PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth
Fellow in Law,
The Queen's College, Oxford

and

Peter Leyland
Senior Lecturer in Law
London Metropolitan University

HART PUBLISHING
OXFORD AND PORTLAND, OREGON
2003

over decisions about whether the 'public interest' required or justified non-disclosure of government-held information in court proceedings. Decisions such as these were taken as heralding the dawn of a new era of government legal accountability—a new 'public law.' In the 1970s Diceyan premises about the legal position of government were further undermined by the development of rules and principles of tort law concerned expressly with the liability of 'public authorities.' Many thought that the final nail had been inserted in the coffin of Dicey's intellectual and ideological legacy when, in *O'Reilly v Mackman*,[63] the House of Lords interpreted the 1977 amendments to judicial review procedure as having introduced a special regime for 'public law cases.' As we have seen above, this procedural public/private divide brought in its wake the idea that public law cases are subject not only to public law procedure, but also to substantive rules and principles of public law. The development of a substantive public/private divide in the English common law has no doubt been encouraged by the fact that such a divide plays an important part in EC and human rights law.

Perhaps the staunchest modern supporter of Dicey's opposition to a substantive public/private law divide is Carol Harlow.[64] Her basic argument is that subjecting the state to 'the ordinary law of the land' is likely to be a more effective way of resisting the creation of legal privileges and immunities than creating a separate regime of public law rules of state responsibility. In her view, a separate regime of public law rules and principles makes sense only if there are separate institutional arrangements for dealing with complaints against the state. She argues against such arrangements because they bring with them the need for criteria to delimit the jurisdiction of these separate complaint-handling bodies. In her view, neither institutional nor functional criteria of publicness reflect the 'interpenetration of public and private institutions and capital' that characterises contemporary society. Indeed, the effect of the public/private distinction is to conceal political issues behind a formalist façade. What is needed, she said, are procedures to enable courts to deal better with such political issues rather than to pretend that they arise only in 'public law cases' which, therefore, require the creation of separate procedural arrangements and separate substantive rules.

Experience in both France and England certainly provides good reason to avoid the sort of fruitless jurisdictional line-drawing that accompanies the existence of separate public law adjudicatory bodies and procedures. It is also hard to disagree that it is undesirable for the public/private distinction to be used to prevent the consideration of issues of public interest by classifying contexts in which they arise as 'private.' But none of this seems to be inconsistent with drawing some sort of public/private distinction, at least for some purposes. Unless we say (in effect) that 'everything is public' or, conversely, that 'everything is private'—which Harlow does not do—there is no reason to object to a public/private distinction as such, however much disagreement there may be about how it should be drawn in various circumstances.

[63] [1983] 2 AC 237.

[64] See especially "Public" and "Private" Law: Definition without Distinction' (1980) 43 *MLR* 241.

The view that a distinction between public law and private law makes sense only in a particular political and constitutional context is elaborated by John Allison.[65] He argues that such a distinction is 'satisfactory' only in a system (like France in the eighteenth and nineteenth centuries) which displays four features: (1) a well-developed theory of 'the state' as a discrete administrative entity to which public law can be applied and which has characteristics (such as unique powers and the opportunity for their abuse) that justify and require subjecting it to special legal controls; (2) a 'categorical approach to law' according to which legal categories such as 'public' and 'private' are mutually exclusive; (3) a doctrine of separation of powers which ensures that those who decide disputes between citizen and state are independent of the administration but also expert in understanding its processes and needs; and (4) inquisitorial procedures for the resolution of disputes between the citizen and the state which enable the public ramifications of such disputes to be properly investigated.

Allison's analysis is complex and sophisticated, and full justice cannot be done to it here. A number of general comments are in order, however. First, there is a certain inevitability, if not circularity, about Allison's argument. He starts by asserting that the public/private distinction has been transplanted into English law (from French law). He then expounds the conceptual and institutional foundations on which he considers the French public/private distinction to have been built and notes the absence of each in the English legal system. Finally he concludes that the public/private distinction could operate satisfactorily in English law only if the conditions of its thriving in French law were reproduced in England. Thus reduced to its bare bones, the argument appears to depend for much of its force on the assertions that the French legal system provides the paradigm (if not the only instance) of a successful public/private distinction, and that it is this distinction that English law is and should be striving to reproduce. Neither of these assertions is (to say the least) beyond argument.

Secondly, it is clear that even if the concept of the state as a discrete administrative entity reflected the reality of eighteenth and nineteenth century French political life, it is in serious conflict with contemporary pluralistic understanding of the way society is organised and governed. There is a tendency in some writings critical of the public/private distinction to suggest (at least implicitly) that government participation in economic and social life and, conversely, the involvement of non-government entities in the tasks of governance, is—like our conscious awareness of these phenomena—a feature of the late twentieth century. One only has to think of the long history of professional self-regulation, for instance, or of state participation in the relief of poverty, to find grounds for doubting this suggestion. One of the most frequent criticisms of Dicey concerns his failure to recognise the many and various sites of governmental activity in nineteenth century England.[66] If it is indeed the case that a workable public/pri-

[65] See above n 18.

[66] Eg HW Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, Toronto UP, 1985).

vate distinction can exist only where state and non-state occupy separate and non-overlapping spheres, it would surely be incapable of thriving in France as well as in England, either in the nineteenth or the twenty-first century. However, Allison's view appears to be that the public/private distinction operates successfully in France despite the realities—and our understanding of the realities—of governance in contemporary society.

There is, I think, a more fundamental point at stake here. Even if Allison is correct in identifying a theory of the state—as opposed, for instance, to a desire on the part of the executive and legislative arms of government not to be judged by lawyers—as the historical foundation of the French public/private distinction and of the institutional arrangements that give it practical effect, it is worth recalling (see p 253 above) that from 1873, the concept of 'public function' (*service publique*) has played a central role in the definition of the jurisdiction of the Conseil d'Etat and, hence, of the sphere of public law. This reflects the fact that the reason we want to impose special legal controls on the state is not because of what it is but because of what it does.[67] Unlike the concept of the state, that of a public function is radically evaluative. As Harlow puts it, no function is 'typically governmental in character.'[68] People can and do disagree about where the public ends and the private begins. But this does not prevent public/private operating 'satisfactorily' as a legal distinction any more than the radically evaluative nature of the concept of reasonableness (for instance) rules it out as a 'satisfactory' legal concept. What is essential, however, is that the evaluative nature of the functional public/private distinction should be recognised and that judgements about the nature of particular functions should be supported by normative arguments so that the political nature of the distinction is not hidden behind a formalistic screen.

Thirdly, a word needs to be said about Allison's contention that a satisfactory distinction between public and private law requires a 'categorical approach to law.' One example of the different approaches of French and English law is that the latter allows, while the former denies, