast between an a priori and a functionalist approach, Griffith argues, already presents itself at the jurisprudential level. From the a priori approach of “natural lawyers” and other “metaphysicians” the law is conceived as intrinsically moral (1979, p. 15) and, thereby, it is possible to enunciate some “principles” (viz. general propositions held out as desirables or ideals) which are to be considered as necessary and fundamental to “the rule of law” or the “constitution” such that they ground and frame the application of all particular rules of law. In its most recent manifestations, natural lawyers have rediscovered such “higher order laws” –or “natural laws”– in “certain principles about individual freedom vis-à-vis the political rules which can be expressed as fundamental, innate, human rights” (1981b, pp. 3–4, 1982, p. 4, 1997a, pp. 302–8, 2000). Facing these revived forms of natural law, Griffith insists that all these “metaphysical” claims are to be rejected because, as can be made evident from an empirical or “positivist” functionalist critique, they offer not only a mythical conception of the law and the constitution, but they underestimate the conflictual character of modern societies and present political contentions under the guise of legal argument²⁰⁶.

From the “unmetaphysical” approach of functionalist analysis, laws are not seen as mere normative propositions but as social facts –“laws are things not words” (1982, p. 9)– that is, law is a “part of the social order” and as such its academic study is “a social science” (1962, p. 18). As a social thing the law is purposeful, it performs a function. The law is but “a means towards ends (about which it is possible to have differing opinions)” (1979, p. 15). Academic legal analysis, therefore, should aim to “explain law as a means” under the light of its putative ends or social functions and to ascertain the ends actually “served and

²⁰⁶ “To speak of natural law in this connection is a mystification and that history and present practice show that the issue is not legal but essentially political” (Griffith, 1981b, p. 4)

their alternatives” (1962, p. 20). It is not the function of the legal analyst “to promote those ends or their alternatives” nor “to solve legal problems nor even to suggest that fundamental conflicts are capable of solution”, but to reveal “the contrasting complexities of this particular discipline” (1962, pp. 18, 20). This does not mean that the legal scholar or law teacher should avoid legal criticism or evaluative judgements, quite the opposite²⁰⁷. This empirical approach requires, however, the legal scholar to take care to distinguish between facts and values –and, in this sense, to strive for objectivity– but without asking for an unachievable purity from values and evaluative judgements. On the contrary, the legal scholar must involve himself in the final stages of the analysis with subjective conceptions about justice in order to show “the nature of the problem and what are the contemporary and partial answers” (1962, p. 18). For Griffith, the way to deal with the problem of values in the study and teaching of the law is not to aspire to an unattainable value-free analysis but by requiring the legal scholar to examine and explicitly state her own views upfront and not to conceal them under the pretence of objectivity nor to carry on from unexamined political prejudices. This applies with particular force in the realm of public law, for in this field it is even clearer that the legal scholar cannot approach his object of inquiry without political views²⁰⁸.

The need to examine and make explicit our “political philosophy”, Griffith adds, is particularly clear in public law matters as the answer to them depends on our view of the “desirable limits of government action” which, in turn, hinges on the fundamental ambivalence of state authority that sometimes appears “as a force for greater social justice and sometimes as a force for oppression” (1968, p. 497). This dilemma is present with particular force “when it comes to writing about constitutions” and differences will be manifest between those who emphasize the individual and its liberties and those more

²⁰⁷ “This does not mean that I would turn my back on any evaluation of legal rules. On the contrary, I would continually try to show their defects. The defects may be of two kinds: first, that the legal rules do not effect what they purpose; secondly, that the legal rules work in such a way that the interests of certain individuals or groups (private and public) are advanced to the disadvantage of other individuals or groups. But the next step I should take with care and circumspection. If I proceeded to indicate which interests should, in my view, prevail and whether, therefore, the rules worked, in my view, ‘justice’ or ‘injustice’, I should clearly indicate my personal or philosophic presumptions and assumptions. And I should embark on this final evaluation in order to [show]... that this is the point at which these questions arise” (Griffith, 1962, p. 19).

²⁰⁸ “Anyone who writes about rent tribunals or agricultural land tribunals or compulsory purchase orders or planning decisions approaches these questions with certain political views, whether or not he is a member of any political party. This is true also of those who write about Democracy, Freedom, the Rule of Law, the Independence of the Judiciary or any such groups of capital letters. Amongst law teachers, it has become the mark of respectability to keep decently covered the political part of their anatomy. A cheap laugh can always be extracted in a lecture room by a brief public exposure of personal political prejudices. This modesty seems to me to be unfortunate... I think that when speaking to undergraduates on these controversial problems of public law we should make clear, very shortly, what are our conceptions of that part of the Universe. Then they can discount our prejudices” (Griffith, 1956, pp. 208–9).

concerned with social justice and the condition of the less favoured in society (2000, p. 176). However unavoidable political conceptions are when addressing the problems of public law, the public lawyer should not allow them to “damage” the objectivity of the analysis²⁰⁹. Griffith in his own work, indeed, tries to signal when the analysis of certain issues seems to depend on subjective political views and to not present them as objective fact or dressed as legal argument. While the identification and explanation of the objective facts bearing on the working constitution is a matter for the legal/political scientist, questions about desirability of certain ends or the justice of rules of law and other political acts are controversial matters that are not only subjective²¹⁰ but constitute the very substance of government, i.e. to decide what is in the “public interest” according to a certain “political philosophy” (1963, p. 25).

From this austere, empiricist methodological basis results the most distinctive features of Griffith’s public law theory. First, it is clear that Griffith gives a certain primacy to facts over theory expressed in a positivist or empiricist orientation that aspires to convert constitutional practice into the very object of constitutional theory. In his words, “the theory of the constitution is the rationalisation of events; changes in society result in changes in the method of government. The duty of a constitutional theory is to recognise and explain these changes; the way they come about is a matter of fact. To bewail the method of the change because its nature is not liked is to confuse the issue” (1950, p. 1118). There are two important points that must be elaborated. First, the aim of constitutional theory is to recognise and explain, not to justify, the constitution as it has come to be at a certain moment in its historical path and, in this sense, it is a rationalisation in that it seeks to determine what brought these changes about (as matter of fact). The academic public lawyer’s primary inquiry is a search for the (empirical) causes of these changes not for their putative (normative) justificatory reasons. The normative assessment of such constitutional changes is secondary and should not be allowed to confuse the prior task of identifying and explaining them. This is the meaning of this famous passage: “The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also” (1979, p. 19). Properly understood,

²⁰⁹ What Griffith says about Robson is entirely applicable to himself: “this has been the manner and style throughout, as it was with so many of his contemporaries. But like them –especially the Webbs– strong political feeling kept breaking through, not necessarily or even often to damage the objectivity of the analysis but to provide its motive and to inform it” (1976a, p. 201).

²¹⁰ “Political controversy in the end is concerned with what people believe, what they seek to achieve, and how they behave” (Griffith, 1982, p. 3).

what Griffith is saying there is that any constitutional change that becomes stabilised and accepted as a part of the established method of government of the day is legally constitutional by definition (it would be meaningless to say that it is legally unconstitutional). This is a consequence of the dissolution of the estrangement between constitutional theory and practice.

This makes evident that the so-called “laws” of the constitution “are not laws in the usual sense of the word”. Normally “laws” refer to rules imposed by bodies with recognised authority to make and enforce them (e.g. legislature, courts, etc.), but the laws of the constitution refer to “fundamental practices [that] derive their authority from nowhere; or, if you prefer, from the constitution itself, from the set-up. And to describe those practices as laws is therefore a special use of the word” (Griffith & Hartley, 1981, p. 6). Griffith, in other words, proposes an “unmetaphysical” or “positivist” concept of the constitution which is used to describe those fundamental practices that “are recognised as providing the absolutely basic framework” (Griffith, 1979, p. 19; Griffith & Hartley, 1981, p. 5). The constitution is, thereby, the set-up that frames the authoritative exercise of political power without being itself authorised or grounded upon anything higher. This concept of the constitution appeals to that unavoidable “ultimate statement” that simply describes the political situation or fact that political power is exercised “and no more”. The basic point of Griffith’s constitutional theory is to show that “it is on political realities that the authority of government rests” (1997a, p. 305)²¹¹.

This also suggests that there is “little advantage” in the attempt to draw a distinction between the laws and the conventions of the constitution as both “are no more than statements about political relationships at a particular point in history” (Griffith & Hartley, 1981, p. 7). The constitution is “shaped” by the shifting functions and interrelations between the groups that exercise political power, especially those three main institutions that constitute the focus of constitutional analysis (viz. government, Parliament and the courts)²¹². In fact, these need to be understood, in turn, in the larger social context of other “intermediate” institutions or political and social groups (e.g. political parties, local government, associations of producers and employers, investors, trade unions, the

²¹¹ “The fundamental practices which provide the framework for the government of a country are determined not by constitutional or legal events, not by the making or unmaking of constitutions or of laws, but by political happenings, within the country or outside it, which shift the load of power from one group to another” (Griffith & Hartley, 1981, p. 7).

²¹² “I suppose this is what distinguishes the natural lawyer from the positivist. I prefer to describe the constitution etymologically. It is that which is constituted: the set-up. And today, in the United Kingdom, this means, politically, the three institutions of the Executive, Parliament and the Judiciary; and the relationships between them which are constantly changing” (Griffith, 2000, p. 165).

professions, and so on)²¹³. Again, all this does not imply that once this prior factual or descriptive stage of the analysis is carried out, a normative assessment may not be offered. Such further normative step might be necessary to pursue the analysis in important respects. Griffith, indeed, has no problem in arguing that some proposed or actual constitutional change is not only “politically unwise” (2000, p. 175) but “politically unconstitutional” in the sense that it can be said to run counter the “spirit of the constitution” and is, thus, “quite fundamental” (1985, p. xii). It should always be remembered, though, that such claims do not state objective political facts nor, properly, a legal argument, but express subjective political judgements that are inherently controverted and that have a primarily political use (they are weapons to be used in political conflict and disagreements)²¹⁴.

The second point to be emphasized is that, on Griffith’s account, the academic public lawyer is to inquire into the historical formation and transformation of the what happens constitution by searching its social causes (i.e. by pointing to “changes in society”) and to explain its present social function, viz. “what ends it appears in the contemporary world to serve” (1962, p. 20). The shape of the constitution, he contends, is determined by the structure of society²¹⁵. Law in general and public law in particular, in consequence, is to be situated in its social context and public law scholarship integrated with the other social sciences, especially political science²¹⁶. Griffith’s point is not merely that a legal scholar should consider or refer to current developments in political science (and other related social sciences), but he contends that public law and politics are but “two ways of looking at the same thing”²¹⁷. The confusions that besiege the understanding of law and government derive for the most part from not properly acknowledging the continuity

²¹³ Indeed this shows that dispersed political power among several institutions not supposedly separated state powers are key to the working of the constitution: “It is the distribution of functions among so many institutions that has been a more important safeguard against tyranny... and the deliberate downgrading of local authorities and of other intermediate institutions, like the universities and the professions, by the Thatcher administrations seriously subverted the working of the Constitution” (Griffith, 2001, p. 55).

²¹⁴ Generalising the analysis of the rule of law, it can be said that “they [any constitutional change] may be condemned not as contrary to the law of the constitution but as contrary to its spirit. They may be defended as sound reformatory measures or showing the flexibility of the constitution... [They are] a banner under which opposing armies march to combat” (Griffith & Street, 1973, p. 21)

²¹⁵ “The structure of the society we live determines the shape of our institutions and the way they behave. That structure is both economic and political” (Griffith, 1997a, p. 209)

²¹⁶ Griffith holds that the law as a subject as any other university subject “illuminates a sector of universal knowledge, beyond the boundaries of the subject itself. Instruction in law should throw light on sociology, political science, economics, and history” (Griffith, Fuller, Megarry, Morton, & Tunks, 1962, p. 55)

²¹⁷ Griffith has held this since his early years as a lecturer in the late 1940s: “for a public lawyer, the connection, almost the identification, of these two major disciplines, was inevitable and obvious” (Griffith, 1976b, p. 136, 1982, p. 1). Similarly in the 1950s: “it is not so much that the study of one is incomplete without reference to the others, but rather that the landscape is single and entire” (Griffith & Street, 1952, p. v)

between public law and politics and by not separating actual political facts from political claims. This can be illustrated by considering one very important site of confusion in contemporary constitutional theory, namely, the doctrine of the rule of law.

The “slippery” concept of the rule of law, Griffith claims, has been often used to elaborate fallacious arguments that disguise (subjective) political prejudice as (supposedly objective) legal argument. The concept of the rule of law would not be problematic if it were only used in its “precise and legal sense”, i.e. the establishment of a “proper and adequate machinery” for “dealing with criminal offences” and “ensuring that public authorities do not exceed their legal powers” (Griffith, 1963, p. 48, 1979, p. 15; Griffith & Street, 1973, p. 21). Ever since Dicey’s writings, however, it has been given a wider sense according to which the administration has not only to act according to law but it has to be subject to rules that are certain in the sense that they ensure that “the actions of the Administration are foreseeable” (Griffith & Street, 1973, p. 18). On this conception, the rule of law not only requires that there be limits to administrative discretion but that wide or discretionary administrative powers ought not to be conferred at all. This wider conception of the rule of law is not only political in the sense that it is based in a controversial political philosophy about the proper scope of government –viz. it should be limited to the maintenance of order and the protection from external aggressions– but in the guise of general principle it promotes “specific interests” by attempting to sanctify certain legal and political institutions²¹⁸. More concretely, it defends powerful economic interests up against the regulations and administrative reforms brought about by a state that since the middle decades of the nineteenth century became increasingly concerned with the “condition of the poor”²¹⁹.

Under this wider conception, therefore, “the Rule of Law seems to be a moral concept, perhaps synonymous with ‘justice’” which aims to treat as part of the law of the constitution certain “a priori postulates” about the limits of governmental action, confusing the actual with the desirable (Griffith & Street, 1973, pp. 19–21). This confounds the whole

²¹⁸ When the rule of law “is extended to mean more than that [its precise legal meaning], it is a fantasy invented by Liberals of the old school in the late nineteenth 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. Then it is become a new metaphysic, seeming to resolve the doubts of the faithful with an old dogma” (Griffith, 1979, p. 15).

²¹⁹ This insight harks back to Griffith’s formative years: “It slowly dawned on me (aged nineteen) that when people argued from general principles they were doing so the better to promote specific interests. What governments did (more often during the hundred and fifty years after 1830 than since 1980) frequently displeased those who enjoyed economic power... the argument about discretionary powers and the rule of law was politics dressed up as legality. The general principle, expressed in terms of safeguards against tyranny, was no more than political tub-thumping directed to ensuring that economic power stayed where it was, undiminished by the demands of the public interest or the protection of the lower classes” (1995a, p. 412).

issue hiding from view the real questions to be addressed. First, this metaphysical conception of the law should be rejected. Law is part of the social order, a social thing and not mere words²²⁰. A moralised view of the rule of law, likewise, is not only clearly historically unsustainable (e.g. it totally disregards the social changes that underpinned the emergence of the regulatory state)²²¹ but wrongly suggests that politics and the rule of men can be somehow entirely subject to general legal principles so as to exclude the need for discretion in matters of government (“a rule of laws and not men is impossible in our society”²²²). It is fallacious to suggest that law can replace or be an alternative to politics. One should set aside such fantasies and recognise “that law is politics carried on by other means, that law is the creature of politics” (Griffith, 2001, p. 59) and that laws are essentially “political acts”, viz. “statements of a power relationship” and not anything higher (Griffith, 1979, p. 19). Here lies, it is argued, the most obvious mistake of recent acolytes of the so-called “common law constitution”, namely, they ignore that the constitution is a “political construct” not a legal one, based on “political realities” rather than in judicial rulings²²³.

It would be a mistake, Griffith remarks, to conclude from this that the influence and constraints that the law imposes on rulers are negligible or that laws are purely an instrument of domination (1982, p. 8). The law is, certainly, an instrument that rulers use to promote their own interests but, at the same time, it embodies “compromises” in the “perennial struggle between rulers and ruled” which cannot be brushed aside by rulers without eroding the very basis of their authority. The employment of the law as an instrument of power carries in itself unavoidable constraints²²⁴. The influence of the law on the exercise of political power is, thereby, a crucial political fact that cannot be passed over by the social or political scientist (2001, p. 59). Furthermore, in “democratic societies” constitutions are political structures that not only provide for the exercise of political power but also ensure the incorporation of dissent, that power is exercised in the context

²²⁰ “Law is law and not morals” and “natural law is not law but ethics”(Griffith, 1997b, p. 195).

²²¹ Dicey and his followers simply fail “to appreciate the significance of the change which the functions of government were undergoing in the second half of the nineteenth and the beginning of the twentieth century” (Griffith & Street, 1973, p. 19).

²²² “Modern industrial society is complex and so are its problems. It is impossible to reduce all the powers that Governments must have to precise rules which will cover every situation. Discretionary power is inevitable” (Griffith & Hartley, 1981, pp. 7–8)

²²³ “It seems remarkable to claim that the day-to-day running of the country was, at any time, determined by judicial decisions. The existence of the great offices of the state, the operation of governmental functions at home and abroad, the law, privileges, proceedings and usage of Parliament, have been touched by litigation only on rare, though occasionally significant, occasions” (Griffith, 2001, pp. 44–5)

²²⁴ “Law is inevitably two-faced in operation. It confers power by creating rights but in doing so it defines and therefore limits the extent of the power and of the rights. Government give themselves power by legislation but they remain constrained within the limits of their power”(Griffith, 1982, p. 8).

of the manifold interests and conflicts that animates social life²²⁵. Within the British constitution, party political struggle and parliamentary government aims to subject government to mechanisms of scrutiny and critical debate geared –especially when complemented by a free press– to conditioning and reflecting public opinion and the views of citizens at large. This crucial aspect of the constitution, however, has lost a great part of its former vitality in the last decades, a time when the weakening of political democratic processes has brought a considerable expansion of the role of the judiciary and the proliferation of proposals for constitutional reform, among which the argument for a bill of rights has been one of the –if not the– most conspicuous.

6. The politics of the judiciary: rights and the myth of judicial neutrality

In a similar vein to old arguments regarding the rule of law, Griffith remarks, the new generation of metaphysicians (the “new natural lawyers”) have rekindled since the late 1970s the fallacy that law can replace or be an alternative to politics. As before, these writers evade the “real issues”, presenting what truly are “questions of politics” as if they were “questions of law” (1979, p. 17). Once again they offer a moralised concept of the law and try to ground the constitution in some fundamental principles that are now to be found in some “national consensus”, “sense of justice”, “community morality”, “rule of reason” and other such “non-sense on stilts”. In Griffith’s eyes, it is precisely this appeal to “higher-order laws”, which are said to be prior to actual constitutional practice, what makes them “religious writers”. Whatever their differences in matters of detail, however, all the versions of this “celestial jurisprudence” appeal to “natural”, “innate”, “inalienable”, “fundamental” or “human” rights, that’s why Griffith focused his attack on the mystifications and confusions advanced by the “argument about rights”. Yet, as will be seen, the most serious problems of this recent brand of metaphysical jurisprudence are to be found not in its philosophical mistakes but in its misguided politics.

Griffith is one the earliest legal critics of this whole range of “rights theologies” but among his numerous criticisms to them two types of objections stand out: [1] that they present political arguments disguised as legal arguments and [2] that they are more than philosophically confused, they are politically unsound. As regards the first type of objection, Griffith begins by remarking that these rights-arguments do not sufficiently distinguish between legal and political rights. Whereas a legal right is “something vested in

²²⁵ As it has been remarked before, this includes many interests and groups beyond the prevailing political and economic powers. Even in our oligarchic capitalist societies it would be both “misleading and a gross simplification to assume, as some Marxists do, that... the power of industrial capital is so great that all other centres of power must or wish to bow before it” (Griffith, 1969, p. 390).

a person which a court of law will uphold unless indeed it is successfully challenged by an even bigger and better legal right”, a political right is “a shout, a protest, above all a *claim*... a claim to a legal right” (1981b, p. 5, 1982, p. 4). Once this distinction is drawn, it becomes clear that these fundamental rights are not –as these neonatural lawyers would have us believe– legal rights but “political claims” made by individuals (and groups) on those in authority (1979, pp. 17–8). Any argument about the proper extent of freedom in contemporary democracies is political. A claim about the protection of this or that dimension of individual liberty is a political claim and will remain such until the struggle for this fundamental right is won and this achievement translated into laws and legal rights properly established²²⁶. Rights-arguments, in other words, are nothing but “statements” of political conflicts pretending to be “solutions” to them and this remains true whether these arguments are presented as deductions from a theory of justice or come to be based upon a bill of rights.

In the writings of these “rights-and-justice boys”, rights-arguments are commonly grounded in a basic principle of liberty according to which everyone is entitled to an equal right to the most extensive liberty compatible with a similar liberty for others, “a form of words which over the years has given political philosophers a bad name” (1993b, p. 111). As soon as one leaves the abstract realm of conceptual political philosophy, Griffith observes, the emptiness of this principle becomes apparent: there is no solution to any actual social conflict where the extension of the liberty of some is procured without restricting the liberty of others²²⁷. To disregard this elemental reality is to overlook that any solution to a social problem (especially when they take the shape of a legal rule) must inexorably favour the interests of a person or group over the interests of other person or group²²⁸. The principle of liberty and any other formulation of the sort –e.g. the priority of “negative” over “positive” rights (2000, pp. 166–7)– cannot provide an answer to any social conflict²²⁹. The “silliest proposition”, Griffith adds, “and I choose my words with care”, is the Rawlsian idea that the principle of liberty can be differentiated from and given

²²⁶ “Fundamental human rights and freedoms are commonly claimed to be anterior to governments and to laws. But legal rights are of no value if the political means of enforcing them do not exist. Freedoms are political ends and are achieved by political means. Only after their achievement may they be translated into law” (Griffith, 2001, p. 60)

²²⁷ All the so-called “liberalising measures enlarge liberties for some at the necessary and inevitable cost of curtailing liberties for others” (Griffith, 1983b, p. 799). “If you and I are in conflict, the extension of my liberty can never be compatible with the extension of yours” (Griffith, 1981b, p. 11, also 1997b, p. 202).

²²⁸ “Legal rules work in such a way that the interests of certain individuals or groups (private and public) are advanced to the disadvantage of other individuals or groups” (Griffith, 1962, p. 19).

²²⁹ “Under the guise of giving solutions they merely restate the problem. Every political claim I successfully establish, every legal right I successfully establish, is at someone else’s expense” (Griffith, 1981b, p. 11).

“priority” over the “difference principle” which states that social changes should favour the worst-off in society. This not only is based on the specious assumption that the people’s liberty is ethically more important than their welfare (2000, p. 172) but, once again, it disregards the reality that any measure favouring the poor has curtailed the liberty of others –“after all the rich have a lot more liberty to curtail” (1981b, p. 11)²³⁰.

The other foundation that these neonatural lawyers have offered is similarly defective. Many have sought to base rights-arguments on some sort of consensus or socially shared values or principles –i.e. a “community morality” in Dworkinian terms– but this is just another way of neglecting the pervasive disagreement that characterises our “conflictual society”²³¹. Modern societies are intrinsically divided, fragmented into “warring interest groups” and there is no (nor could there be) an underlying moral or otherwise extra-legal normative common ground that could solve the fundamental conflicts and bring them all together²³². This is a search for metaphysical non-sense²³³. The function of politics is, Griffith contends, to channel their various conflicts through the many political processes that have come to characterise contemporary representative democracies. Law is politics carried on by other means, that is to say, law is just another process by which conflicts are dealt with in contemporary societies. Law is no alternative to politics. The a priori principles of the neonatural lawyers do not solve but merely recast social conflicts in another form of words (i.e. the matter of conflict would appear now to be about the

²³⁰ “To give total pre-eminence to the first principle and to allow trade-off with the second is to appear to misread the whole history of the attempts of the less fortunate to better their political and economic position. It would be more true to say that that betterment has been able to take place only by reducing the political and economic liberties of the more fortunate. And when Rawls is defended against this charge by arguing that he is concerned only with societies where everyone has a reasonably good standard of living or that, at least, a trade-off is permissible until that stage is reached, the irrelevance of his theory to the problems of the modern world is exposed” (Griffith, 1983b, p. 800).

²³¹ “Mystification follows and these rights are presented in metaphysical or transcendental wrappings. Words like ‘natural’, ‘inalienable’, and ‘endowed’ conceal what is no more than a particular statement about the exercise of political power. Some philosophers and some lawyers have long sought extra-legal principles or standards by which legal relationships may be judged. But, not surprisingly in our conflictual society, they have not progressed beyond phrases like a sense of justice, or the morality of the community” (Griffith, 1993b, p. 112).

²³² “Once again it posits that first, last, and necessary refuge of natural lawyers who have been rash enough to venture into the treacherous country of politics. I mean their assumption that there is a body of opinion, a mass of activity, of a generalised sort which can be appealed to as the inarticulate majority. Whereas I am arguing that this is not so... society is endemically in a state of conflict between warring interest groups, having no consensus or unifying principles sufficiently precise to be the basis of a theory of legislation” (Griffith, 1979, p. 19).

²³³ “They are looking for standards which are extra-legal because they must have some testing ground. For many, God is out of fashion. Even the perennial philosophy is under a cloud. Democracy is certainly no good. If we relied on ascertainable views of the masses we would have capital punishment and the flogging of sexual offenders. But they feel that there must be something. There must be some point of reference by which we can justify application and implementation of our own prejudices. Some call it the *Volksgeist*. Others call it the general conscience of mankind. Rawls calls it a sense of justice. Dworkin calls it community morality. I call it, as Bentham did, ‘nonsense on stilts’” (Griffith, 1981b, p. 12).

application of abstract principles to particular cases rather than about interests) but, ultimately, the concrete decision would reproduce the very controversies with which all began (i.e. as it necessarily comes to favour some interests over others)²³⁴.

That law cannot replace politics becomes even clearer when the operation of bills of rights is examined. Entrenched bills of rights do not change the political character of these human rights even if the judiciary is entrusted with the task of determining the extent of their protection (2001, p. 60). The characteristic provisions of bill of rights contain extremely broad and indeterminate statements of principle that are restricted by equally broad and indeterminate exceptions, such that their judicial enforcement dramatically increases both the scope of judicial action and the level of judicial discretion (1993b, p. 111). A bill of rights inevitably brings about, in other words, a great expansion of the discretionary power of judges and QCs at the expense of Ministers and MPs, judicialising questions that hitherto were undoubtedly political²³⁵. The consequent recalibration of the relative constitutional strength of the judiciary, government and Parliament reaches even higher proportions as bill of rights usually make judicial rulings on these matters more resistant to legislative change (1993b, p. 117). The effect bills of rights have over the relative load of power within the main institutions leads Griffith to object “politically” (and not only “philosophically”) to the proposals for constitutional reform now in vogue²³⁶.

Bills of rights and related reform proposals are an invitation to reshape the constitution by shifting the load of power towards the judiciary at the cost of government and Parliament and this in a time when judges had already been gaining more constitutional weight. As Griffith points out, judges began to adopt a more prominent political role since the 1960s when the Law Lords delivered a series of landmark decisions that fostered a “radical alteration in the attitude of the judiciary” (1981a, pp. 148, 152–3, 1993a, pp. 79–

²³⁴ “I do not disbelieve in generalised *a priori* principles. I have them filling my pockets and coming out of my ears. But they cannot be guidelines for legislative or administrative activity, because such principles, in their application to particular situations, are the very questions which divide not unify opinion./ We are back in the conflicts where we began. And politics is what happens in the continuance or resolution of those conflicts. And law is one means, one process, by which those conflicts are continued or may be temporarily resolved. No more than that” (Griffith, 1979, p. 20).

²³⁵ Consider, for example, how the protection of the right to life judicialises matters that are highly divisive in contemporary societies such as abortion, euthanasia and capital punishment (Griffith, 1993b, pp. 112–8). These and many other day-to-day political issues “will be left for determination by the legal professions as they embark on the happy and fruitful exercise of interpreting woolly principles and ever woollier exceptions” (Griffith, 1979, p. 14).

²³⁶ “The fundamental political objection is this: that law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political” (Griffith, 1979, p. 16)

107, 189–90, 1997c, p. xiii–iv, 67–72, 105–8, 1997a, pp. 291–4, 1997b, p. 202), which not only displaced the quiescent stance of earlier decades but favoured “active” line in key areas of political contention (especially ministerial powers and industrial relations)²³⁷. The wave of increased judicial activism continued gaining force in the following decades reaching unprecedented levels of judicial assertiveness and rhetorical excess, putting under strain the constitution and bringing courts more frequently into day-to-day political brawls which may end up damaging the reputation of the judiciary (1993a, pp. 190–1, 1997a, pp. 289, 296–7, 2000, pp. 159, 167).

The persistent influence of that old myth of apolitical character of the judiciary has meant, however, that the problematic issues raised by these trends of constitutional change have not been addressed nor appreciated in all their significance. The main assumption underlying the expansion of the constitutional role of judges is that certain matters are of such great importance that should not be at the mercy of partisan politicians but should be entrusted to “neutral” judges who would protect them upon “neutral” grounds. This assumption is mistaken on both counts. Transferring political questions to judges does not change their nature –they do not become “any less political”– but substitutes the discretion of ministers and local authorities by judicial discretion. The provisions of a bill of rights are “so open-textured... that the judges will be obliged to exercise their political judgements in the process of interpretation” (2000, p. 170). Likewise, a larger role for judges justified by appealing to a higher-order law to be found in the values of the common law, a theory of justice or some sort of “community morality”, would only replace the “dangers of overweening political princes” with the “dangers of too much judicial power” (1997b, p. 202, 1997c, p. xvii). The yearning for being ruled by higher-order laws and not human politicians is illusory. To all intents and purposes, to be ruled by higher-order laws is to be ruled by those who become entrusted with interpreting and applying them, namely, senior judges, and we can only hope that they will exercise this “unfettered discretion” wisely²³⁸.

²³⁷ “In *Ridge* the way was opened for a much wider review of the propriety of exercise of administrative action, untrammelled by preconceptions or categories. The decision in *Burmah Oil* showed a willingness to invent legal rights which had not previously existed, and, like *Conway*, was a direct rebuttal of Ministerial claims. *Padfield* and *Anisminic* went much further, biting into the red meat of statutory powers. *Rookes* and *Stratford* made a strong impact on the politics of the day, reinforcing the belief of trade unionists that the courts were biased against them. The question that remains unanswered is why, at this particular time, the Law Lords (led by Devlin who was crucially supported by Reid) became ‘minded’ to reopen liability of trade unions” (Griffith, 1993a, p. 106)

²³⁸ “The trouble with the higher-order law is that it must be given substance, be interpreted, and be applied. It claims superiority over democratically elected institutions; it prefers philosopher-kings to human politicians; it puts its faith in judges whom I would trust no more than I trust princes. And it will not even make the trains run on time. If we are to create a more just and free society, we must do it the hard way – without Moses. And our vigilance must be extended to judges, no less than to others in authority” (Griffith, 2000, p. 165)

Why should anyone trust judges more than elected politicians? This is the key question that has not been properly addressed. Actually, Griffith argues, it cannot be answered without firstly removing the assumption that impairs most writings on the judicial function, i.e. the myth of the neutrality of the judiciary. Only by eliminating this myth might one compel public lawyers to drop their uncritical attitude to judges and convince political scientists that any analysis of British politics remains incomplete without considering the judiciary. In consonance with his view of law as a social science continuous with politics, Griffith proposes a different approach that begins by relativizing the distinction between legal and political institution by simply observing that judges –just like ministers, local authorities, etc.– exercise a form of state authority²³⁹ and that, therefore, judicial actions should be analysed and criticised as any other “public or state activity”²⁴⁰.

Griffith pursued this line of analysis in his writings on the judiciary, most obviously, *The Politics of the Judiciary* (1st ed 1977, 5th ed 1997c) and *Judicial Politics since 1920* (1993a), in which he explores them in a large historical frame following, respectively, a thematic and a chronological narrative. As with other functionalists, Griffith not only rejects the formalist or mechanistic conception of the judicial function²⁴¹ but, in particular, tries to illuminate the “creative function” that judges perform in “political cases”, i.e. cases concerning “controversial legislation or controversial action initiated by public authorities, or which touch important moral or social issues” (Griffith, 1997c, p. 7). In the different editions of *The Politics of the Judiciary*, Griffith provides a survey of the areas of the law where political cases tend arise with particular frequency and intensity (e.g. industrial relations, police powers, race relations, immigration, deportation and asylum, etc.), showing that judicial decisions are prone to great variability over time (i.e. similar cases decided differently as the historical context changes), breed with internal disagreements (e.g. dissenting opinions and overrulings) and even inconsistency²⁴². What all this suggests is that not only judges

²³⁹ “Except in the most formal sense, there is no distinction to be drawn between legal and political institutions. All are part of the same structure of government, are channels of the same power” (Griffith, 1976b, p. 138)

²⁴⁰ “How can anyone talk adequately about the power in the modern state without considering what judges do?... Who are these people with this power? Whence do they derive their authority? How much discretion do they have? How far are they politically biased? These are not *different* from other political questions. They are as political as asking what is the educational background of MPs –and at least as important” (Griffith, 1976b, p. 138).

²⁴¹ “If the judicial function were wholly automatic, not only would the making of decisions in the courts be of little interest but it would not be necessary to recruit highly trained and intellectually able men and women to serve as judges and to pay them handsome salaries. /It is the creative function of judges that makes their job important and makes worthwhile some assessment of the way they behave, especially in political cases” (Griffith, 1997c, p. 6).

²⁴² To quote three of Griffith’s favourites among his huge collection of cases: [1] Lord Atkin’s famous dissent in *Liversidge*; [2] the restrictive interpretation by the House of Lords (overriding the Court of Appeal and with an important dissenting opinion) of the Race Relations Act in *Charter and Dockers’ Club*; [3]

exercise a considerably creative function but that their decisions are as controversial and open to different standpoints as any other kind of political action. Here lies the book's principal message, which remained unaddressed in spite of the numerous of critical reactions stirred by its publication²⁴³.

Griffith's historical survey of judicial behaviour intends, further, to demonstrate that one may identify patterns in what judges do that not only reflect the "kinds legislation they encounter" and the "political atmosphere of their times" but that reflect an "underlying attitude" that is distinctive of the judiciary as a group, viz. that there are "strands of judicial attitudes which persist and are discernible, separate from day-to-day politics" (1993a, p. xiv). Here one finds a characteristic insight of Griffith's functionalist approach, namely, that judicial decisions cannot be analysed only in terms of what they say (i.e. the explicit reasons offered as justifying the decision), but should be analysed in terms of what judges do (viz. including implicit or background factors necessary for explaining judicial attitudes). Put differently, the "politics of the judiciary" can only be analysed if one realises that not all the determinant factors of judicial behaviour are explicitly contained in their judgements (i.e. as "articulate premises") but that some remain "inarticulate premises" and sometimes even operating "subconsciously"²⁴⁴.

To answer why judges act as they do, one needs to look more than simply what is said in their judgements and search for "inarticulate" premises. Griffith's functional explanatory strategy can be summarised in a few steps. The inquiry must not consider cases in isolation but situate them in a larger historical and social context trying to distil patterns of judicial behaviour. More concretely, these patterns of judicial action are to be identified and explained by [1] the kind of legislation judges encounter, [2] the prevailing political atmosphere and [3] a distinctive underlying judicial attitude. Although the first two are

the confrontation between the Court of Appeal (led by Lord Denning MR) and the House of Lords in the late 1970s over trade union activity (1968, pp. 491–2, 1993a, pp. 36–48, 139–46, 1997c, pp. 79–84, 152–6, 176–8, 286).

²⁴³ "No one –not even Lord Devlin– examined the validity of the central proposition: that, in our system judges must act politically and cannot act neutrally because they are constantly required to determine where the public interest lies. I would have been interested to see a position developed which argued that the limits of that judicial discretion were so tight that the exercise of the discretion could not properly be called political" (Griffith, 1982, p. 10).

²⁴⁴ "I cannot accept... that the reasons judges give for their decisions adequately reveal their political role. Sometimes, like the rest of us, they consciously or subconsciously find plausible reasons for prejudiced attitudes" (Griffith, 1984, p. 761). "In considering the case-law, I suggest a distinction that may be helpful. It is between the Imps and the Amps. Imps are the judges' inarticulate major premises. They carry a suggestion of the dark underworld about them. Amps are the judges' articulate major premises, shedding light on the decisions-making process. Of course, in the recesses of the judicial mind, what we take to be Imps may not be so; and what we take to be Amps may merely conceal deeper Imps. So the distinction does not necessarily carry us very far. It is suggested only as an aid, a flickering candle as we try to answer that most fascinating of all questions: why judges decide as they do" (Griffith, 1997b, p. 196).

certainly important, it is the third factor that constitutes Griffith's main focus and which he calls the "politics of the judiciary" or "judicial politics". In identifying and explaining this judicial attitude the inquirer should begin, on Griffith's account, by analysing the judiciary as a human group and ask with the lenses of the political scientist or sociologist: "who are these people?" To answer that question one is to inquire into those shared social markers (e.g. socio-economic status, education, professional experience, etc.) of the group that might help to explain the actions of its members²⁴⁵. This kind of analysis is particularly fruitful in the case of such a highly "homogeneous" group like the judiciary where all members share a remarkably similar economic, educational and professional background. This shared social milieu is the first type of implicit determinant factor to be considered when explaining common patterns of judicial thought and action. Having been socialised in the environment of wealthier social strata²⁴⁶, judges will tend to have a view of what is in the public interest that is more tuned to the outlook of those who are relatively well-off in society (i.e. those who are contented with the established order)²⁴⁷. Judges' conservative disposition is reinforced by their professional careers at the bar and the nature of their occupation orientated as it is to the application –not the reformation– of the existing legal order, allowing only for slow and incremental adaptations to changing social circumstances²⁴⁸.

Accordingly, Griffith's historical survey of judicial decisions traces this conservative judicial disposition showing how judges have struggled to come to terms with social changes they perceive as threats to the established order. To name three among the numerous examples tracked down, Griffith shows how this underlying judicial attitude is

²⁴⁵ "Judges are people. Like us, their attitudes are determined by their class, their upbringing and education, their professional life, and their personal experiences. Unlike most of us, but like politicians, these attitudes reflected in their decisions, have important consequences both for individuals and for society" (Griffith, 1993a, p. xiii).

²⁴⁶ Considering various studies carried out from 1956 to 1994, he shows that senior judges not only enjoy an handsomely paid and stable occupation and similar professional background as successful barristers, but that most of them come from more prosperous social and economic classes which, in turn, translates into a definite educational background (most of them attending public schools and an English Ancient university). Finally, remain notoriously homogeneous also in terms of gender and ethnicity, as one finds few women and ethnic minorities represented in their numbers (Griffith, 1997c, pp. 8–22).

²⁴⁷ "When people like the members of the judiciary, broadly homogeneous in character, are faced with such situations, they act in broadly similar ways... behind these actions lies a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions... They are protectors and conservators of what has been, of the relationships and interests on which, *in their view*, our society is founded. They do not regard their role as radical or even reformist, only (on occasion) corrective" (Griffith, 1997c, pp. 7–8).

²⁴⁸ "Her Majesty's judges are by nature conservative because their function is to apply existing law, to uphold a system not to subvert it. But they are not by nature reactionary, do not have any necessary opposition to new ideas, must indeed seek to fit political novelties expressed in statutory terms into the existing order. But, by their background and more importantly by their training, they are cautious, have seen it before" (Griffith, 1968, p. 485).

reflected in: [1] the interwar period as a bias against social legislation and policies which “interfere” with private property and other traditional common law institutions, e.g. slum clearances and compulsory purchases (1968, pp. 486–90, 1977, pp. 107–11, 1993a, pp. 1–33, 1997c, pp. 103–4); [2] the long history of the conflictive relations between trade unions and the judiciary (1993a, pp. 11–5, 93–13, 106, 129–50, 1997c, pp. 63–102) and [3] the judicial partiality towards national security (1993a, pp. 36–48, 123–6, 150, 1997c, pp. 152–6, 196–9, 253–4). This last strand of judicial behaviour, actually, is particularly significant for recent debates as it suggests that from the point of view of individual rights (e.g. personal liberty, freedom of speech and association, etc.) the actual judicial record does not corroborate the claim that courts are so reliable as defenders of individual rights, at least when there are national security concerns (1981b, pp. 149–52, 1993a, pp. 36–48, 110–26, 146–50, 1997c, pp. 153–259).

An analysis of the politics of the judiciary would not be complete, however, if it only considers the level of general patterns of judicial socialisation and behaviour. Indeed, on Griffith’s view, particular judicial actions –which might later on bring large-scale changes– cannot be entirely explained without considering the traits of individual judges involved (Griffith, 1993a, p. xiii). One must consider their individual experiences and, most importantly, their individual political and legal philosophy, i.e. their view of the nature of the judicial function and its relation to Parliament and government²⁴⁹. Griffith’s historical analysis of the development and change of judicial politics in the twentieth century spends, in consequence, a great deal of effort trying to trace the individual characteristics of the judges that played a prominent role in the most important political cases of each period²⁵⁰. Moreover, on this account, as the political role and discretion of the judiciary becomes larger, the need to consider the attitudes of individual judges becomes increasingly important²⁵¹.

To conclude, what are the consequences of Griffith’s demystification of the judiciary? First, it corroborates that judges hold a distinctive kind of political power that carries with it the exercise of a considerable degree of discretion. Secondly, it makes evident the political necessity to subject judges to a similar sort of and level of exposure to

²⁴⁹ “Every judge has to develop his own view of the judicial function and of the way that function relates to the Parliament and Executive. In this sense, every judge has to develop his own political philosophy. He must also develop his own jurisprudence, that is to say his view of the nature of law itself, what he sees as its bases and its purposes” (Griffith, 1993a, p. 103).

²⁵⁰ To name three within a large list: Lord Greene (Griffith, 1993a, pp. 49–57, 1997a, pp. 290–1), Lord Reid (Griffith, 1993a, pp. 80–106, 1997a, pp. 291–4) and Lord Denning (Griffith, 1993a, pp. 57–8, 125–6, 139–50, 1997a, p. 294).

²⁵¹ *vid.* his recent discussions of the political and legal philosophies of Lord Woolf, Sir John Laws and Sir Stephen Sedley (Griffith, 1997, pp. 297–310, 2000, 2001)

criticism than elected politicians (1963, pp. 42–44)²⁵². Thirdly, given the political character of the judiciary one should be aware of the dangers of “judicial authoritarianism” no less than the dangers of “executive authoritarianism” (1981a, pp. 153–4). A political question poses itself, i.e. what is the proper extent of judicial power? While it is true that resisting the expansion of judicial power one might find oneself subject to increased executive authoritarianism, the reverse is also true, especially when the constitutional role of the judiciary has already been greatly expanded since the 1960s. This is why, Griffith argues, the proposals for even further enlarging the judiciary’s constitutional and political role are politically unwise. Were they to be implemented, “political questions of much day-to-day significance would, even more than at present, be left to decision by the judiciary” (1979, p. 14). Why anyone would trust the judgement of irremovable, unelected and unaccountable judges more than that of ministers who are removable, scrutinised by Parliament, the opposition and the media and, ultimately, subject to the verdict of the electorate in general elections? The remedies to authoritarianism, Griffith concludes, should not rest in illusory appeals to higher-order law, abstract principles of justice or fundamental rights, but in political mechanisms proper (e.g. parliamentary scrutiny, the freedom of the press, local government, etc.) which do not restrict but liberate the capacity of political processes to deal with the warring interests that animate our conflictual society. Moreover, as the judicial record involving trade unions, national security and freedom of speech shows, judges have not always acted as defenders of individual rights and a control over government but also, to an important degree, as an instrument of governments and defenders of the established order (1979, pp. 16, 20, 2000, pp. 163–5, 174–6, 2001, pp. 60–7).

7. Conclusion: the place of deconstructivism

Griffith’s writings represent a distinctively deconstructivist conception of public law theory. Deconstructivism is a formidable critique of the way in which the constitution and public law more broadly have been theorised. Constitutional theory, it is argued, has a tendency to become estranged from constitutional practice either because it fails to acknowledge constitutional change or because it exaggerates the role of principles within the field. The growing distance between the “theory” and the “working” of the constitution creates the conditions for the unreflective reproduction of a number of myths. A first step, therefore,

²⁵² “Knocking the judiciary is as proper a political activity as knocking the front bench; both are powerful and can affect our activities” (Griffith, 1968, pp. 497–8). “We must face our judges and treat them as the politicians they are. This calls for continuous and detailed criticism not only of their decisions but also, often, of the manner in which sometimes they conduct themselves” (Griffith, 1981a, p. 154).

towards dissolving the fracture between the two is to demystify constitutional theory, liberating it from the misconceptions it inherited from nineteenth century liberalism.

The elaboration a public law theory that does not give a central place to traditional constitutional principles would amount to an original conception, but Griffith's programme went further. Rather than merely searching for new foundations it proposed to carry out the search in a different way, with a different method. Public law theory is not to be grounded in some a priori foundations. Instead, the enquiry should begin from an empirical conception of the constitution, i.e. as a series of "political happenings" that can only be described and explained, not deduced or justified. Public law theory, in this sense, is a "rationalisation of events" which it identifies and explains by finding out their social causes and functions. Griffith, in short, elaborates a functional approach to the law and the constitution that conceives them as an aspect of modern societies and public law jurisprudence as a part of the social-scientific study of politics. This means, first, that the constitution is to be conceived as a constantly evolving social "thing" whose shape and changes reflect the larger structure of society and its changes. The task of the public lawyer is, then, to explain the what happens constitution by situating it into large-scale social changes in the political and economic structure of society. Secondly, at the level of institutions, Griffith's social-scientific approach invites us to treat judges as any other group of political actors. To explain their actions by facts about their common social markers and common attitudes and by facts about the individual characteristics and attitudes of those who compose these bodies. Thirdly, legal phenomena are to be studied not according to some a priori conceptual structure but as a specific form of political processes for dealing with social conflicts.

Griffith's deconstructivism stands in sharp contrast to both constructivism and reconstructivism. In contrast to constructivism, deconstructivism rejects the view that public law scholarship is a primarily normative undertaking and takes the very idea of searching for a philosophical basis for public law using theories of justice and the like as entirely futile. Griffith, moreover, laments the "poverty of theory" that has followed the success of such "religious writers" as Rawls and Dworkin and declares himself puzzled by the appeal of a "conceptual" political philosophy and jurisprudence that are not aimed at solving pressing contemporary social problems but geared towards conceptual questions to be answered by hypothetical scenarios, abstract statements of principle and other such

“word games”²⁵³. The only way forward, Griffith insists, is to see that law and politics are about processing the irreconcilable interests that animate a conflictual society. Furthermore, any attempt to locate a normatively favoured element of the constitution – be it government (chapter 2), Parliament (chapter 4) or the judiciary (chapter 3) – is to confound the analysis, making it prone to confuse the actual with the desirable. The shape of the constitution is determined by the ever-changing relations that, as a matter of fact, obtains between these bodies which act within a context structured by the presence of other public and private groups (e.g. political parties, local government, interest groups, private corporations and investors, trade unions, universities, professions, etc.).

Griffith’s deconstructivism also differs from reconstructivism (chapter 6). While both approaches share the premise that public law is but a specific form of politics, they employ different methodological strategies to develop this basic insight. Whereas deconstructivism favours an empirical methodology that is geared to ascertaining the political facts upon which public law is based and explaining them in terms of causes and functions, reconstructivism adopts a post-empiricist methodology that intends to ascertain the role that public law plays in discursively structured political practices, i.e. how public law contributes to the way in which we make sense of the political world. Briefly put, reconstructivism is geared not to explaining political facts in terms of causes, but to understanding them in terms of meaning. By this methodological shift, reconstructivism elaborates more extensively Griffith’s insight that our political philosophy is in some way constitutive of our conception of public law.

For all the distinctiveness and critical might of Griffith’s deconstructivism, there are two main sets of problems with its empiricist conceptual and methodological assumptions. First, there are important internal tensions within his empirical analysis of the constitution. Consequent on his positivistic assumptions, Griffith elaborates an analysis of the constitution that intends to eliminate from consideration all non-empirical concepts. In particular, Griffith tries to circumvent the use of the abstract or “metaphysical” concept of the state and the normative considerations inherent in the concept of legitimate

²⁵³ “The re-emergence of the religious writers –like Ronald Dworkin and John Rawls– make old rationalists like me stir our weary limbs. For it seems to me that if Dworkin and Rawls are the answer, the question must be wrong. So it is with the new natural lawyers. I confess myself amazed and bewildered at the enthusiasms aroused by John Rawls’s *A Theory of Justice*. I cannot see how it has come to support such an industry unless it be that our modern jurisprudents are frightened of the great problems raised by thinking about the relations of law to the modern world of over-population, economic collapse, terrorism and the rest that they have fled to the safety of conceptual moral philosophy” (Griffith, 1981b, p. 8, 1982, p. 5).

authority²⁵⁴. This leads him to conceptualise the constitution as a set of facts about the exercise of power in society. Accordingly, in a first instance, Griffith conceptualises the constitution widely, including within it not only the main constitutional bodies (government, Parliament, courts) and other public authorities (e.g. local government) but also a range of “intermediate” political and social groups that extend from political parties to associations of producers and employers, investors, trade unions, the professions, and so on. Yet, a great part of Griffith’s more detailed analysis of the constitution comes to be focused on the three main constitutional bodies and their interrelations. Moreover, he insists at various points of the argument that it is the relations and tensions between these institutions that shape the constitution. One might concede, as Griffith argues, that to privilege these aspects of the constitution is justified by the fact that these main bodies together exercise “most” of the “public political power”, but this cannot really solve the problem. How can Griffith justify privileging the analysis of or even explain what he means by “political” or “public” power without appealing to the concept of the state or to the notion of legitimate authority? If he is interested in power as it is in fact exercised in society, private or social forms of power should be treated as being, in principle, as relevant to the analysis as public and political forms of power. As Griffith himself points out, the growing concentration of power in small economic elites is one of the most important facts about power in the contemporary “oligarchic and authoritarian” capitalist societies. To treat more systematically this set of problems, however, Griffith would need to have recourse to the theory of the corporate state or the theory of the crisis of state legitimacy in late capitalism in the style of critical social theory (as social constructivism tries to do). But this would integrate into the analysis those metaphysical and normative considerations excluded by his austere empiricism.

Secondly, Griffith’s insistence on the distinction between subjective political views and objective political facts is dissonant with his insight that the understanding of public law is inevitably determined by normative attitudes. As it has been shown, Griffith has emphasized that the “political philosophy” of the theorist, especially her views about the “desirable limits of government action”, greatly determines her understanding of the subject. Similarly, he has come to argue that the understanding of judicial politics must also consider the individual political philosophy of judges, i.e. their conception of the judicial

²⁵⁴ “I begin by rejecting the existence of that abstraction called the State. With Carlyle I accept the universe. I also accept the country, and the nations that inhabit it. But the State is yet another metaphysic invented to conceal the reality of political power. Secondly, then, I reject the notion that those who hold political power have any moral right or moral authority to do so, however they came to their positions. They are there and they have power” (Griffith, 1979, p. 16)

function and its relation to government and Parliament. This seems to suggest, however, that the behaviour of agents in public law cannot be understood without considering how the agent themselves understand their role and that the theorist cannot proceed without being reflective about her own preconceptions about the subject. This, in short, seems to suggest that public law as a social phenomenon can only be appropriately understood through an interpretative or hermeneutic methodological stance. The problem is, Griffith would counter, that it is not possible to adopt such an approach without, thereby, falling prey to the errors of “conceptual” political philosophy and constructivism. As it will be seen in the next chapter, this is precisely the challenge taken up by reconstructivism.

6. RECONSTRUCTIVISM AND THE RETRIEVAL OF POLITICAL JURISPRUDENCE

1. Introduction

Mainstream constructivist conceptions of public law theory are challenged by another theoretical approach that here will be called reconstructivism and which has been developed mainly by Martin Loughlin. As with deconstructivism, reconstructivism rejects the project of elaborating public law theory as a normative undertaking akin to moral philosophy. Reconstructivism, in fact, can be seen as a countermodel to deconstructivism in that it also pursues many of the animating ideas and concerns of interwar functionalism albeit within a different methodological frame. Like deconstructivism, reconstructivism contends that public law theory is continuous with politics and that law is to be understood as a social phenomenon. But it rejects its empiricist assumptions and develops an interpretative approach that is anti-positivist but which does not transform the undertaking into an exercise in ethics (section 2). Public law, on Loughlin's account, is an aspect of the activity of politics which in the modern world has come to be institutionally and conceptually framed by the modern European state. This means that in order to understand British public law it is necessary to place it within the larger context provided by the historical trajectory of the British state. Consequently, reconstructivism intends, first, to make sense of the main elements of the British constitutional tradition (i.e. the traditions of parliamentary government and local government) by placing them within the history of the formation and transformations of the British state (sections 3 and 4) and, then, shows how this historical enquiry provides the necessary background to make sense of the mode of evolution and the present predicaments of British public law thought (sections 5 and 6).

2. Public law and political theory revisited

Reconstructivism began as a systematic elaboration of the thesis that there is an internal connection between public law and politics. Obscured and rejected by traditional public law scholarship, during the second half of the twentieth century the contention that law and politics are intrinsically connected became widespread, even fashionable. For all its popularity, the precise nature of the connection remains, Loughlin argues, largely unexamined, perhaps under the expectation that its nature can be somehow intuitively grasped. To the limited extent that it has been elaborated, the connection has tended to adopt either of two alternative forms. Whereas for some it leads to the adoption of a

“sociological approach” that emphasizes the “necessity of connecting public law to the facts of political life”, others who promote a “normativist approach” take it to mean that public law “must be rooted in political theory and thus in a particular moral vision of the political community” (1992a, pp. 23–4, 1995, pp. 171–82). Both conceptions have proved unsatisfactory. The challenge, Loughlin argues, is to offer an “explanatory theory in public law” that is empirical but not empiricist and normative but not normativist. Indeed, to recognise the indispensability of and the tension between the empirical and the normative is the beginning of wisdom in the field and the task of the theorist is to provide a cogent account of the “fusion of description and evaluation” (1992a, pp. 53, 56).

Empirically oriented theories like deconstructivism, Loughlin concedes, were right in rejecting traditional constitutional analysis; both its formalistic concept of the law and its professionally oriented view of legal scholarship were too narrow for providing realistic accounts of the field. By separating facts from norms and focusing on “behavioural analysis”, empiricist theories were able to throw light on causal relations and regularities that were left out of sight by the normativist perspective of the traditional approach (1992a, pp. 50–7). Deconstructivism, along these lines, aspired to a public law theory grounded in ultimate political facts, explained constitutional change in factual terms as social causes and effects, uncovered patterns of behaviour and distinguished objective statements of political fact from subjective political judgements. These “positivist” methodological tenets are, however, problematic as they imply the extension to the realm of politics and public law of the model of the natural sciences.

Following the cues of post-empiricist political theory, reconstructivism starts from different methodological assumptions. Loughlin challenges, first, the assumption that theories can be founded upon –or, even, falsified directly by– “basic”, “uninterpreted facts”. As there is no “canonical” or “privileged” grid of concepts that we might use to state such facts, there can be no theoretically-neutral descriptions and, therefore, all statements of fact are disputable interpretations²⁵⁵. Moreover, by turning towards the specificity of the object domain of the human sciences, it is possible to see that strict distinctions between objective and subjective, facts and values and description and evaluation, are questionable. The neat empiricist distinction between objective and

²⁵⁵ “We should acknowledge at the outset that there can be no facts independent of our theories about them and consequently there is no way of classifying and explaining the world that all rational persons are obliged to accept... there is no canonical grid of concepts through which the world can objectively be divided up and classified” (Loughlin, 1996b, p. 52). This “challenges ‘objectivism’; the idea that phenomena can be categorized as ‘out there’ and consequently observable. This objectivism, then, is founded on the belief that there exists certain basic, uninterpreted facts which provide a foundation for all empirical knowledge” (Loughlin, 1992a, p. 34).

subjective is undone once one realises that the social world is partly constituted by –and cannot therefore even be described without referring to– the beliefs of social agents about their social world and their own part within it. In other words, as social agents are “self-interpreting” creatures, certain beliefs cannot be simply deemed to be subjective states of mind but are an intrinsic part of their social world (1992a, pp. 29–30, 34–5, 53). Thus, any adequate explanation of social change cannot consider its “causes” without inquiring into its “meaning”, that is to say, any causal ascription must be placed within a “framework of understanding” that incorporates the perspective of the agents themselves, i.e. their beliefs and intentions (1992a, pp. 56–7, 1995, pp. 182–3)²⁵⁶. This means, in turn, that the social world cannot be known “outside the context of human purposes” and, in this sense, knowledge in the field of politics and public law is “relational”: facts acquire meaning only once discerned and ordered in relation to value positions (Loughlin, 1992a, pp. 33–36, 50).

In consequence, Loughlin contends, progress in public law theory can only be made by adopting an “interpretative” or “hermeneutic” approach that starts from the realisation that “knowledge must be sought in meaning” (1992a, pp. 41, 50, 1995, p. 183, 1996b, p. 54, 2005a, p. 186). This has significant consequences for the nature of the inquiry. As social practices are meaningful to their participants, social actors already have a “self-understanding” that enables them to participate and contribute to the maintenance of the practice and this implies that “theories” are, first and foremost, a reconstruction of already existing knowledge. The necessary starting point for theories within public law is the understandings that members of the social practice already have but is often “implicit based on intuition or common sense”. The role of the theorist is, thereby, an expressive one, to render explicit, systematic and rigorous –a “know-that”– the knowledge that participants have about what the practice requires them to do –a “know-how” (1992a, pp. 35, 50, 57, 231, 2005c, pp. 61–2). It “begins with the ordinary material of public law and tries to extend our understanding of that material by seeking to discover what is *implied* in it” (1992a, p. 41). However, as there are no theoretically neutral or uninterpreted facts, but only fallible and revisable interpretations, this should not be taken to mean that the “professional understandings” of the subject have a special standing. In contrast to traditional public law scholarship, the interpretative approach does not accord a “privileged status” to professional understandings as these are, just as any other characterisation of the “underlying meanings” of social practices, “open to question by someone offering an

²⁵⁶ “If we are seeking an explanation of change, we need to take account not only of the causes of change but also the meaning of social change; and this exercise must include understanding social action from the point of view of the agents performing them” (Loughlin, 1996b, p. 52)

alternative explanation”²⁵⁷. Furthermore, an interpretative approach to public law, Loughlin contends, will tend to reveal a “range” of self-understandings that, in turn, underpin a plurality of “rival explanatory accounts” and which, therefore, must be considered critically by the theorist (1992a, pp. 35–6).

Reformulating these arguments in a different way, the enquiry begins with the appreciation that “our arrangements of government are organized through certain representations whose meaning we must try to grasp” (1996b, p. 55). The task of the theorist is to make sense of these representations by systematically unpacking the “conceptual structures” through which the “edifice of public law” has been erected and is understood. From an interpretivist conception, in other words, public law theory has a primarily expressive role, it is a reconstruction of already existing practical knowledge, making it explicit, clear and rigorous by elaborating the content, connections and assumptions of the basic concepts that shape the way public law is described and explained (1992a, pp. 36–7). The reconstructivist approach is, therefore, “historical” or retrospective in that it looks backwards to existing conceptual structures that have emerged within –and helped to shape– the field. As this interpretative-historical exercise reveals, the theorist will encounter a field that has been shaped by a “range of conceptual structures” that “present rival explanatory accounts” –i.e. traditions or “styles” of public law thought– and that, consequently, “there is no neutral language of public law” (1992a, pp. 34–40, 231).

Furthermore, the exercise should also reveal that the different accounts were born within different historical contexts and that each have contributed to (re)define the boundaries of the field and the (re)formation of the basic concepts through which we make sense of it. From this historically oriented perspective, the appearance of neutrality of the language of public law is revealed as an illusion generated by the partial convergence of a number of interpretative positions that is dispelled once the different traditions of public law thought are made explicit and thoroughly theorised. In contrast to those who assume there is a normatively privileged reading of public law (as constructivist conceptions do), a reconstructivist approach adopts a “pluralising” rather than a “singularising” hermeneutics that recognises conceptual complexity and variation rather than trying to come up with some artificially univocal and fixed conceptual grid of interpretation²⁵⁸. Once the meaning

²⁵⁷ “This theoretical approach to the study of public law... does not accord a privileged status to professional understandings or to the traditional grid of interpretation” (Loughlin, 1992a, p. 52). “The interpretative approach which I have advocated rejects any approach which incorporates an implicit predisposition in favour of a particular type of interpretation which is compatible with a professionally prescribed view of the subject” (Loughlin, 1992a, p. 57).

²⁵⁸ “Rather than seeking the one correct reading, it traces the various meanings within the texts and, through the exercise of relating language to experience and being attentive to instabilities of meanings, seeks

of the practice is diffracted by this variety of perspectives and their implicit assumptions explicated and unpacked, it becomes clear that the “theoretical journey” must be carried on and engage critically with these traditions of thought. To end the exercise with just the elaboration of the plurality perspectives within the field would assume that the landscape of public law thought can be mapped “from no particular point of view”, reiterating at a higher theoretical level the positivistic separation between fact and value. Once the hermeneutic premises of the enterprise are accepted, the theorist cannot excuse positioning herself within the field and retreat to a supposedly objective agnostic position (1992, 1995, pp. 175–6). At this further level the interpretative-expressive character of the undertaking is not lost, however, as at this juncture the theoretical aim is to elaborate, by critically appropriating the cultural past of field, “an adequate language to express and respond to contemporary challenges” (1992a, pp. 39, 229).

Criticism, on this view, cannot be done from without the field and its history. It is here, Loughlin argues, that those who turn to moral political philosophy to “re-invent” from ideal models the foundations of public law and its historical development go wrong. Given the complexity, polyvalence and contingency of the subject, it is most unlikely that it will ever conform to the models philosophers elaborate from their armchairs²⁵⁹. Lacking a rigorous historical sense and sufficient empirical content, Loughlin argues, a public law theory built upon such basis (e.g. Allan’s “liberal normativism”) is condemned to be misleading (1992a, p. 243). This argument, it might be added, is applicable to all species of what here are called “constructivist” theories. To the extent that these theories offer normativist re-readings of the British public law tradition, to Loughlin’s mind, they inevitably tend to offer unbalanced views of the subject, fallaciously retrojecting contemporary political debates to the past (they are engaged in “retrospective politics”)²⁶⁰

understanding by relating parts to the whole and vice versa in what might be called a ‘fusion of horizons’. It is thus an approach which might readily lend itself to historical treatment of the subject since, by such study, we might begin to identify the way in which concepts change their meaning in the light of particular concerns and determine how the boundaries of the subject have been adjusted over time” (Loughlin, 1995, p. 184).

²⁵⁹ “It is impossible to undertake a critical analysis of any governing regime without first examining its mode of evolution. This is not the sort of exercise that can be invented by philosophers” (Loughlin, 2010b, pp. 92–3). Here, the implicit reference is one of Loughlin’s favourite Maitland quotes: “the more we study our constitution... the less do we find it conform to any such plan as a philosopher might invent in his study” (Loughlin, 1995, pp. 184–5, 1996b, p. 54, 1999a, p. 202, 1999b, p. 48)

²⁶⁰ In these “portrayals of our constitutional heritage” –Loughlin argues paraphrasing Oakeshott– “history is treated as an exercise in ‘retrospective politics’, with the past being ‘a field in which we exercise our moral and political opinions, like whippets in a meadow on Sunday afternoon’” (Loughlin, 1988, pp. 539–40) As he puts it in a later essay, also discussing Harden and Lewis’ *Noble Lie*, their approach is “in fact short on historical analysis and long on grand claims” (1995, p. 177).

and selectively overemphasizing that which confirm the philosophical model they favour (they adopt an unhistorical golden age narrative)²⁶¹.

Constructivist theories, on this account, while pretending to be grounded in history and tradition, are really exercises in (re)invention, political programmes of reform posing as legal-constitutional arguments (1992a, p. 210, 1995, pp. 179, 182). What is needed, then, is a more rigorous, empirically informed, interpretative account of the peculiar historical path of British public law and the traditions of thought that have animated it. In particular, it is necessary to resist the lawyers' unsound methodological tendency to indulge in a "presentist treatment of history" and to wield it as an "ideological weapon" (2006, p. 435)²⁶². Only once the ideological propensities of normativism are resisted, can the subject be addressed in a less "politicised" manner and placed on a "more scholarly foundation" (2009b, p. 153). This is not, however, to fall prey to antiquarianism as contemporary conditions remain being both the point of departure and the end point of this interpretative-historical-critical-empirical enquiry (1992a, pp. 36, 231). Ultimately, reconstructivism aims, just as all other recent theoretical writing, to "find a mode of speaking and writing about the subject which engages with contemporary concerns" (1995, p. 163).

From a contemporary perspective, what needs to be made intelligible, Loughlin has insisted since his earliest writings, is why British public law seems to be undergoing a period of crisis and accelerated change (1978, 1983, pp. 672–3, 1985). First, at the institutional level, the authority of the British constitutional inheritance has dramatically waned and this has inspired the proliferation of programmes of reform and constitutional modernisation. Nowadays all appear to have become "modernisers" as "the entire political class seems to have lost faith in customary ways of governing" (2013a, p. 4). The piecemeal and pragmatic engagements in constitutional reform during the last decades have been,

²⁶¹ "What unites the historical aspect of common law constitutionalism with the republican argument of Tomkins is a shared belief that there exists some critical period during which the 'true' nature of the British constitution is revealed, and that the task of the constitutional historian or theorist is to identify this definitive moment and then, by removing the corruptions beneath which it has become buried, to restore its normative authority. The claims of the common law constitutionalists ultimately run back to the myth of some ancient Anglo-Saxon constitution that formed the repository of our immemorial liberties and was stifled under the Norman yoke. For Tomkins, it is the assertion that the true character of the constitution is revealed through the frame of mid-17th century civic republicanism. In both cases, the past is being treated ideologically, as a field in which, as Oakeshott would say, we are able to exercise our moral and political opinions like whippets on Sunday afternoons" (Loughlin, 2006, pp. 432–3)

²⁶² This was already noted, Loughlin remarks, by F. W. Maitland: "the legal mind, Maitland claimed, thrives on a productive misreading of history; the past must be continuously attuned to the needs of the present. Consequently, not only is the past often depicted anachronistically, but the novelty of the present must be denied. In such a situation, Maitland argued, the professions of lawyer and historian must remain fundamentally at odds" (Loughlin, 2009b, p. 151)

however, more successful in making visible the extent of corrosion of British traditional constitutional arrangements than in generating a new constitutional settlement. Furthermore, while these processes have indeed encouraged many to engage in deeper conversations about the constitution, there is still a dearth of constitutional reflection, especially among jurists (1992a, p. 27). Just as all recent efforts at constitutional modernisation may seem rather makeshift, contemporary writings on the constitution fudge most basic constitutional questions. British public law, in this sense, is not only facing a “crisis of authority” (at the level of institutions) but also a “crisis of understanding” (at the level of politico-legal thought)²⁶³. Following the lines set by his interpretative approach, Loughlin contends that anyone trying to understand the contemporary predicament of British public law must first try to get a better sense of the historical trajectory that led it into its present circumstances²⁶⁴.

3. The formation of the British parliamentary state

Not long ago the British constitution had a “model status”. Extolled as a “standing wonder”, “the matchless constitution” was seen as a testimony of the British “genius” for the practical matters of government, as it emerged out of centuries of continuous evolution, a historical outgrowth that could not conform to any plan that could be drawn in abstract out of pure reason (1992a, p. 2, 2003a, pp. 522–3, 2013a, pp. 1, 6). Since the late 1970s, however, “the British seem to have lost faith in this historic constitution” and this led to an incessant urge for constitutional modernisation that, for all its bustling about, does not seem able to quell the “loss of meaning” –the “pathos”– that has accompanied the whole process (2013a, p. 6). This suggests that the reasons behind the crisis in British public law are more deep-seated than most reformers and writers have supposed. The quest of British public law theory is, thereby, retrospective rather than prospective, it is an exercise in historical clarification more than in political or moral instruction, namely, to answer why the British constitution has veered from being a major source of pride and admiration to a source of dissatisfaction and bewilderment.

The outstanding feature of British constitutional history is, Loughlin remarks, that it has been able to achieve the singular feat of effecting the transition to modernity (e.g.

²⁶³ “In Britain there seems, at present, to be a rather basic sense of cultural disorientation with respect to ‘constitutional’ matters. Few people seem able any longer to call to mind a world in which the British constitution made sense, and lawyers no longer appear to figure prominently within that diminishing group. Since the authority of the British constitution flows from general acceptance, one might reasonably conclude that the traditional idea of the constitution is more or less bankrupt” (Loughlin, 1999a, p. 193).

²⁶⁴ “In the light of contemporary uncertainties, the only sound approach is to offer an explanation of how we have arrived at our present state. Without understanding that history we have no hope of grasping our present constitutional predicament” (Loughlin, 2013a, pp. 4–5).

from a medieval monarchy to a parliamentary government, from an English state to a formidable British Empire, from an agricultural to a commercial and industrial society, from aristocratic-oligarchic rule to mass democracy and the welfare state, etc.) without any “fundamental, irrevocable breakdown of institutional forms” (2003b, p. 2). In historical terms, what is most striking is that “Britain made an evolutionary, not revolutionary, transition to modernity” (2013a, p. 42)²⁶⁵. This extraordinary “political achievement” has left as an inheritance “a massive gulf between the legal form and the actual practices of government” which many regard as the trademark of the British “genius” in matters of government (1999b, pp. 47–8, 2003b, p. 2)²⁶⁶. This meant, however, that the “juristic foundations” of this “distinctively political constitution” have remained for the most part uncovered, hidden beneath obsolescent legal forms and fluent conventional practices²⁶⁷. The juridical underpinnings of the modern British state have remained largely inarticulate and underdeveloped. The ensuing lack of a sophisticated juridical consciousness explains why when it was most needed (viz. with the growth of the administrative state) the British legal tradition turned its back on the challenge of developing a distinctive system of public law²⁶⁸. Unsurprisingly, in times when the conventional practices that sustained these traditional arrangements of government have lost their former effectiveness, there are no appropriate juridical resources to respond to the emerging challenges. To understand why it is necessary to consider the historical context.

The traditional constitutional arrangements that have underpinned the British state rely, according to Loughlin, on two intimately related sets of governmental practices, namely, its distinctive form of parliamentary government and its once cherished tradition of local government. Paradoxically, what made possible the flourishing of both parliamentary government and local self-government was the early formation of a highly unified, centralised and powerful English monarchy and, in this sense, they were born as an

²⁶⁵ “The most striking feature of the British system of government has been the remarkable degree of historical continuity within the principal institutions of rule. The fact that there has been no permanent rupture which has brought us the paraphernalia of modern settlements –written constitutions, documents proclaiming the fundamental principles of the political order and such like– has meant that State formation in Britain has been a fairly slow process of incremental adaptation of our governing apparatus to the exigencies of the moment” (Loughlin, 1999b, pp. 43–4).

²⁶⁶ “The existence of basic contradictions between form and reality has been a major theme in the development of our governing institutions; indeed, many regard the ability to retain ancestral forms while recasting their meaning and significance as constituting the peculiar political genius of the British” (Loughlin, 1996a, p. 12).

²⁶⁷ “The concept of public law has remained suppressed in British legal practice for much of the last 250 years” (Loughlin, 2010b, p. 3).

²⁶⁸ “Insofar as we can lay claim to a tradition of public law thought in this country, it is founded on the idea that we lack a distinctive system of public law” (Loughlin, 1992a, p. 1). “In Britain the modern conception of the subject is founded on a negative proposition. Modern British history is based on rejection of the idea of public law” (Loughlin, 2003b, p. 2).

expression of the strength rather than the weakness of English kings (1999b, pp. 44–5, 2010b, pp. 243–9, 2013a, p. 44). The English Parliament, originally an extension of the King’s Council, was first and foremost an “effective device of royal government” that thrived because it proved valuable when kings were in need for additional revenue (especially for military campaigns)²⁶⁹. Combining its taxing responsibilities with that of a high court that heard petitions in cases referred by the king’s judges, Parliament became both a forum where common grievances could be addressed and where the representatives of the historic communities of the realm (i.e. the knights of the shires) could consent to the decisions taken by the king and his council²⁷⁰. Although parliamentary representation was at the beginning a device to tie the localities to royal decisions –an incident of “feudal service” rather than proto-democratic– Parliament was uniquely suited to foster a sense of national unity based upon “something deeper and broader than monarchical authority”, viz. by bringing together the King in Council and the localities of the realm, Parliament would come to symbolize the “political nation”²⁷¹.

The authority of the King in Parliament would be used “to the full” with the Reformation Parliament which, exalted by the king, claimed a supreme law-making power that could undo medieval liberties and privileges (especially those of the Church) and consolidate royal supremacy. Elevated to the highest expression of law, Acts of Parliament proved to be an invaluable piece of Tudor statecraft that liberated the Crown from the “shackles” of medieval fundamental law, both in temporal and spiritual matters (2010b, pp. 252–5, 269). It would be, however, with the confrontations between Parliament and the Stuart kings that the foundations of governmental authority came to be discussed in an uncompromising way. The until then undisputed divine rights of kings came to be challenged by the promoters of the parliamentary cause who began to claim that Parliament’s authority (especially the Commons) was grounded in the principle of popular sovereignty (its voice was the voice of the people from whom all authority derives). The 1640s and 1650s constituted a singular period of constitutional experimentation that saw

²⁶⁹ “If Parliament had emerged as a body that simply opposed the Crown and promoted the cause of liberty by curtailing the Crown’s prerogative, it would surely have withered at an early date. Its survival depended on its utility as an instrument of royal government” (Loughlin, 2010b, p. 247, 2013a, p. 46).

²⁷⁰ It is important to observe that the Commons acquired a singular strength, on Loughlin’s account, because alongside the city and borough members, the Commons were formed by those lesser barons and knights who gained the leadership of the localities from the peers as the latter were exempted from attendance at the county courts due to their position in the council. As this lesser nobility was formed for the most part from the younger members of baronial families not benefited by a peerage that operated strictly in accordance with primogeniture, the Commons enjoyed a natural way of communication with the “higher baronage” (Loughlin, 2010b, pp. 248–9).

²⁷¹ “This sense of a national consciousness, rooted in the localities but flowering at the centre, was the efficient secret of the English parliamentary system” (Loughlin, 2010b, pp. 247–9, 2013a, pp. 46–7).

the appearance of the “world’s first written constitution” –the Instrument of Government of 1653– and the “first movement to expound the main precepts of constitutional democracy”, namely, the Levellers (2007a, pp. 28–38, 2007b). Retrospectively, what is perhaps most remarkable about the period of constitutional innovation that ended with the Restoration (1660) is how the constitutional questions and ideas it engendered came to be “obfuscated” when not “suppressed” by the subsequent English/British constitutional practice after the revolutionary settlement of 1689. The problem of sovereignty was left undecided as it came to be located in the composite King-in-Parliament and the revolutionary process was reclothed as a conservatory movement, viz. a restoration of the ancient constitution. Indeed, if there are any heirs to the constitutional arguments of mid-seventeenth England they are to be found elsewhere, in American and French political thought that inspired the drafting of the first modern constitutions (2007a, pp. 40–2, 2007b, pp. 28–31, 2010b, pp. 256–9, 2013a, pp. 48–51).

The seventeenth century, Loughlin observes, marked a highpoint in English/British constitutional thought. From the eighteenth century onwards that level of reflection on public law matters would not be attained again until the last third of the twentieth century. From the 1700s onwards, the nascent British parliamentary state would focus political argument almost entirely on the ends and policies of government, leaving unresolved – unaddressed even– the questions concerning the foundations of governmental authority (2007b, pp. 35–9)²⁷². This was possible because the British state was capable of presenting its arrangements of government as being “so secure as to avoid the need for juristic investigation into its foundations” (2010b, p. 3). Parliament, especially, proved to be a remarkable “instrument of state-building”, as its consolidation –i.e. once it became a reliable and effective restraint on royal policy– allowed government to gain levels of legitimacy and trustworthiness such that it could maintain a standing army and a powerful navy and build a financial system to fund them, that is, a “fiscal-military state” that would grow to become a major world power (2007b, pp. 34–5, 2010b, pp. 260–2, 2013a, p. 50).

There were also “reasons of state”, Loughlin argues, behind the underplaying of constitutional arguments. The parliamentary state that took shape since the eighteenth century constituted a stable form of aristocratic rule (viz. Parliament was firmly controlled a “small elite of landed families”) and would have not thrived in a “more democratic environment” (2007b, p. 32, 2010b, p. 266, 2013a, p. 54). The people were only “virtually”

²⁷² “All the most basic constitutional ideas –such as sovereignty (does it vest in the commons, or in the crown-in-parliament?), the people (do they speak through their local communities, or the several nations, or is this purely an abstraction?) or rights (are these a set of ‘fundamental’ claims or simply concessions conferred by law?)– has remained in state of irresolution” (Loughlin, 2007a, p. 47)

represented in the Commons. While the Commons acted with independence from public opinion, a great many of Members of Parliament were “under obligation to their noble patrons”. Parliamentary politics came to be conducted upon a set of informal conventions that operated alongside a ritualised confrontation between government and opposition organised through political parties (i.e. “coalitions of leading families”) that emerged to manage Parliament. Within this framework what prevailed was a form of “club government” wherein governing and political conflicts were regulated by a “common culture of rule” that both was made possible by and reinforced the “cohesion of the governing class” (1996a, pp. 26–8, 2007b, pp. 31–2, 2010b, pp. 264–6, 2013a, p. 46). In this context, constitutional argument could aspire at best to a more proportionate representation of the people and an extension of the franchise, but any advance in this direction was hindered after the appeal to popular sovereignty became entangled following the American and French revolutions. Further, the failures of the continental revolutions of 1830 and 1848 underwrote in Britain the respect for tradition and slow evolutionary change, making British nineteenth century nationalism –elsewhere a progressive and populist cause– a rather ambiguous phenomenon that embraced the monarchy, the established church and its aristocratic form of governing as “symbols of national identity” (1992a, p. 14, 2007a, pp. 45–6, 2007b, pp. 32, 35, 2013a, pp. 53–6). The very concepts of people and nation would continue to raise difficult questions as the English state incorporated Scotland and Ireland and then expanded into an Empire making any discussion of federalism an “anathema to British constitutional thought” (2007a, p. 46, 2007b, p. 35, 2013a, p. 76).

The constitutional practices or conventions that since the eighteenth century underpinned the British parliamentary state, in consequence, were first and foremost a “tradition of statecraft” that by focusing on well-contained party-political controversies about what was in the national interest managed to circumvent the more fundamental questions raised by mid-seventeenth century English constitutional thought²⁷³. Former appeals to the sovereign people and constitutional compacts were submerged under a doctrine of Parliamentary sovereignty that was perfectly suited for the needs of both the form of aristocratic rule and the imperial prospects of the British parliamentary state. Here lies another “paradox” that is essential to understand British constitutional history. Although Parliament is rightly seen as embodying an institutional constraint to

²⁷³ “Political argument took place not over the nature of the constitution but over the policies of the governing parties, and the main constitutional understandings concerning parliamentary conduct, relations between government and Parliament, and between Parliament and the people gradually evolved” (Loughlin, 2007b, p. 32).

governmental power, it has also been since its very inception an extraordinarily serviceable instrument of government. Indeed, Parliament, once consolidated as the pivotal institution of government, bolstered the power of the Crown under the composite form Crown-in-council-in-Parliament leading to what amounted to, in modern terms, a sovereign authority. It was, in fact, the remarkable institutional resilience and adaptability acquired by the parliamentary state that allowed it to effect a transition to modernity without major permanent institutional breakdowns and to sidestep basic constitutional questions until the last decades of the twentieth century (2007b, p. 34, 2010b, pp. 260, 269–71, 2013a, p. 50).

The most striking achievement of the British tradition of statecraft was the provision of a singular degree of institutional continuity amid accelerated processes of religious, economic, social and political transformations. Within what was essentially an ancient monarchical structure, the law of the constitution gradually evolved, incorporating greater levels of institutionalization and differentiation of governmental functions (law-enforcing, law-applying and law-making) by the diffraction of royal authority (king's council, king's courts and king-in-parliament) and the incremental generation of power-creating constraints. A testament to the resilience and strength of this institutional framework was the “political accommodation” (i.e. by gradual changes in constitutional conventions, the franchise and the party system) of the pressures for democratization and social reform that were imposed by an industrialised, populated and urbanised society. The political responses to these challenges would bring a new era of constitutional development, one that was marked by the displacement of the eighteenth-century limited government by the modern administrative state. As the pragmatic and informal mode of governing that characterized the British parliamentary state continued to prevail, the full significance of this new era was not registered in formal-juridical terms. To understand its full significance it is necessary to analyse another central element in British constitutional history, namely, the tradition of local government.

4. Local government and the rise of the administrative state

Although not today part of the “showy” side of the British constitution, local government has been an essential element in its historical development, whose value therewith was once proclaimed by not only Whig constitutional historians, who extolled the mythical ancient constitution during the nineteenth century, but also by some of the most distinguished foreign commentators on the British constitution such as Rudolf von

Gneist and Josef Redlich (1996a, pp. 12–7, 2009b, pp. 156–7, 2010b, pp. 440–1)²⁷⁴. Celebratory rhetoric and mystifications apart, the British parliamentary state, Loughlin observes, indeed tallied with a distinctive tradition of local government (1996b, p. 57). Further, analysis of the place of local government within British constitutional history is particularly helpful as it provides a key element to understand why there did not emerge a distinct concept of public law (2003a, p. 526).

By the end of the eighteenth century it became established in continental Europe that the internal administration of the country was a responsibility of the central State, a task that was carried out primarily through royal ordinances implemented by a large and rationalised royal administration separated from the judiciary. England, in contrast, was ruled but not administered from the centre. As England became unified and centralised considerably earlier, the central State could preserve ancient local institutions and entrust to them much of local administration without suffering the ills of political feudalism that were common in the continent²⁷⁵. Although they were early on a “principal instrument of royal government”, local institutions were never “simply creatures of the central State”: it was as “representations of historic communities” that they came to be placed within a national frame that granted them a voice at the centre through Parliament and subjected them to a “structure of national laws” whose unity was ensured by the royal courts (1996a, pp. 23–4, 1996b, p. 58, 2003a, p. 525, 2009b, pp. 157–8, 2010b, pp. 244–5, 441). This suggests, Loughlin contends, that there is a crucial link between the formation of the parliamentary state and the constitutional role that local self-government has played in British constitutional development²⁷⁶.

In the British state central-local relations were not structured by arrangements between central departments and local institutions, but through “a network of relationships

²⁷⁴ “Within this evolutionary political constitution the value of local government was universally acknowledged... Local institutions reflecting historic communities and exercising a voice at the centre through the workings of the parliamentary system were a central aspect of British constitutional arrangements” (Loughlin, 2003a, p. 523)

²⁷⁵ “By centralising early, England was able to avoid many of the dangers of political feudalism which threatened neighbouring States of continental Europe, and the centre was therefore able to leave much of the internal government of England to ancient local institutions. The pattern of what has been called ‘self-government at the King’s command’ was thus a consequence of the unrivalled authority of the central power” (Loughlin, 1999b, p. 44). The importance of this fact was clearly seen by von Gneist and Redlich, (Loughlin, 1996a, pp. 16–7, 2009b, p. 162).

²⁷⁶ “While the Crown’s policy of working with these local institutions is of decisive importance in determining the character of the system of local administration, the constitutional value of local government is largely a consequence of the growth in the power of Parliament. Since parliamentary constituencies were based on these local territorial divisions, membership of the Commons consisted essentially of the representatives of these counties and towns. The ancient divisions had always formed the key units of government for executive, judicial and military purposes. With the growth of Parliament, and in particular the arrangements for parliamentary representation, the localities also had the ability to exercise a powerful legislative voice at the centre over issues affecting their interests” (Loughlin, 2003a, p. 525)

between local government, Parliament and the courts” (1996a, p. 24, 2003a, p. 526, 2009b, p. 159, 2010b, p. 441). As there were few prerogative powers in the “domestic sphere”, internal administration was ultimately under the authority of Crown-in-Parliament, which meant that the interests of the localities were represented in the mechanism –i.e. Acts of Parliament– through which the “will of the central State” was imposed on them²⁷⁷. Moreover, the law-making procedure commonly used for these purposes (i.e. private Bills procedure) ensured the preservation of local initiative and the participation of representatives of the localities in the deliberations. As to the rest, local authorities were subject to the ordinary law of the land (viz. the common law) which, again, could not be modified by the Crown alone but only with the consent of Parliament. All this contributed to give local government a distinctly “judicial spirit”. First, as the courts were in charge of applying this structure of national laws (common law and Acts of Parliament) they exercised an important supervisory role over local government (especially via prerogative writs). Secondly, to the extent that Justices of the Peace carried out most of the work in the localities this judicial spirit remained intrinsic to the basic structure of local government. Finally, the private Bill procedure had an “essential judicial mode” of operation and, by that means, this “practice of the High Court of Parliament seems to reinforce the basic principle of the rule of law” (1996a, p. 25, 2009b, p. 160).

Although there were occasions where central government tried either to develop a “supreme administrative authority” or a “special administrative jurisdiction” (e.g. the Star Chamber), such initiatives were cut short by the seventeenth century struggles. As the tradition of local government remained placed within a structure of (undivided) national laws modulated by parliamentary legislation and implemented by the courts, one might understand why the lack of a distinct system of administrative law seems to be rooted in the particular path of British constitutional development²⁷⁸. As with the parliamentary state, the tradition of local government relied on the “cohesion within the governing class” which was made possible by a “common tradition of rule” that was reproduced by the Justices of the Peace that administered the localities, the parliamentarians that scrutinised central government and the judges that cultivated the common law. The strength and resilience of this informal mode of “club government” was what, more than anything else,

²⁷⁷ “The House of Commons, as its name implies, was a body consisting of representatives of the ancient local communities who were (and still are) referred to as such in parliamentary proceedings. Furthermore, though peers attended Parliament in their own right, they took (and take) local titles. Parliament thus provided the localities with a forum within which their interests and grievances could be brought to the attention of the central State” (Loughlin, 1996a, p. 24, 1996b, p. 58, 2009b, p. 159)

²⁷⁸ “The reason why the concept of administrative law has never become embedded in the British system lies deeply buried in English constitutional history” (Loughlin, 2009b, p. 156)

facilitated the operation of a “significant amount of administration” without the development of anything like a formal and distinct administrative law (2009b, pp. 162–3)²⁷⁹.

Not even when local government was radically overhauled during the nineteenth and twentieth centuries to adapt it to the conditions of the modern administrative state did such a “juridified” administrative law system emerged. By the early decades of the nineteenth century, signs of the loss of aristocratic power were already visible. Although successful in taming royal power, the parliamentary state was becoming manifestly unable under aristocratic rule to improve the condition of the “new rich” (urban industrialists and merchants), the middle and non-propertied classes. The 1830s marked, in fact, the beginning of a gradual process of democratisation of Parliament through electoral reform and the formation of the modern party system (2013a, pp. 54–6). The 1830s also inaugurated a protracted process of local government reform as the institutional capacities and the social base of existing arrangements began to unravel under the pressures of increased trade, industrialisation, population growth, poverty and rapid urbanisation. By the end of the century, local government was placed on a “statutory foundation” mainly contained in public general legislation of a permissive character occasionally punctuated by the imposition of duties. This reformation led, in turn, to the establishment of a relationship between central and local government articulated by many “administrative ties” and, in particular, a “mosaic” of central controls to ensure that actions could be taken when a local authority neglected its duties or abused its powers²⁸⁰.

The process of statutorification brought about momentous changes, ushering in what Loughlin calls the modern tradition of local government. Central government became a critical factor in local government displacing both Parliament and the courts. As central departments assumed the role of fleshing out the framework established by primary legislation and came to channel local petitions for extended powers, local authorities lost their direct access to Parliament (1996a, pp. 50–1, 2003a, p. 530, 2009b, p. 169). At the same time, from the second half of the nineteenth century, judicial supervision of local government lost significance vis-à-vis the “administrative channels” of control provided by an array of centralised checking mechanisms. Although central departments assumed the

²⁷⁹ “The lack of a formal State tradition in England was the product of a high degree of cohesion within the governing class. Our Justices, Parliamentarians and judges were all educated in a common tradition of rule. And it was this shared culture of the governing class which rendered unnecessary both a distinct, logical arrangement of institutions which possessed the formal power to enforce the State interest and a formalized body of ‘jurist-law’. We had no need for a concept of the State or for a system of public law” (Loughlin, 1996a, p. 28)

²⁸⁰ For an analysis of the two opposite models inspiring this reformation process, see Loughlin (1996a, pp. 31–6, 2003a, pp. 527–8, 2009b, pp. 165–8).

primary role in regulating local government, Loughlin claims that it would be a mistake to believe that statutorification transformed local authorities into agents of the centre or that central-local relations acquired a hierarchical structure. Under these new statutory arrangements local initiative was largely preserved and the centre did not acquire powers of “strategic direction” but rather was vested with “appellate” or “supervisory” powers. Characteristic of this structure of central supervision were, in this sense, techniques such as inspection. Even in the case of a more intrusive type of central intervention like “default powers”, they turned out to be “in exercise” considerate to local autonomy, as they were to be used sparingly, in no more than a few exceptional cases. What emerged, in sum, from these statutory foundations was a complex of administrative ties between the centre and local authorities that constituted a “non-juridified”, “informal and relatively closed system of administrative law” that replaced judicial supervision by administrative controls. This was largely acquiesced by the courts as they lacked the resources and the “effective working methods” to assume a more prominent role (1996a, pp. 39–52, 1996b, p. 59, 2003a, pp. 530–1, 2009b, pp. 169–73).

By the beginning of the twentieth century, local government had acquired an indispensable place within the modern administrative state, becoming along the way inextricably bound up with the centre. This generated continuous tensions that were intensified by a context of unrelenting political, economic and social transformations. The local-central tensions were exacerbated, first, by the “restructuring of local government” brought by the establishment of the welfare state, which meant a reorientation of the functions of local government away from trading services (e.g. public utilities like electricity and gas) towards social services (e.g. education, housing and the like). The restructuring of local functions, in turn, augmented the financial dependency of local government as it transformed the latter into a potential redistributive mechanism, creating, thereby, further tensions between local autonomy and the centre’s interest in economic management. Thirdly, as the last remnants of class rule unravelled with the break-up of the great-estates after the First World War and the major parties came to play a more significant role in local politics, a process of “nationalisation of local politics” became yet another motor of change. Finally, the attempts at –a much needed– “reorganisation of local government” unavoidably pitted systemic imperatives of efficiency (“functional capacity”) against governmental autonomy (“democratic capacity”). For most of the twentieth century, however, central-local relations retained one crucial feature of nineteenth century arrangements, namely, its operation depended less on formal institutional mechanisms than

on shared understandings and assumptions (i.e. an informal system of administrative practices) that made possible the preservation of local autonomy in a context of significant centralising imperatives (1996a, pp. 52–60, 1996b, p. 59, 2003a, pp. 532–9).

The enlargement of the part played by central government in supervising local authorities became irresistible as national and local affairs came to be progressively intertwined. Centralisation trends were readily apparent in the formal legal framework of central-local relations as it contained extensive and substantial powers of central supervision. However, Loughlin argued, one should avoid adopting “too literal an interpretation” of these central powers. Drafted with “weaker authorities in mind” the formal legal framework presented a “rather distortive view” of the actual central-local relations. To understand central-local relations, therefore, “conventional practices were much more important than legal formalities” (1996a, pp. 61, 63). Central powers were “less intrusive” than they might appear because they were generally used only to enforce a “basic minimum standard” in service provision or assure the “fair treatment” of the local interests involved. The minor part played by formal legal arrangements was also reflected in the reluctance of courts to exert a prominent supervisory role. Beyond the manifest limits to their capacity to police and remedy failures concerning the policies of local services, the legal framework itself contained “too many lacunae, irregularities and ambiguities” to be adequately enforceable by the courts, i.e. statutory language was “too opaque” to be translated into a juridical scheme of enforceable rights and duties (1989, pp. 23–5, 1996a, pp. 60–9).

A key to understand the role that the law played in central-local relations is the realisation that the incompleteness, indeterminacy and complicated character of formal legal arrangements were not the product of “oversight” but the natural corollary of their secondary function. Their role was not to establish an “overarching regulatory structure” but rather a “general and flexible framework” within which the business of government could be conducted. Central-local relations within the modern state, in consequence, came to be conducted not so much by formalised legal rules but by informal administrative practices that allowed for the accommodation of differing interests. Central and local government came to be locked in a “network of interdependency” that could not operate without a base of “mutual understanding, co-operation and compromise” and which was animated by a form of “administrative politics” within which decision-making was rarely highly politicised and officers endowed with recognised “managerial skills” exerted considerable influence. This “tradition of managerial professionalism” coalesced into policy

and professional communities that sustained a “national local system of government” wherein conflicts were contained and negotiated through a network of central-local relations, a common technical language and shared operating ideology. Put differently, this policy and professional network contained the self-regulatory mechanisms (i.e. a “non-juridified system of administrative law”) that shaped central-local relations within the twentieth-century administrative state (1996a, pp. 69–72, 1996b, p. 59, 2003a, pp. 538–40).

The growth of administrative government during the twentieth century had an important impact not only on the tradition of local government but also on the British constitution more broadly. The conventions of the parliamentary state and the modern party system granted the executive considerable control over Parliament. Already during the nineteenth century legislation came to be a governmental rather than parliamentary function as government-sponsored Bills and Statutory Instruments came to comprise the great bulk of modern legislation. At the same time, the machinery of government became buttressed by the formation of a professional and non-political Civil Service that absorbed a great deal of the constantly expanding governmental tasks without frontally compromising neither ministerial responsibility nor the impartiality of civil servants as the working relations between Ministers and officials remained mantled underneath the convention of anonymity (2013a, pp. 57–61). As a result, however, the British parliamentary state secreted a “secretive veil around an informal world of governmental decision-making” within which eventually proliferated a complex of “governing networks” that were relatively unsusceptible to parliamentary scrutiny, eroded the influence of party and diminished the role of the Cabinet itself (2008a, p. 23, 2010b, p. 267).

As administrative government expanded, the authority of Parliament declined as parliamentary constraints on government and its bureaucratic apparatus seemed emasculated by party discipline and overwhelmed by the sheer scale and complexity of the administration. In this context, since the 1960s the judiciary became increasingly disposed to adopt a more active stance in reviewing administrative action and embarked on the “major project” of developing a more coherent set of public law principles which, with the reform of judicial review procedures, has opened a path to the future development for a more judicialised and potentially more “rationalised” system of administrative law (Loughlin, 1994, pp. 109–12, 1999b, pp. 64–76, 2010b, pp. 444–5). At the same time, the legitimacy of what was perceived to be an overloaded, unresponsive and rigid administrative state became decisively compromised by its seeming incapacity to tackle economic stagnation, reaching a crisis point during the 1970s when imperatives for fiscal

retrenchment imposed themselves in a context of rising expectations. This economic-political crisis put an end to the post-war consensus that sustained the prevailing mode of governing –the “welfare state model”– and cleared the way for radical programmes of “administrative reform” since the 1980s affecting both local government and the central state itself, inaugurating a different mode of governing –the “regulatory state” – and a new managerial ethos –“new public management” (Loughlin & Scott, 1997).

The determined governmental will to cut back what it saw as an overstretched welfare state and to curtail the influence of professionals viewed “not as disinterested promoters of the public interest but as self-serving status groups” had inevitably a major impact on local government as it was both orientated to social services and its operation relied on central-local networks sustained by professional communities. Moreover, new forms of ideological politics in central-local relations further deteriorated the tradition of administrative politics as “municipal socialism” posed a challenge to a central government led by the “new right”. With the breakdown of the informal mechanisms that contained conflicts through bargaining and compromise, confrontations between local authorities and central government had to be resolved by litigation and the enactment of even more legislation, giving more prominence to the courts and Parliament in central-local relations. The constitutional significance of these changes, Loughlin remarks, should not be missed. The advance of the process of juridification and formalisation of central-local relations reflects the retreat of those informal practices that preserved local autonomy in the face of increasing centralising trends and, consequently, local authorities are bound to become “agents of central government” (1996a, pp. 74–7, 2003a, pp. 549–54).

The “sustained attack on the public service orientation” of the welfare state model had equally significant constitutional dimensions at the level of the central state itself. The boundary between public and private has been redrawn and diluted (e.g. via privatization, out-sourcing arrangements, public/private partnership schemes, etc.). At the same time, the traditional collectivist orientation, the public service values of probity and professionalism and the recognition of field-sensitive professional standards have been overcome by efficiency concerns imposed by performance indicators, performance monitoring techniques (“value for money audit”) and the commodification of public services (“consumer sovereignty”). Thirdly, a considerable amount of “institutional fragmentation” has been produced as central departments were broken down in order to create executive agencies that operate at arm’s-length from ministers, separating policy-making and service delivery. Finally, a series of independent specialist bodies have emerged to gather and

assess scientific and technical evidence to feed into a great range of areas of public decision-making (food safety, medicines, nuclear waste, environmental pollution, etc.). The cumulative effect of these changes have certainly altered the status, culture and influence of the civil service and displaced the service orientation of the state which has receded to a “steering role” carried out using an array of “regulatory techniques”. As these administrative reforms were dictated by predominantly economic and political-partisan goals, the constitutional significance of these changes went largely unexamined and remains unclear. What is clear, Loughlin concludes, is that a “new phase of governing” is opening up, one that requires a degree of conceptual innovation as the architecture of the state and its law cannot be adequately understood using the traditional categories of public law thought (Loughlin, 2008a, 2010b, pp. 445–65; Loughlin & Scott, 1997).

Weaving all these threads together one might start having a better sense of the degree of disintegration of the historic constitution, “how it all seemed to make sense, and how during the modern era it has veered from being a major source of pride to an arrangement that provokes dissatisfaction” (Loughlin, 2013a, p. xi). The gradual waning of the authority of Parliament, the weakening of the constitutional role of local government and the civil service, all have contributed to the erosion of traditional governmental arrangements and to a generalised sense of decline of political conduct. Attempts to prop up this faltering governmental framework through formalising and juridifying the once distinctively political unwritten constitution (e.g. increased judicial oversight, the codification of conventions and a bill of rights) have not been able to quell the sense of crisis. In spite of all the efforts at constitutional modernisation, the lack of authority and intelligibility of existing governmental arrangement remains stubbornly there. A question, thereby, presents itself immediately, why is it that the present constitutional predicament has proved to be so difficult not only to resolve but even to understand? To answer this question, it is necessary to pay a closer consideration of the traditions of thought that have emerged within and influenced English/British state-making practices.

5. The British state and the unfolding of British public law thought

Although not frequently emphasized nowadays, it is of the outmost importance, in Loughlin’s view, to realise that juridical reflection on the subject long predates the time when the study of constitutional law as a university discipline became established and Dicey wrote his extremely influential account of the constitution. By situating public law discourse within a larger historical framework it is possible to appreciate that the development of public law thought is intrinsically tied to the political ideas that shaped the

formation and transformation of the British state. This seems to confirm Loughlin's claim that public law thought must be seen as a special kind or aspect of political thought. Moreover, on his account, it is only by following the unfolding of public law thought in relation to the historical trajectory of the state that one might come to see why the former found itself without intellectual resources to make sense of the constitutional issues raised by the transformations of the state during the last decades of the twentieth century.

The most distant antecedents of English/British constitutional thought are to be found in those medieval scholastic writings that elaborated, using organological symbolism, a theologically framed doctrine of kingship²⁸¹. The theological-corporational conception of royal authority reached its highest point during the Tudor and early Stuart period, as Henry VIII elevated the authority of King-in-Parliament to assert state sovereignty against all external jurisdiction and James I promoted the divine right doctrine in response to doctrines of resistance. The seventeenth-century constitutional conflicts are, in this sense, an eloquent demonstration that strengthening royal authority upon these foundations was a highly ambivalent enterprise. The exaltation of the monarch brought with it not only the institutionalisation of the office of the Crown but it meant also that, as wrongdoing could not be attributed to the monarch ("the king can do no wrong"), responsibility must lie with the king's agents (e.g. through impeachment). At the same time, the organological symbolism that underpinned the doctrine of the Crown and elevated the dignity of a representative Parliament furnished the concept of the body politic with a uniquely concrete meaning, which later nurtured the idea of parliamentary sovereignty and the conflicts between king and Parliament. But the constitutional arguments and revolutionary innovations brought by the seventeenth-century struggles became obfuscated and refashioned through a conservative movement: a restoration of a mythical ancient constitution (Loughlin, 2007a, pp. 28–42, 2010b, pp. 252–60, 378–83).

The seventeenth-century constitutional settlement and the narrative of the ancient constitution cast a long shadow over the British constitutional imagination (1992a, pp. 43–6, 2013a, pp. 24–8). This is, Loughlin claims, already visible in Blackstone's *Commentaries*, the first modern exposition of the laws of England and the most influential eighteenth-century account of the constitution. First, Blackstone reaffirmed the view of English constitutional history as a gradual restoration of an ancient constitution which predates the Norman conquest. Secondly, while accepting that law ascribed to the king "special pre-

²⁸¹ In particular, Loughlin emphasizes at different points the contributions by John of Salisbury, Henry de Bracton and Sir John Fortescue (1999b, pp. 49–53, 2000a, p. 112, 2003b, pp. 54, 79, 134–5, 2007a, p. 29, 2010b, pp. 40–2, 44).

eminence” as manifested in his prerogative powers to act “out of the ordinary course of common law”, Blackstone emphasized the absolute character of the sovereignty of the Crown in Parliament. Finally, by putting the unlimited authority of the Crown in Parliament at the centre, this view of the constitution undercut old notions of “fundamental law”, which came to be displaced by the supremacy of the law proclaimed by Act of Parliament (2007a, pp. 43–4, 2010b, pp. 381–2, 2013a, pp. 28–30).

Although Blackstone’s restatement of the principles of the common law and the English constitution became greatly influential, it did not go unchallenged. Already in the eighteenth century, John Millar presented an alternative view of English constitutional history claiming that the origins of liberty are not ancient but modern. Following the cue of Adam Smith, Millar elaborated a “science of legislation” that attempted to show how constitutional development was to be explained in terms of material progress, that is to say, the social forces released by increased division of labour and the flourishing of a commercial society, which fostered a sense of independence and liberty in the great body of civil society through the growth and spread of wealth, the advancement of science and literature. With the progress of civilization, the rights of government, while historically have rested on authority, come to rest on utility. Millar, Loughlin remarks, provides a striking early example of the attempt to “root an understanding of the constitution in a theory of society”, with the result that the focus shifts from legal and constitutional concerns to the social and economic relations that are real constitutive elements of civil society (1992a, pp. 4–13).

Bentham also elaborated a critique of Blackstone’s view of the constitution and articulated a science of legislation which, in contrast to Millar’s, was not historical and explanatory but prospective and critical, i.e. it was focused on what the legislator ought to do in the future. Strictly distinguishing between what the law is and what it ought to be, Bentham’s science of legislation aimed to elaborate a rational critique of both the common law and the English constitution devising a plethora of schemes for social and legal reform. Taking the principle of utility as the sole standard of justification and critique of legal and political institutions, Bentham did not accept local custom and common law as embodied wisdom and challenged the aristocratic principle in government. In fact, Loughlin observes, Benthamite thinking made a large imprint on nineteenth century reformation of local government by promoting a more centralised, uniform and efficiency-driven administration (1992a, p. 19, 1996a, pp. 29–39, 2009b, pp. 164–70).

Bentham's disciple, John Austin, would become particularly influential in nineteenth-century legal thought. Austin aspired to produce a "scientific" expository jurisprudence, developing an empiricist conception that sought to eliminate all normative elements from legal science. The primary task of jurisprudence was to expound the law as it is, by systematically classifying its elements and clarifying basic legal concepts. Austin's expository-analytical jurisprudence provided valuable resources for the project of the academic lawyers that sought to establish the university study of the law during the latter half of the nineteenth century. These law professors aimed, more concretely, to legitimise their role in the eyes of the legal profession and to find a place for academic legal studies among the other university disciplines. This is nowhere better expressed, Loughlin contends, than in Albert Venn Dicey's writings, who was one of the first to apply the analytical method to the study of the law of the constitution (1992a, pp. 20–1).

The duty of a constitutional law professor, for Dicey, was to state what are the laws that compose the constitution, arrange them "in their order", explain their meaning and exhibit their "logical connections". The academic lawyer should not play the part of a "critic" or an "apologist" but simply of an "expounder", his duty being neither to attack nor to defend but "simply explain" the laws of the constitution. By adopting a strictly expository-analytical approach Dicey demarcated, thereby, the study of law from normative political and moral philosophy. Equally important, however, was to demarcate the domain of the constitutional lawyer from that of the constitutional historian and the political scientist. In contrast to the former, the constitutional lawyer is primarily concerned with the present rules of the constitution not with its origins or development. The constitutional lawyer differs from the latter in that she is primarily concerned with the "rules of law" not with mere "political understandings or conventions". The constitutional lawyer, however, should describe the constitution as it really is, Dicey warned, and not fall victim to the "formalism" that characterised the traditional legal approach to the field (Loughlin, 1992a, pp. 13–7, 21–2, 1995, pp. 165–6, 2009b, p. 152, 2013a, p. 31).

The application of this expository-analytical method ensured that the academic study of the law of the constitution was rendered not only serviceable to the profession but also scientific to the extent that it conformed to the value-neutrality that –according to the then dominant positivist assumptions– characterises any authentic science. Dicey's elegant and careful definition and delimitation of the scope of constitutional law was syntonetic with the process of fragmentation of the older more comprehensive approaches and the emergence of political economy, history, philosophy and law as separate disciplines with

technically precise boundaries. Dicey's construction became so dominant that the expository-analytic method came to be accepted as defining the juristic method and his writings seen as the true beginning of juridical thinking within the field (1992a, p. 140). Dicey's imprint on British public law thought, however, is not confined to these methodological innovations. In fact, Loughlin claims, his legacy cannot be really understood without considering that Dicey also infused the conceptual structures of the subject with a particular political "outlook" that loomed large over the controversies that beset the latter during the twentieth century. To understand Dicey's inheritance exclusively "in formal analytical terms –to understand Dicey rationalistically– is to miss the point" (1994, p. 93).

Dicey's achievement, Loughlin claims, was to restate the ideological tenets underpinning the British constitutional tradition using the "modern analytical method". In spite of "the veneer of scientific objectivity in his analytical method", Dicey's theory of the constitution was, in essence, a reaffirmation of a "common law mind-set" attuned to the "set of values" that pervaded the "professional classes of mid-Victorian society", i.e. classical liberalism (2009b, pp. 153–6, 175). Dicey's "genius" was to articulate a theory of the constitution "which, though presented in a scientific idiom, served mainly to bolster the authority of traditional wisdom" and, thereafter, his work remained a "lamp" or "beacon" that proclaimed the "faith" in the common law precisely at a time when its social and political underpinnings were unravelling (1995, pp. 166–7). It is difficult to appreciate this aspect of Dicey's contribution because he posited as the pivotal principle of the constitution a seemingly absolutist conception of the doctrine of parliamentary sovereignty, but this obfuscation is cleared once the other basic elements of his theory are considered, namely, the rule of law and constitutional conventions.

Dicey's notion of the rule of law is an ambiguous notion, but whatever else it means, it assumes that it is incompatible with extensive administrative discretionary powers and with the subjection of the administration to a distinct body of laws administered by special courts. For Dicey the rule of law requires the subjection of administrative action not only to pre-existent and precise general rules but also to the ordinary law of the land as administered by the common law courts (which meant the extension of private law principles to the administration). By articulating a constitutional theory and a reading of common law values through the ideological prism of classical liberalism, Dicey managed to present the emergence of a distinct administrative law and the growth of collectivist legislation as running against the grain of the British constitution. The common law and the

common law courts, rather than legislation and the statutory protection of rights, are (and should remain) the true basis of the constitution of liberty. The law of the constitution is not the “source” but the “consequence” of the rights of individuals as they have been gradually developed by judicial decisions. The British constitution is a “judge-made constitution” and therein the law of the constitution flows from ordinary law and not the other way round. Finally, the balance between parliamentary sovereignty and the rule of law is maintained by a set of political practices (e.g. constitutional conventions) that subject Parliament to an electorate and public opinion immersed in a constitutional culture that has survived the expansion of democracy due to the deferential disposition of the new political class, i.e. the practice of “democracy tempered by snobbishness” (Loughlin, 1992a, pp. 140–53, 1994, pp. 93–4, 2003b, pp. 136–40, 2013a, pp. 32–3, 89–90).

Confronted with the recalcitrant reality of the growth of “socialistic” legislation, the expansion of executive power and the rise party politics, Dicey adopted a pessimistic tone in his later work, increasingly nostalgic of the mid-Victorian understanding of the “spirit of the English constitution”. The tenets animating Diceyan thought (especially his suspicions towards the emerging administrative law) lived on in the mind of lawyers. During the inter-war period, after the wartime experience of collectivist state organisation, a series of writers working within Dicey’s framework (e.g. Lord Hewart, Carleton Allen and Sir John Marriott) polemicised against the extensive delegation of legislative and judicial powers to the administration (Loughlin, 1992a, pp. 153–65, 2010b, pp. 441–3). By the middle of the twentieth century, however, it was clear that Dicey’s unqualified rejection of administrative law had become unsustainable. Sir William Wade, “the most distinguished of our contemporary disciples of Dicey”, assumed the enterprise of adapting Dicey’s tradition to the conditions of the welfare state. Wade set out, first, to show in these new circumstances that the common law tradition –i.e. the materials already contained in the law reports– if approached in a more spirited fashion was able to ensure that governmental power be exercised in legal and regular manner without requiring a great deal of legislative assistance. Secondly, Wade insisted that the courts remained the primary guardians of the principles of public law and should keep their constitutional duty to uphold the rule of law and liberty against a background of growing social legislation. Finally, Wade opposed the development of a dual system of public and private law and reaffirmed the contention that the rule of law was founded on the supremacy of ordinary law applied by ordinary courts (Loughlin, 1983, pp. 667–71, 1992a, pp. 184–90, 1994, pp. 98, 106, 1999a, pp. 197–8, 1999b, pp. 67–70).

Despite its dominance, Dicey's tradition never ran unchallenged. One of his most distinguished contemporaries, the legal historian F.W. Maitland, already saw that any conception of English law had to take into account the vast departments of law of a statutory nature that have recently emerged (some of which "may be called administrative law") and that to neglect the existence of the governmental powers therein contained was to frame "a partial and one-sided obsolete sketch" (Loughlin, 1992a, p. 166, 1994, p. 94, 2009b, pp. 153–4). Maitland's thoughts seemed to have been neglected until a group of public lawyers sought to contest both the method and the political values underpinning Dicey's theory of the constitution, laying the foundations for a "critical" or "dissident" functionalist tradition. By adopting a social scientific perspective, jurists like William Robson, Ivor Jennings, and John Willis, argued not only that there was a vast body of administrative law but that now the real challenge was to understand its ramifications and impart a greater degree of order and coherence to it. By integrating into the analysis arguments from history, social theory and the theory of the state, they aspired to show that the extension of governmental functions were not signs of despotic power but of a change in the role of the state whose roots are to be found in deep social changes. Finally, functionalism demonstrated that ordinary courts were ideologically biased, procedurally ill-equipped and lacked sufficient technical knowledge to operate a rational system of administrative adjudication and that, more broadly, the traditional private-law and common law orientation of lawyers should be replaced by a modern public law perspective more attuned to modern social legislation and the new role of the state (Loughlin, 1983, 1985, 1992a, pp. 165–76, 2005b, 2014b).

During the post-war period, this critical tradition was further elaborated in somewhat different directions by John Griffith, John Mitchell and Patrick McAuslan. A first, "empiricist", variation, was formulated by Griffith who insisted on the need of stripping away the façade of constitutional doctrine to disclose what he saw as the realities of government. Griffith, in particular, distrusted attempts to enlarge the role of judges in controlling governmental discretion and fought the illusion that law could be a substitute for politics, arguing that what was needed instead was to reinforce the democratic means of controlling power and the conditions for a government in the public interest (Loughlin, 1992a, pp. 197–201, 2010a). Mitchell, elaborating a more "idealist" variation, argued instead that there was already an excessive concentration on parliamentary controls, which, in fact, has stood in the way of the real solution to the legal challenges posed by the administrative state, namely, the development of a dual system of public and private law, differentiated

both at a substantive and institutional level (Loughlin, 1991, 1992a, pp. 191–7). Finally, a more contemporary version was elaborated by McAuslan, who argued that the challenge was to go beyond existing judicial and bureaucratic arrangements as they both were one-sidedly centred on either private/individual rights or public/collective interests and create new legislation, new institutions and procedures that aimed towards an open government and a more participatory democracy (Loughlin, 1992a, pp. 201–5, 2013c).

By the last decades of the twentieth century, Loughlin argues, both traditions exhibited evident signs of decline. Already towards the middle decades of the century it was clear that the status of constitutional lawyers and the common law as regard the conduct of politics and governance had greatly diminished since Dicey wrote his major works. While during his time the great political issues were couched in the language of constitutional law (e.g. extension of the franchise, home rule, etc.), by the early years of the twentieth century the focus of political debate came to be increasingly dominated by matters of social and economic reform on which the constitutional lawyer and the common law could offer little guidance. By mid-century it became apparent that the Dicey's understanding of the constitution was cut-off from the political culture that animated recent constitutional developments and that the analytical public lawyer, having little to say to social scientists interested in understanding the contemporary world or to politicians in need of parameters of governmental action, was relegated to the margins of social and political thought. During the 1960s and 1970s the ideological tenets that underpinned the Diceyan tradition lost what remained of its authority as parliamentary government and the unwritten constitution came to be seen not as marks of the genius but as serious weaknesses of British constitutional culture (Loughlin, 1992a, pp. 206–14, 232–5, 1995, pp. 195–7).

The functionalist tradition did not fare better during the last decades of the twentieth century. Indeed, the 1960s and 1970s were also times in which the progressive narrative that tied together the expansion of the administrative state with social and economic development started to lose its appeal under the growing sense of economic decline and scepticism towards the ability of expert officials to deliver services in the public interest. As the post-war consensus that embodied the functionalist faith in the positive state crumbled under the pressures brought by “stagflation”, a new set of ideas came to dominate governmental action. This new political orientation advocated a return to individualist mechanisms of welfare provision (e.g. privatisation, contractualisation and marketisation) and the displacement of the professional and public service ethos of the state administration by a “new public management” that had economic overtones.

Against the background of the aggressive programme of administrative reforms implemented since the 1980s, functionalism tended to switch from a progressive to a defensive or reactive stance and some even came to favour the legal entrenchment of what was left of the welfare state, adopting an uncharacteristic positive attitude towards the role of the judiciary and legalistic arguments in governmental matters (Loughlin, 1992a, pp. 214–229, 2013c, 2014b, pp. 66–7).

The simultaneous “intellectual crisis” of the orthodox Diceyan tradition and the dissenting functionalist tradition, which animated scholarly enquiry and debate within the field since the late nineteenth century, meant that the academic public lawyer has no conceptual resources at hand with which make sense of the contemporary predicaments of the subject and, consequently, is forced to search for new ways of thinking and talking about public law that are more appropriate to its present challenges.

6. Political jurisprudence: public law as the law of the state (*Staatsrecht*)

The dominant Diceyan public law tradition proved unable to provide intellectual resources to respond productively to the waning of constitutional authority since the 1960s and 1970s. The dissenting functionalist tradition, attached as it was to a welfare state model that has been the object of sustained critique since the 1970s, proved to be no more able to elaborate ways of making sense of the predicaments of the field. From the mid-1980s onwards, the intellectual crisis of both traditions of public law thought made it necessary to elaborate “innovative approaches” to the field²⁸². Despite their differences in detail, all these innovative approaches are attempts to achieve a “new consensus” around the normative principles that underpin the British constitution. In this sense, they all share a “tendency to treat law as branch of moral philosophy” (Loughlin, 1995, p. 174). Within this philosophically oriented public law scholarship rights-based liberal conceptions inspired by Rawls’ theory of justice and Dworkin’s jurisprudence have been particularly dominant. Consequently, Loughlin has mainly focused –though by no means exclusively (1988, 1995, pp. 177–9, 2005b, 2006)– his discussion of contemporary British public law thought on this strand of scholarship.

Liberal normativist constitutional theories, Loughlin concedes, certainly represent a step towards progress in that they rightly reject both the formalist conception of law of the Diceyan orthodox tradition and the instrumentalist conception of the law of the functionalist critical tradition. By trying to elaborate explicitly the connection between law

²⁸² “Innovation in public law scholarship has mainly been a response to uncertainty and disorientation; it is a product of the attempt to continue to work in public law without those certainties which gave birth to the subject” (Loughlin, 1995, p. 186).

and politics without reducing law to a mere expression of existent power relations, liberal readings of the constitution are breaking free from positivistic assumptions that either led to the formalistic stance that law could be understood without considering its political context or to the empiricist stance that law was nothing but an instrument that social groups use when vying to satisfy their interests (1995, p. 174). The problem with these recent liberal constitutional theories is that they confound the nature of the exercise by adopting a moralising stance that is not sufficiently grounded in actual practice and misrepresents the mode of evolution of the subject. To the extent that they lack sufficient empirical content and do not exhibit an adequate degree of historical awareness, it is unlikely that liberal constitutional theories would be able to provide ways of thinking about public law that are adequate to contemporary concerns.

The steps of Loughlin's critique should be examined more closely. One should readily acknowledge that these liberal readings of the constitution make use of normative philosophies of justice and law of "immense analytical rigour". By applying the general theory of rational choice to the question of social justice –viz. rational, self-interested actors deciding in idealised conditions ("original position") about the principles underpinning social cooperation– Rawls' *Theory of Justice* offers a philosophically sophisticated and relatively clear account of the principles of justice that govern an ideal (or "well-ordered") society. In its later, somewhat less ambitious and universalistic reformulation, Rawls' principles of justice came to be an elaboration of a "public reason" that restrains unreasonable and irrational political positions, a public reason which, although grounded in an "overlapping consensus", ends up being embodied by the judiciary and constitutional adjudication (Loughlin, 2000a, pp. 96–100, 2005a, pp. 187–91). Similarly, Dworkin has constructed a normative jurisprudence that, by highlighting the essentially argumentative nature of legal practice, contends that any proposition about what the law is can only to be rationally justified by appealing to the "best" elaboration of the principles of "community morality" that are embedded within the law and that an idealised adjudicator ("judge Hercules") would use to establish the rights of the parties in "hard cases". Armed with this theory of law, Dworkin articulated a sophisticated theory of constitutional adjudication that is, arguably, capable of providing determinate solutions (a "right answer") to constitutional cases by setting forth a "moral reading" of the constitution (Loughlin, 1992a, pp. 238–40, 246–50, 2000a, p. 106, 2003b, pp. 145–6).

Whatever the merits of these theories as philosophies of justice and constitutional adjudication, they do not, Loughlin contends, offer an adequate frame for constitutional

theory. In contrast to normative political philosophy, constitutional theory cannot be an inquiry into “ideal forms” but it must aim to understand “the character of actually existing constitutional arrangements” (2005a, p. 186, 2008b, p. 49). Actual constitutional practices have a complex, diverse and protean nature that greatly exceed what can be captured by “constitutional models” invented by philosophers. This means that constitutional theory “must be rooted in historical experience and must acknowledge the variety of forms that history exhibits” (2010b, pp. 92–3). Further, the “singularising hermeneutics” advocated by these normativist conceptions, aimed at determining the “best interpretation” or “right answer”, ignores that actual constitutional traditions have thrived historically due to the fluid, polyvalent and partial character of their prescriptions²⁸³. Moral readings of constitutions also run against the fact that institutionalised structures of political authority are to some extent an answer to the inexistence of an “authoritative morality” (2003b, p. 148). These recent normativist liberal constitutional theories, in sum, share the fundamental weakness of the Kantian rationalist practical philosophy they seek to revive, namely, they gain their “intellectual rigour” at the cost of their “social-political relevance”²⁸⁴.

The shortcomings of liberal normativist conceptions become yet more evident once concrete attempts to apply it to the British case are considered. By trying to re-interpret governmental practices in compliance with the model of liberal constitutionalism these conceptions inevitably end up misrepresenting both the distinctive character of the British constitution and its particular mode of evolution. Furthermore, under the guise of legal argument this liberal re-interpretation constitutes “essentially an exercise in political reform”, a “revolutionary project” that promotes a judicial “appropriation” of the constitution by reinventing in rationalist fashion the rule of law and the common law tradition²⁸⁵. Liberal normativist conceptions, turning Dicey on its head, take the rule of law

²⁸³ “What we often fail to appreciate, especially when theorizing about constitutions, is that... constitutions are replete with gaps, silences, and abeyances. More importantly, such silences are not just the result of an oversight. They might not be even the truce between opposing defined positions... Being important aspects of the exercise of managing political conflict, obscurities are functional. Constitutions –and constitutional laws– are... instruments in the on-going business of state-building” (Loughlin, 2003b, p. 50).

²⁸⁴ “As a claim in political jurisprudence, this argument falls prey to Hegel’s criticisms about the ‘impotence of the ought’... By explaining that our duty requires compliance with the rational law (categorical imperative) that we establish for ourselves, Kant provides a more exact formulation of political right. But its weakness as political jurisprudence is a direct consequence of its intellectual rigour: that is, the precision of this rational law is acquired only by virtue of its abstraction from the material concerns of particular societies. Kant’s conceptual solution to the search for a science of political right is achieved only at a cost of its socio-political relevance” (Loughlin, 2010b, p. 129).

²⁸⁵ “Liberal normativist lawyers have thus sought to reinterpret our dominant tradition in a rationalistic light and have tried to explicate a corpus of rights inherent in the common law. In effect, they are seeking to reinvent our traditions, by supplanting the ancient conception of the rule of law with a modern conception... Their implicit programme of injecting rationalist liberal theory into public law should be

as a “juridical precept” rather than a “political ideal” and postulate that the common law, rather than parliamentary sovereignty, is the foundational principle of the constitution. Using what seems to be an argument of impeccable logic, liberal normativist constitutionalists argue that legal principle of parliamentary sovereignty is a common law doctrine (logically it could not be founded on statute law) and that as such the determination of its contents and limits is a judicial matter. The principles of the rule of law embedded in the common law –especially fundamental rights– are thus elevated to a form of higher law that governs statutory interpretation and, in extremis, impose limits to parliamentary supremacy (Loughlin, 1992a, p. 237, 1995, pp. 180–2, 1999a, pp. 199–213, 1999b, pp. 65–6, 2010b, p. 271, 2013a, p. 98).

Although these liberal normativist theories of the constitution are highly influential within contemporary public law thought, their main tenets are, Loughlin claims, so incongruous with basic features of the British constitutional and legal tradition that their currency among lawyers and judges must be taken as another sign of the waning of constitutional authority and understanding. First, although it is certainly true that judges have come to “recognise” parliamentary sovereignty, it would be a mistake to believe that it is a judge-made principle rather an aspect of the particular formation of the British state, i.e. a trait that evolved from a multisecular political process that made Parliament the pivotal governmental institution. Contrary to what liberal constitutional theories postulate, the British constitution is “the epitome of a political constitution”. It is difficult to deny that from the last decades of the twentieth century it has become increasingly juridified and that the institutional position of the judiciary has become more prominent in the process. But the point is, precisely, that this represents a shift of “revolutionary proportions” as the normativist aspirations to a “constitution of legality” take the place of the traditional informal practices of the political constitution and parliamentary sovereignty is redefined under a reinvented rule of law that has come to be used mainly as an “ideological weapon” (Loughlin, 1999a, pp. 201–3, 2000a, pp. 107–8, 2000b, pp. 425–6, 2010b, pp. 271–2, 2013a, pp. 99–100, 112–6)²⁸⁶.

Liberal constitutional theories have turned, secondly, the tradition of the common law “entirely on its head”. While liberal normativist conceptions rely on a theory of law as a

viewed, like their explicit political programme for constitutional reform founded on the need for an entrenched system of rights, as being essentially an exercise in political reform” (Loughlin, 1992a, p. 210).

²⁸⁶ Thus, Loughlin concludes, the rule of law has come to embody an “unachievable ideal” that is “susceptible to use as ideological weapon” (2010b, p. 337). Similarly, in an earlier work, he argued that the concept of the rule of law has become largely “meaningless” as a consequence of sustained “ideological manipulation” (1988, p. 538).

system of legal rules underpinned by abstract general moral principles which protect a corpus of rights, the “common law mind” is adjusted to a conception of the law as a body of precedents that incrementally evolves through concrete and particular judicial experience and practice. The increasing adoption by lawyers and judges of a reinvented common law adjusted to the “rationalist” perspective of liberal constitutional theorists represents, Loughlin claims, a change of vast implications as it brings a shift from precedent to principle, the concrete to the abstract, the particular to the general and from jurisdiction to legality (1992a, pp. 42–6, 209–10, 237, 1994, pp. 108, 111, 1995, pp. 180–2, 1999a, pp. 194–206, 1999b, pp. 65–6).

Liberal normativist readings, Loughlin concludes, exhibit a dim understanding of the British constitutional tradition because they start in the wrong place. Rather than trying to reinterpret contemporary public law from some ideal model, the way forward is trying to articulate an account that is rooted in practice and history (1992a, p. 241, 2003b, p. 4). Public law theory forms “a distinct enquiry” and, therefore, it cannot be “completely absorbed into political philosophy” (2005a, p. 186). More importantly, once the rationalist project to reduce the foundations of public law to the moral prescriptions of a rational or transcendental law is put to one side, it becomes evident that they are to be sought within – not outside– the practices of “state-building” and that, in consequence, public law “far from transcending politics, is an aspect of political practice” (2003b, p. 132).

If public law is to be seen as aspect of politics, its “autonomous” character must be understood in a very specific sense. Traditionally, this “autonomy” is understood to mean that public law is different from other neighbouring disciplines (history, political economy, sociology and political science) in that it has a distinctive object (i.e. the law that relates to government) and it applies the legal method (viz. public law is to be studied as any other branch of law). From Loughlin’s perspective, in contrast, public law is “autonomous” in the sense that it is distinct from other branches of law in that it not only has a distinct object but also has its own method. In particular, two significant methodological consequences follow from the insight that law is an aspect of politics, namely, that in order to understand public law we need to understand first the practices of politics (i.e. the “activity of governing the state”) and, by implication, that we cannot just suppose that public law answers to a single and universal concept of legality but rather we need to search for a theory of law that is adequate to the practices of politics (i.e. one that adequately conceptualises the role of law within the practices of state-making). This means that public law should, like the old “sciences of the state” (*Staatlebre*), conceive the study of the politics

as a unified field of enquiry (legal, sociological, historical, etc.) and that the model of private law is utterly inappropriate for the study of public law to the extent that it is blind to the singular juridical status of the state (1994, p. 109, 1999b, pp. 69–76, 2003b, pp. 1–2, 42–3, 132, 2010b, pp. 9–10).

The beginning of wisdom in the field, Loughlin argues, comes from the realisation that public law is an aspect of politics or, more precisely, of the activity of governing the state (“statecraft”). Methodologically, this means that politics is prior in the order of understanding and explanation to public law (one must grasp of the former to grasp the latter)²⁸⁷. This has many implications. First, it means that, from a conceptual perspective, the concept of the state is the “foundational concept of public law” and, thereby, the formation and evolution of public law is to be seen as an aspect of the formation and evolution of the modern state (2009a, 2010b, pp. 183–208). Secondly, once public law is seen as an aspect of politics it becomes evident the importance of acknowledging that public law discourse is “simply a sophisticated form of political discourse; that controversies within the subject are simply extended political disputes” (1992a, p. 4). This means, in turn, that public law like politics “is a highly polarised discourse” and that its study is not going to reveal a singular but a “range” of interpretations of its conceptual structure (2003b, p. 28)²⁸⁸. It is methodologically essential for the public law theorist, thereby, to pursue a pluralising hermeneutics that recognises that public law is constitutively –and not only contingently– formed by “competing rationalities” and, consequently, adopt a “prudential” mode of reasoning that comes to terms with the fact the fissure(s) running through the subject cannot be resolved but only negotiated²⁸⁹. This

²⁸⁷ Metaphorically, Loughlin has expressed this important point by saying that public law is the attempt by jurists to make explicit (turn into “theoretical knowledge”) the “grammar” that is embodied in the “vernacular language” (the “practical knowledge”) that is (re)made by the actual speech governmental actors. The public lawyer makes explicit the standards of propriety that implicitly underpin the activity of governing the state and, therefore, the system of principles or code of rules of jurists will remain secondary and derivative: “although general principles and specific rules certainly provide part of the corpus of public law, these should be treated as cribs, or guides to conduct; they do not themselves yield the source of knowledge of the subject” (Loughlin, 2003b, pp. 29–31, 2010b, pp. 178–80)

²⁸⁸ “The search for a ‘science of political right’ is driven by the conviction that there is some mode of right ordering of public life that free and equal individuals would rationally adopt. This is purely an exercise in imagination which experience has shown to be journey without end: countless normative schemes have been postulated and all have foundered on the rocks of political necessity. In part, this is because political right must negotiate between norm and fact and this has left public law with a polarized consciousness” (Loughlin, 2013b, p. 19)

²⁸⁹ “The history of public law reveals the existence of a range of theories, each of which exposes distinctive features of the practice... These features amount to distinctive expressions of the polarities of a bifurcated discourse. The disjuncture they express can be neither eliminated nor reconciled, but only negotiated. This negotiation does not itself amount to the explication of right as such: it involves the exercise of prudential judgement. Rather than treating public law as the unfolding of some science of political right, then, public law should be understood to involve an exercise in political jurisprudence, whose task is to

pluralistic-pragmatic perspective not only is to be applied, at a higher level, to accounts or interpretations of the conceptual structure of the subject as a whole (distinguishing “traditions” or “styles” within public law thought) but also, at a lower level, to the concepts with which these are articulated, revealing the plurality and fluidity of their content and relations²⁹⁰.

The same pluralistic-pragmatic method is used by Loughlin when it comes to the discussion of the relation between law and government. The undertaking is to identify and elaborate the competing conceptions that have emerged along the intellectual history of the subject. Following the insight that public law discourse is a special form of political discourse, Loughlin tries to show that the persistent debate over competing concepts of law (i.e. law as [1] tradition or custom, [2] command or will, and [3] right or reason) is in itself essentially a political question (2000a, p. 227). This means first that the public law theorist should resist the temptation to adopt a one-sided concept that reduces it to positive law or formal regulatory law (i.e. law as command or “jurist-law”) ignoring that law embodies informal practices and cultural dispositions (i.e. law as tradition or “folk-law”) as well different conceptions of “right-ordering” (i.e. law as right or “political right”). Secondly, the public law theorist should also avoid two similarly one-sided conceptions of the law that intend to understand legal discourse either as an entirely rational and logically structured thought or as mere instrument or superstructure veiling or propping the fact of political domination (2000a, p. 26). One should aim, Loughlin concludes, for a deeper view that begins with the realisation that law, like politics, dwells within the meaningful social world and, more specifically, that law and politics are constituted by the “activity of creating and maintaining a normative universe”, an autonomous social imaginary whose purpose is to give order to collective life²⁹¹.

Politics and public law, on that score, emerge from the symbolically articulated world that humans make and which shapes their collective life in conjunction with material

negotiate between the various conflicting accounts of political right that form part of its evolving discourse” (see also, Loughlin, 2003b, pp. 148–52, 2010b, p. 164)

²⁹⁰ Thus, Loughlin applies this perspective to the basic conceptual repertoire of the field, from the foundational concept of the state to the other basic concepts like constitution, representation, sovereignty, liberty, rights, etc. It is in this sense, that he has sought to sketch the “conceptual foundations of public law” (Loughlin, 2003b, p. vii)

²⁹¹ “The politico-legal world we inhabit is a world that we have made. We create a normative universe which enable us to ‘maintain a world of right and wrong, of law and unlawful, of valid and invalid’ and although lawyers generally locate their normative world solely in the rules, practices and institutions of law, these rest on a set of stories or traditions which invest them with meaning... It is through this type of process that we develop traditions –meaningful patterns of political behaviour– and a distinctive way of understanding the nature of the political relationship... It is through the deployment of myth that we have devised those stories which tell us who we are as a people, how we have come in being as such, and why we are here” (Loughlin, 2000a, pp. 21–2).

forces, e.g. biological, geographical, economic (2000a, pp. 6–17). The autonomy of the “imaginative world” of public law is a function of the autonomous character of a distinctive political sphere which has come to be conceptually articulated through the concept of sovereignty and institutionally embodied in the modern state (2010b, p. 186, 2013b, p. 12)²⁹². From a pragmatic point of view, therefore, the “reason of public law” is to provide a “grammar” or “juridical coding” to the practices of statecraft. In this sense, the “reason of state is the reason of public law” (Loughlin, 2003b, p. 151)²⁹³. Indeed, as the autonomy of public law is a function of the conceptual and institutional foundations of the autonomy of the political, the decay of the latter cannot but bring the decline of the former. This explains the incipient decomposition of constitutional thought as the oxymoronic theories of post-sovereign/post-state governance and constitutional pluralism seem to gain more ground (Loughlin, 2009a, pp. 17–27, 2010b, pp. 461–5, 2013b, pp. 21–4, 2014a).

At this juncture, the consequences of this theoretical framework for British public law can be restated. More than any other constitutional system, within the British parliamentary state constitutional arrangements are the product primarily of traditions of rule and the role of the law has remained secondary in the sense that, at best, it has provided a facilitative frame for the operation of informal practices of government. During the eighteenth century, the modern British state was conducted by what was essentially a form of aristocratic government which imposed a pragmatic “culture of rule” that dominated parliamentary politics, local government and, later on, the administrative class of the civil service. The long process of local government reform during the nineteenth century, the emergence of the administrative state and the democratisation process, in turn, gave rise to an informal system of administrative law that relied on a tradition of professional-managerialism that sustained the distinctively political character of the constitution well into the twentieth-century. The structural developments of the last decades of the twentieth century have all but destroyed what’s left of the “historic constitution”, e.g. the “demise” of the tradition of local government, the loss of authority of parliament and the weakening of the civil service. Recent constitutional reforms have responded by codifying more and more constitutional practices in rules and regulations

²⁹² “The political sphere does not denote a sub-system of society differentiated from other spheres, such as the family, markets, the institutions of civil society, and the courts. Rather, it stands as a representation –from a distinctive perspective– of the entire society... [this] is a conceptual claim, founded on the attempt to elaborate the essential character of public law” (Loughlin, 2008b, p. 57).

²⁹³ “Public law has a distinctive logic, but his *ratio* is no that of moral reason; it is *ratio status*, a form of political reason that works to ensure the continuing authority of this autonomous political realm” (Loughlin, 2005c, p. 58).

(e.g. Ministerial Code, Cabinet Manual, etc.) and by engaging in less timid steps towards “constitutional modernisation” (e.g. devolution, Human Rights Act, etc.). Meanwhile, this process of “juridification” of the constitution has been further advanced by a judiciary that has come to disown many of the traditional traits of the English juristic tradition by adopting a rationalistic “discourse of rights” (Loughlin, 1999a). Despite this hyperactivity in constitutional modernisation, however, it is difficult to see what is taking the place of the old and, indeed, the persistent cultural disorientation in constitutional matters makes one wonder whether British governmental arrangements amount to a constitution anymore (Loughlin, 2013a, pp. 1–5, 105–18).

“Required to work a constitution that is intellectually bankrupt” (Loughlin, 1999a, p. 193), there is little that the public lawyer can do other than trying to making sense in a dispassionate manner of the critical condition of British public law. In these circumstances, many public law theorists have been tempted to transcend public law practice and preach normativist theories of public law and programmes of constitutional reform, abandoning the position of the “scholar” and adopting the role of an actor who promotes his own “ideological objectives” (Loughlin, 2005c, pp. 65–6). By abandoning the constraints underpinning scholarly enquiry in the field, which require it to remain rooted in practice, such activist public law theorists tend to reduce “scholarship to ideological struggle”, reiterating the polarising tenets that have confounded the study subject since the times of Dicey and Maitland (Loughlin, 2008b, pp. 52–5, 2009b).

7. Conclusion: the place of reconstructivism

Loughlin’s writings set forth a distinctive reconstructivist approach to public law theory which pursues, with different conceptual and methodological assumptions, three animating ideas of interwar functionalism, namely, [1] the importance of recognising the distinctiveness of public law, [2] that there is neither a strict separation between law and politics nor between the study of law and politics, and [3] that law is to be understood as aspect of modern society and, therefore, legal studies are to be situated among the social sciences. In contrast to both interwar functionalism and deconstructivism, Loughlin’s reconstructivism adopts a post-empiricist stance, rejecting the positivist assumption that a theory of law or politics could be elaborated following the model of the natural sciences. Like constructivism, reconstructivism contends that values and normative attitudes play a constitutive role in the realm of law and politics but, at the same, it rejects the constructivist’s attempt to reduce public law theory to a normative exercise. Rather than

reading public law in compliance with some ideal normative scheme, reconstructivism argues that public law theory must remain rooted in practice.

Public law theory must be able to uncover and accommodate, in particular, the plurality of competing rationalities (i.e. traditions or styles) that have shaped the understanding of the subject. Rather than favouring a single “best interpretation”, the theorist should aspire to make sense of the multiplicity of readings that have shaped the field. Public law, on this account, responds to a prudential (not a moral) mode of reasoning as it is constituted by normative structures that thrive due to their ambivalent, fluid and protean character. Public law is, in this sense, an aspect of the practice of politics and its *raison d’être* is to contribute to the maintenance of the autonomous public sphere (i.e. the state) within which politics has come to operate in the modern world. The history of the formation and evolution of public law, therefore, is an aspect of the history of the formation and evolution of the modern state. Consequently, Loughlin has attempted to provide a reconstruction of the mode of evolution of the subject in Britain by placing it within the historical of the formation of the British parliamentary state and its subsequent transformation into an administrative state. Moreover, in his later work, Loughlin has expanded the frame of interpretation for theorising contemporary British public law not only historically but also comparatively, by placing its evolution within the larger horizon of the formation, flourishing and waning of a common European public law discourse (2010b, pp. 2–6).

Despite its considerable reach, however, the reconstructivist conception of the subject and methods of public law theory raises a set of significant problems. Given its focus on the formation and change of “conceptual structures”, Loughlin’s reconstructivism is vulnerable to the materialist objections to historicist idealism. These difficulties have become especially troubling after Loughlin’s earlier functionalist-sociological orientation²⁹⁴ came to be displaced by the project of articulating a political jurisprudence constructed upon the premise of the (conceptually necessary) autonomy of the political. One might well wonder whether a history of the formation, flourishing and crisis of public law (and of the modern state for that matter) can be really understood and explained without considering the historical evolution of modern capitalism. This concern is reinforced by the fact that Loughlin himself seems to recognise, in passing, the crucial importance of considerations of political-economy when explaining the contemporary crisis of the British constitution

²⁹⁴ In its first, more sociologically oriented, statement of the project, he conceived it as contemporary reformulation of eighteenth century “science of legislation”, which attempted to ground public law theory in a theory of society along the lines suggested by Luhmann’s systems theory (Loughlin, 1992a, pp. 4–13, 18, 244).

(e.g. the breakdown of the post-war consensus on Keynesian economic management and the welfare state) or the contemporary difficulties surrounding the concepts of the state and sovereignty more broadly (e.g. their erosion under the conditions of a globalised economy). This should lead one to wonder whether public law theory should not be placing the subject within the trajectory of modern political economy as well as of modern political thought. Otherwise, public law theory seems to pay excessive attention to the cultural over the material preconditions of the juridical structure of modern constitutional states. Furthermore, as social constructivism (chapter 2) and deconstructivism (chapter 5) would remark, by grounding the theorisation of politics and public law in the concept of the state, reconstructivism downplays “social” (and especially “economic”) forms of power that have come to be so prominent in contemporary capitalist societies that the state itself is, as matter of fact, increasingly dependent on them. By focusing on the self-understanding of the modern state and its law and, thereby, by conceiving politics as a self-contained activity, reconstructivism makes more intelligible the normative articulations of the relation between the state and society (i.e. through concepts such as sovereignty, the people, constituent power, democracy, political equality and so on) at the cost of leaving the materialist aspects of that relation (e.g. political-economic and geopolitical) largely unaddressed.

CONCLUSION: EVALUATING THE THEORETICAL TURN

1. Introduction

My thesis is that, during the last 30 years, there has been a theoretical turn that brought about significant conceptual and methodological experimentation within British public law scholarship. Three main theoretical conceptions are to be distinguished, namely, constructivism, deconstructivism and reconstructivism. The first conception has received greater attention within contemporary theoretical writings in the field and, as shown, it has branched into three distinct varieties of constructivism, which I have called social, moral and political (chapters 2, 3 and 4). Despite its predominance, I have shown that deconstructivism and reconstructivism constitute two alternative theoretical programmes that cannot be reduced to constructivist conceptions (chapters 5 and 6). In this conclusion, I consider the degree to which these theoretical conceptions have advanced the understanding of the subject. I will argue that this question cannot be adequately answered if the assumptions of what might be called theoretical monism are maintained. Once these monistic assumptions are rejected, however, an alternative perspective of theoretical pluralism permits a more adequate view of the specific ways in which these theoretical conceptions enlarge the understanding of the subject.

Theoretical monism is based on three main assumptions: first, that the nature of the subject is such that it can be understood and explained through one single, comprehensive and coherent theoretical account; secondly, that there is one best mode of inquiry (i.e. one single set of conceptual and methodological assumptions) that yields such account; and thirdly that progress occurs incrementally or cumulatively by extending and correcting the account so as to accommodate new observations and solve inconsistencies and ambiguities, thereby attaining higher levels of precision, comprehensiveness and verisimilitude. From a monistic perspective it is difficult to appreciate in what sense the theoretical turn has represented any kind of progress. The theoretical turn was born from the conviction that it was necessary to provide a new theoretical framework able to displace the conceptual and methodological assumptions that traditional public law scholarship inherited from Dicey (chapter 1). It is clear that public law theorists have produced many interesting and insightful theoretical programmes but that none has managed to provide an authoritative alternative frame for the subject. This might suggest that within contemporary British public law scholarship there are no well-established grounds for judging or appraising theoretical contributions to the subject: constructivism,

deconstructivism and reconstructivism differ so greatly about how the subject should be theorised that they cannot be evaluated applying the same measure or criteria of assessment. On this account, it is difficult to appreciate even in what sense these different theoretical programmes can be really seen to be engaging with one another rather than talking past each other.

My thesis is that there has been a real engagement between these different conceptions and that this theoretical debate has made significant advances by considerably broadening the subject. These conceptions are incommensurable in conceptual and methodological terms, but once the monistic assumptions underlying current theorising of public law are jettisoned, this is no obstacle for there to be a productive theoretical disagreement and definite progress. As I show in this chapter, constructivism, reconstructivism and deconstructivism constitute productive and non-fallacious changes of subject because they are “progressive problemshifts” and propose lines of enquiry that stand not only in competitive but also in complementary relations. I demonstrate this in three steps. First, in sections 2 and 3, I consider in what ways these theoretical conceptions are assumed to be “incommensurable”, i.e. to lack a common measure because they start from substantially different conceptual and methodological assumptions²⁹⁵. In section 4, I show that although constructivism, deconstructivism and reconstructivism are semantically and methodologically incommensurable, this does not imply that there are no local forms of theory-comparison or that there are no indirect means of theory-evaluation. Finally, in section 5, I present the different understanding of theoretical progress that follows from theoretical pluralism and show how it clarifies the definite ways in which these conceptions have enlarged the understanding of the subject.

2. Conceptual diversification

The preceding discussion of constructivism (social, moral and political), reconstructivism and deconstructivism does indeed support the claims that these conceptions are semantically and methodologically incommensurable and that, therefore, in contemporary British public law theory there are no shared conceptual and methodological assumptions²⁹⁶. These conceptions are semantically incommensurable as they propose

²⁹⁵ I am adapting for this context the concept of incommensurability that was coined simultaneously by Thomas Kuhn and Paul Feyerabend in 1962 to refer to a particular form of theory change within the natural sciences, esp. to scientific revolutions such as the changes from geocentric to heliocentric theory of planets in astronomy, from phlogiston to oxygen theory in chemistry and from classical to quantum mechanics in physics (Hoyningen-Huene, 2005; Oberheim & Hoyningen-Huene, 2013).

²⁹⁶ I am adapting to the present context the distinction between semantic and methodological incommensurability that has become common currency in the discussion of the incommensurability thesis (Hoyningen-Huene & Sankey, 2001; Hoyningen-Huene & Schaber, 2009; Oberheim & Hoyningen-Huene,

different conceptualisations of the subject matter and provide a different characterisation of the problem field, i.e. they disagree about the range of problems that constitute its object domain and what are the basic questions of the subject. Their semantic incommensurability is easy to appreciate if one considers the substantial changes that these conceptions bring about to the received vocabulary of the discipline by redefining or discarding existing concepts or by introducing new theoretical terms. The basic concepts, their content and their role in understanding the subject greatly change as they come to be placed within different theoretical contexts.

This argument can be illustrated by examining the degree of conceptual change and diversification that the Diceyan triad underpinning traditional constitutional theory (viz. parliamentary sovereignty, the rule of law and constitutional conventions) undergoes within the different theoretical contexts provided by these conceptions.

Parliamentary sovereignty. In the context of social constructivism, the traditional characterisation of parliamentary sovereignty is seen as a misleading concept in that it overstates the constitutional importance of Parliament in contemporary government (chapter 2, section 3) and in political constructivism it is seen as misleading because it promotes a narrow view of the constitutional role of Parliament and comes to be reframed as a corollary of the bi-polar structure of the separation of powers in the British constitution (chapter 4, section 5). For its part, moral constructivism qualifies the traditional characterisation of parliamentary sovereignty to accommodate the normative limitations that follow from a broader understanding of the rule of law and constitutional role of courts (chapter 3, sections 3 and 4). Deconstructivism, in turn, focuses on dispelling the myths of popular sovereignty and parliamentary supremacy that traditional constitutional theory associated with the concept of parliamentary sovereignty in order to attain a functionally adequate conception of notion of parliamentary government and bring constitutional theory closer to the what happens constitution (chapter 5, sections 2 and 3). Reconstructivism, finally, situates the notion of parliamentary sovereignty in the historical context of the formation of the British parliamentary state showing that it was the particular form that the doctrine of state sovereignty came to be elaborated and that it played a part in submerging seventeenth century constitutional arguments about the sovereignty of the people and the constitutional compact (chapter 6, section 3).

2013); the same difference has been picked out by others who distinguish between linguistic incommensurability and incommensurability of standards (Godfrey-Smith, 2003, pp. 91–5), but the former labels seem to me to be more perspicuous.

Rule of law. A similar process of conceptual variation is found once attention turns to the rule of law. Some theoretical conceptions, specifically social and moral constructivism, confer to the rule of law an analogous explanatory and justificatory role (i.e. it is taken to constitute the normative core of the constitution) but greatly disagreeing about its content: while in the former the rule of law comes to be centred on the legal articulation of the ideals of an open and accountable government (chapter 2, sections 3-6), in the latter the rule of law hinges on the normative requirements of the equal liberty and dignity of individuals as articulated by principles of the common law (chapter 3, sections 2-5). Political constructivism, in contrast, gives to the rule of law a substantially more precise and narrow content and, consequently, a more modest place in the theory of the constitution, relating exclusively to the relation of the executive to the law (chapter 4, sections 2 and 6). Finally, deconstructivism and reconstructivism not only give to the rule of law a relatively narrow content and explanatory role but go further to note that the concept of the rule of law has been systematically manipulated and deployed for ideological purposes, so much so that they suggest that the concept should be forsaken (chapter 5, sections 5 and 6; chapter 6, sections 5 and 6).

Conventions. As with parliamentary sovereignty and the rule of law, the content and the role of the concept of constitutional conventions has changed substantially from one conception to the next. Political constructivism remains closer to the traditional conceptualisation of conventions but it gives the latter a different role in the theorisation of the constitution, viz. to attest to the primarily political character of the British constitution (chapter 4, sections 2 and 5). With reconstructivism, the concept of constitutional conventions is used to depict the formation of the parliamentary state but the theoretical role that conventions play in understanding the contemporary constitution comes to be exerted by different notions (“folk-law” and “political right”) which point to aspects of public law that cannot be grasped by only considering positive law (chapter 6, section 6). Constitutional conventions play an even more diminished role within the theoretical ambit of social constructivism and deconstructivism. Whereas in the former conventions come to be absorbed as just one of the ways in which requirements and expectations of legitimacy are manifested and that are to be captured by a revised notion of the rule of law (chapter 2, section 3), in the latter conventions cannot play any significant conceptual role in the positivist concept of the constitution it proposes (chapter 5, section 5). Moral constructivism, finally, regards the notion of constitutional conventions as misleading and it rejects the normative consequences that traditional analysis has attached to the notion,

viz. the limits it is said to imply for the role of courts in the constitutional realm and for the judicial review of executive action (chapter 3, section 5).

3. Methodological diversification

Constructivism, deconstructivism and reconstructivism are incommensurable not only semantically but also methodologically. They not only conceptualise differently the subject and the relevant problem field (i.e. the range of problems to be addressed and which are the basic ones) but they also disagree about what it is that makes an answer to a problem a good answer and, derivatively, what is that which makes a theory of public law a good theory. Certainly, all conceptions share a similar set of epistemic values or standards of theory appraisal but they give them different weights and interpret them differently. Furthermore, the disagreement about theory evaluation between these conceptions is intimately connected with the different theoretical aims to which they are orientated.

As shown in chapters 2 to 4, constructivism in all its varieties privileges the normative adequacy of a public law theory when evaluating it (how well does it account for the principles, values or ideals that give public law its normative force?) and is orientated to finding ways to bring constitutional practice closer to its normative foundations. Deconstructivism, in contrast, clearly takes the empirical adequacy of a theory of the subject as the pre-eminent standard of theory appraisal (viz. how close is it to the what happens constitution?) and is orientated to revealing the social and political forces hidden behind trends of constitutional change (chapter 5). Reconstructivism, for its part, gives prominence to the expressive adequacy of a public law theory (i.e. how does it account for the diverse conceptual structures or styles of public law thought that have influenced the historical trajectory of the subject?) and is orientated towards the elaboration of a dispassionate (or “pure”) understanding of the evolving relation between law and government (chapter 6)²⁹⁷.

²⁹⁷ It is important to highlight, however, that the methodological differences in respect to standards of theory appraisal –in contrast to the difference in terms of theoretical aims– are a matter of relative prevalence or weight. First, both reconstructivism and constructivism (and this is particularly clear in the case of social constructivism) acknowledge empirical adequacy to be of importance (chapter 2, sections 2-5; chapter 6, section 2). Secondly, in both deconstructivism and reconstructivism considerations of normative adequacy also play a role (e.g. consider in the former the centrality of normative assumptions regarding the proper scope of state action and in the latter the role that the value-positions or ideological foundations of different styles of public law thought have in the understanding of the trajectory of public law discourse). Finally, in constructivism and deconstructivism considerations of expressive adequacy play a role as they readily acknowledge that at least part of the explanation of the diverse views of the subject is to be found in ideological considerations (but, in contrast to reconstructivism, the former postulates that only the view that corresponds to what really are the normative foundations of the subject should constitute the focus of the enquiry and the latter sees them as subjective or political prejudice that should not be mistaken for, nor get in the way of inquiring into, the objective political realities structuring the field).

Methodological incommensurability derives, as has been noted, not only from the standard of theory appraisal and the theoretical aim that a certain conception favours but also from the heuristic or research programme that it adopts to interpret them, i.e. by the particular way it implements them. Although all varieties of constructivism adopt a similar stance regarding standards of theory evaluation and theoretical aim (viz. to give an appropriate account of the normative foundations of public law by employing a normative political theory) they differ in the particular methodological strategies they follow to carry through that programme. As has been shown, whereas social constructivism elaborates its heuristics drawing from critical social theories (chapter 2, sections 2 and 4), moral constructivism does it from liberal theories of justice (chapter 3, section 2) and political constructivism from republican political theories (chapter 4, section 3). In a similar fashion, deconstructivism and reconstructivism aim to satisfy their standards of theoretical appraisal and theoretical aim by drawing from empirical political science (chapter 5, sections 4-6) and post-empiricist political theory (chapter 6, section 2 and 6).

The conceptions discussed in previous chapters, therefore, demonstrate that contemporary public law theory has undergone a remarkable process of diversification brought about by sustained efforts at conceptual and methodological experimentation. Constructivism (in its three varieties), deconstructivism and reconstructivism differ significantly both in terms of their conceptual assumptions (i.e. conceptualisations of the subject and the problem field) and their methodological assumptions (i.e. standards of theory evaluation, theoretical aims and heuristics). These conceptions are, in sum, incommensurable because they cannot be seen as being different answers to the same question: each seem to pose altogether different questions and these conceptions finish up “changing the subject”.

Finally, the main consequences of the conceptual and methodological experimentation and diversification in contemporary public law theory should be considered. It follows, first, that there is no neutral or common way of conceptualising the subject matter or the problem field (i.e. they are theory-laden). The semantic incommensurability between these conceptions supposes, secondly, that there cannot be a direct or point-by-point comparison between these conceptions (e.g. shifts of meaning in key concepts preclude the translatability or reduction of some claims formed within one theoretical context into claims formed under another). Thirdly, in methodological terms, the theoretical aim and standards of theory evaluation adopted by these conceptions are incompatible with a professionally prescribed attitude to public law theory that evaluates it

in accordance to how useful it is from the point of view of the instruction of future lawyers and judges or how well it reproduces what the community of legal practitioners does or thinks within the relevant area of legal practice. The doctrinal standpoint, in consequence, can no longer be taken as the final arbiter or as a theory-neutral yardstick against which alternative public law theories can be assessed. These theoretical conceptions, in sum, “lack a common measure because they use different concepts and methods to address different problems” (Oberheim & Hoyningen-Huene, 2013).

4. Public law theory and history

These conceptions do not just talk at cross-purposes. Despite their semantic and methodological incommensurability, there are indirect ways of theory-comparison and theory-evaluation that suggest there has been a productive theoretical exchange between these conceptions. I will therefore argue that each represents progress in the field as each has enlarged the understanding of the subject in a definite way. But in order to appreciate this, the widespread monistic assumptions about public law theory must be rejected and a “theoretical pluralism” that recognises the complexity of the subject adopted.

With respect to the claim that there is a productive theoretical exchange between these conceptions, it should be noted that semantic and methodological incommensurability do not exclude partial or local forms of theory-comparison and indirect forms of evaluation²⁹⁸. Already the discussion about the notions these conceptions have about parliamentary sovereignty, the rule of law and the conventions of the constitution suggests that semantic and methodological incommensurability does not preclude all kinds of theory-comparison and neither is it an obstacle to authentic theoretical disagreement. But to illustrate the point, consider another site of theoretical exchange that appeared constantly in previous chapters, namely, the relation between the theory and history of the subject. One lesson to be learnt from the discussion of constructivism, deconstructivism and reconstructivism is that each particular conception of public law theory implies a historiographical perspective and that, conversely, any history of the subject supposes (at least implicitly) a theoretical conception of the subject²⁹⁹. Consider, to begin with, the use of historical material by social constructivism to elaborate a revised rule

²⁹⁸ Neither Kuhn nor Feyerabend believed that incommensurability made impossible theory-comparison *tout court*; they believed, rather, that theory-comparison and theory-choice was much more complex and nuanced than the logical empiricist philosophy of science would have us think (Hoyningen-Huene, 2005, pp. 162–71; Oberheim & Hoyningen-Huene, 2013)

²⁹⁹ One might say, extrapolating Lakatos’ insightful paraphrase Kant’s famous dictum (1978b, p. 102), that “public law theory without public law history is empty; public law history without public law theory is blind”.

of law (chapter 2, section 3), the re-elaboration of British constitutional history by political constructivism to substantiate the claim that the British constitution is distinctively political and criticize legal constitutionalist readings of the constitution (chapter 4, section 4), the deconstructivist critique of traditional constitutional theory for its inconsiderate attitude towards constitutional change (chapter 5, sections 2 and 4) and the reconstructivist rebuke of both social constructivism and political constructivism for their unbalanced and biased accounts of the history of the subject and to moral constructivism for its lack of historical sense (chapter 6, section 1). This suggests that history can be used as an indirect means of not only theory-comparison but also of theory-evaluation to the extent that the soundness of a constitutional theory can be questioned by disputing the plausibility of the perspective it implies for constitutional history³⁰⁰.

One consequence of this mutual interdependence between theory and history, however, is that “history without some theoretical bias is impossible”³⁰¹. Indeed, as previous chapters demonstrate, the conception of the theory of the constitution that is adopted greatly influences the assessment of the constitutional significance of historical processes and events (e.g. seventeenth century struggles, the British Empire, the administrative state, electoral reform, disciplined national parties, etc.). The different conceptual and methodological outlooks of social constructivism and reconstructivism, for example, favour opposite historical understandings of the constitutional significance of the formation of administrative policy networks and juridification (compare chapter 2, section 5 and chapter 6, section 4). But also, as seen in chapter 6, it is clear that reconstructivism itself supposes an account of the historical evolution of the subject structured upon the conceptual assumption that public law is but an aspect of governing the modern state (statecraft) and its distinctive mode of political discourse (political jurisprudence). There is nevertheless an important point underlying the reconstructivist criticism against theoretical bias and the (mis)uses of history by other conceptions (e.g. opposing the presentism in their historical narratives or their unbalanced treatment of historical evidence), which helps to explain why, even though any history of the subject supposes a theory of the subject, the former may serve as an indirect means for theory-evaluation. The answer is that history may serve as a test for theory because the interpretations of the history of the subject must

³⁰⁰ Perhaps, the greatest single way in which Kuhn’s *Structure* changed the philosophy of science derives from a “historically oriented view of science” that is animated realisation that the then dominant “image of science” constituted an inadequate guide for the historical study of science and that, in fact, the history of science did not fit –and, therefore, it questioned the verisimilitude of– that conception of science (2012, p. xl, xliii–iv, 1-9).

³⁰¹ Adapting to this context the claim that Lakatos made regarding the relation between the theory and the history of science (1978b, p. 120).

also answer to the methodological precepts internal to the historian's craft and, therefore, theorists cannot just reinvent history in the image of their preferred theoretical conception³⁰². The reconstructivist critique against the misuses of history is sound to the extent that it insists that the interaction between the theory and history of the subject is valuable only to the extent that the theorist's treatment of history is methodologically rigorous in historiographical terms and that a history of the subject rigorously elaborated may serve a basis for criticising alternative theoretical conceptions.

5. Theoretical pluralism and progress

Once it is established that incommensurability does not exclude local forms of theory-comparison and indirect means for theory-evaluation, it is easier to see why the assumptions of theoretical monism are to be rejected. To begin with, the monistic assumption of the cumulative character of progress becomes highly problematic³⁰³. Indeed, on a monistic account, theoretical progress occurs in a field of enquiry as it incrementally produces better answers to the same question(s) but, as argued in sections 2 and 3, the conceptualisation of the subject and the problem field (i.e. what is the range of relevant problems and what are the basic problems) seems to change substantially according to the conception that one favours. The problem of theory-choice cannot be seen straightforwardly as a matter of establishing which is a "better answer" because selection entails "changing the subject" and there are no common standards from which evaluate these different theoretical conceptions. Moreover, the predominance of one theoretical conception supposes the privileging of one conceptualisation of the problem field over the others, leaving therefore some problems (and their potential answers) out of the purview of the field (which means that there would a loss of knowledge)³⁰⁴. This, in turn, should make us reconsider the very assumption that the goal of the enquiry should be to attain some single, comprehensive account or at least to gradually approximate to such an account³⁰⁵. The rejection of theoretical monism, however, means that it is necessary to look for a

³⁰² See the somewhat similar point that Kuhn made in his remarks on Lakatos' paper (1971, pp. 141–3).

³⁰³ Kuhn elaborated the notion of incommensurability as a part of his larger argument against the linear or cumulative view of the history of science. More particularly, one of the basic arguments in *Structure* is that the historical trajectory of science is structured by both cumulative (normal science) and non-cumulative (scientific revolutions/extraordinary science) developmental episodes. As Kuhn put it in the 1969 postscript, "the book portrays scientific development as a succession of tradition-bound periods punctuated by non-cumulative breaks" (2012, p. 207).

³⁰⁴ This argument has become a common topic of analysis in the philosophy of science –frequently under the label of the "Kuhn-loss" problem– ever since was made in *Structure* (Kuhn, 2012, pp. 103–9, 148–9).

³⁰⁵ Kuhn also saw that his account of scientific development put into question the image that "there is some one full, objective, true account of nature and that the proper measure of scientific achievement is the extent to which it brings us closer that ultimate goal" (2012, pp. 169–72).

different understanding of theoretical progress. But if the debate is not moving towards a single, comprehensive theoretical account of the subject, how can progress be made? In order to see how it is necessary to reconsider the natural inclination to assume that progress in a field of enquiry requires a consensus about what is the best mode of enquiry in the relevant domain. The force of this common assumption derives from the correct idea that a main way in which progress occurs within a field of enquiry derives from sustained efforts to extend and refine a certain theoretical conception in order to understand and explain a more extensive range of phenomena in a coherent and precise fashion. The problem emerges when from this idea the theoretical monist infers further that substantial progress in a field can only be obtained when one theoretical conception becomes predominant or so widely accepted that it serves as an agreed conceptual and methodological basis for an increasingly more subtle and detailed research within the field³⁰⁶.

Against the idea that progress predominantly takes the form of getting better answers to the same question(s), a theoretical pluralist perspective suggests that there is another very important form of theoretical progress that takes the shape of finding “novel questions”³⁰⁷ which not necessarily replace but may complement the questions already being pursued by previous theoretical conceptions³⁰⁸. Once one realises that progress may

³⁰⁶ In fact, Kuhn seems in broad terms to agree with this monotheoretical assumption as it is made clear by his claim that the distinctive kind of progress that is observed in the sciences can only be explained by the fact that scientists tend to agree on fundamentals for extended periods (i.e. “normal science”) and focus their work in the more subtle and esoteric “puzzles” that emerge –and can be solved within– that agreed basis or paradigm (therefrom, the scientific tendency towards specialisation). Put briefly, what makes distinctive scientific progress is the predominance of a received paradigm (or a very closely related set) that can support sustained “normal puzzle-solving research” that improves on it by working on advancing the forefront of the field. This is the basis upon which Kuhn (2000, pp. 221–3, 2012, p. xlii, 10–50, 159–69, 207–8) elaborated the distinctions between [1] normal or mature science and pre-paradigm or primitive science, [2] normal (pre-revolutionary or post-revolutionary) science and extraordinary or revolutionary science, [3] natural sciences and the human sciences (and philosophy, arts, etc.). This Kuhnian claim that there should be “one paradigm per field per time” (Godfrey-Smith, 2003, pp. 80–4) –generally known as the “paradigm monopoly thesis”– has become a continued site of contention and a target of criticism for those arguing for theoretical pluralism, like Lakatos (1978a, pp. 68–9) and Chang (2012, pp. 287–8).

³⁰⁷ Two clarifications about of my use of the expression of “novel question” are in order. First, I use it to refer not only to strictly new or previously unknown questions but also to those known questions that have remained largely unexamined or whose significance or complexity has been underestimated. Secondly, I use it in contrast to “better questions” which I take to suggest, in a monistic fashion, that these novel questions can only replace (rather than also complement) known questions.

³⁰⁸ A similar point was made by Felix Cohen when discussing how a new theory of law should be appraised: “In the lists of jurisprudence, the champion of a new theory is expected to prove the virtue of the lady for whom he fights by splitting the skulls of those who champion other ladies. Yet despite the struggle of schools that has been wage... it is possible, I think, to defend... [an] approach in jurisprudence without attacking the achievements of any other school./ In jurisprudence as in other fields of thought, we are more likely to reach a just appraisal of a new school by school by asking not, ‘What thesis does it defend?’ but rather, ‘What question does it put?’ The most significant advances in intellectual history are characterised by the focusing of critical attention upon facts and issues which were formerly considered unimportant, indecent, or self-evident” (1937, p. 5). Consequently, Cohen argued, different schools of jurisprudence (i.e.

take the form of finding novel questions (for brevity this form of progress is called “progressive problemshifts”³⁰⁹), one must allow for the possibility that the investigation into these novel questions may require the use of different modes of enquiry, which, by implication, opens the way for the theoretical-pluralist realisation that a field may progress by the simultaneous development of various theoretical conceptions that might have not only competitive but also complementary relations. This last realisation should lead one, finally, to consider whether one should revise the remaining monistic assumption and come to accept that it might well be the case that the complexity of the subject is such that it cannot be comprehensively understood through one single theoretical account.

The discussion contained in previous chapters support the adoption of a theoretical pluralist perspective. By recasting the relation between these theoretical conceptions as progressive problemshifts (i.e. seeing them as complementary lines of enquiry rather than only as adversarial conceptions) it is possible to see more clearly the definite contribution that the theoretical conceptions examined have made to the understanding of the subject. The discussion of social, moral and political constructivism (chapters 2, 3 and 4) makes readily visible that between them there is some division of tasks such that each illuminate more than the others a distinct aspect of the field (respectively: administrative process, extended government and corporate arrangements; public law adjudication, courts and judicial protection of individual rights; political accountability, Parliament and parliamentary scrutiny mechanisms) and each brings to bear a different heuristics (social critical theory, liberal theories of justice, republican political theory) to carry through a broadly similar theoretical aim (bringing constitutional practice closer to its justificatory ideals). In contrast to constructivism in all its varieties, deconstructivism and reconstructivism extend the debate by pursuing different theoretical aims and, derivatively, illuminating different questions and bringing to bear different methodological strategies to the field. Whereas deconstructivism inquires into the distance between the ideals that underpin public law discourse and the “what happens” constitution by deploying methodological strategies of empirical political science and sociology (chapter 5), reconstructivism makes use of the hermeneutic methodology of cultural and historical sciences to cast light on public law discourse seen as a cultural achievement that thrives on

historical jurisprudence, natural law, analytical jurisprudence and functionalism) should be seen as having (also) complementary relations –“there is an intimate and mutual interdependence among these lines of inquiry, historical, analytical, ethical, and functional” (1937, p. 7).

³⁰⁹ I am adapting to this context the expression that Lakatos coined to elaborate his views on sophisticated methodological falsificationism and the methodology of research programmes both of which highlight the importance of theoretical pluralism (1978a, pp. 36–8, 68–73).

the continuous practical readjustment of a received corpus of normative precepts and usages that is made possible by the interaction of the multiple modes of political and juridical thought from which it has evolved (chapter 6).

A theoretical-pluralist analysis of these conceptions suggests, further, that there is a trade-off between “explanatory power” (i.e. greater theoretical comprehensiveness in the sense of illuminating the field more widely) and “applied potential” (i.e. the ability of a theoretical conception to guide or inform the action of particular actors within the field such as the law reformer, the judge, etc.). Whereas deconstructivism and reconstructivism exhibit more explanatory power to the extent that they do not privilege any particular aspect of the field and apply their methodological strategy widely across the subject, they seem less readily able to guide the reform of the administrative process (cf. social constructivism), rights-based adjudication (cf. moral constructivism) or the reform of mechanisms for the parliamentary scrutiny of the executive (cf. political constructivism). Indeed, even if a more comprehensive constructivist conception were to be elaborated, such that at the same time it were to advance theories of the administrative process, public law adjudication and political accountability of similar levels of elaboration, the selectivity required by its theoretical aim and its standards of theory evaluation (i.e. normative adequacy) would impose on it a form of normative closure (viz. the selection of the best interpretation or the right answer) that precludes the inclusion of the multiplicity of interpretative perspectives that reconstructivism retrieves or the array of factual motivational forces at operation that deconstructivism reveals.

The simultaneous development of complementary lines of enquiry (in terms of theoretical aims, problem fields, heuristics, etc.) would allow, in consequence, public law theory to both enlarge the understanding of the subject and to leave space for conceptions catering for various theoretical and extra-theoretical aims (i.e. to host both more contemplative and more applied theoretical conceptions). Theoretical pluralism, in clear contrast to theoretical monism, reclaims the virtue of the proliferation of theories, to the extent that it brings with it progressive problemshifts.

It should be emphasized that this does not mean that there are no standards from which to rationally judge or even reject theoretical conceptions. First, as discussed in section 3, different theoretical conceptions suppose the adoption of definite theoretical aims, definite standards of theory-evaluation and definite heuristics such that, even if they are incommensurable in the sense that they cannot be subjected to a common measure of evaluation nor directly compared, they need to be internally consistent both in substantive

and methodological terms (indeed, in the conclusive section of chapters 2-6, I have identified the main internal inconsistencies or tensions within each conception). Secondly, it was also seen that although they give to them different weight or interpretations, these conceptions acknowledge a similar set of epistemic values (e.g. normative, empirical and expressive adequacy) and, to this extent, these alternative conception do exhibit competitive or adversary relations. Thirdly, as suggested in section 4, there are indirect ways of theory-comparison and theory-testing applicable to incommensurable theoretical conceptions (esp. the use of the history of the subject as test of theories of the subject). Finally, the just mentioned criteria of explanatory power and applied potential constitute also important criteria for theory-evaluation (even if they cannot be satisfied simultaneously to the same degree). The level uncertainty that nonetheless remains from conceptual and methodological experimentation and diversification –which should continue indefinitely in accordance to theoretical pluralism– is an unavoidable side effect of the enlarged horizons that the theoretical turn has brought into British public law scholarship in terms of questions, concepts and methods. The kind of unconditioned, open-ended theoretical enquiry that the theoretical conceptions here examined embody bears witness to the remarkable extent to which it has become unsaddled from a professionally prescribed view of the subject and, thereby, to the degree to which the academic study of public law has come to resemble the other disciplines within the humanities and the social sciences, reclaiming a genuine place within the university³¹⁰.

³¹⁰ As Stefan Collini argues “this pattern highlights one of the key differences between universities and superficially similar organisms such as the research and development arms of commercial companies or various political and pressure-group think tanks. Institutions of these latter kinds pursue enquiry into a topic for a strictly practical purpose, defined by external criteria, and if inquiry no longer serves that purpose then it is abandoned. Moreover, they are not interested in what we might call second-order enquiries into the boundaries of the topic, or the character of the vocabulary being employed, or the status of the knowledge produced. One mark of an academic discipline is that such second-order enquiries can never be deemed illegitimate or irrelevant in advance, and when reflection is free to proceed without the imperative to contribute to a specific external purpose, such second-order questions inevitably start to exert their seductive attraction” (2012, pp. 53–4).

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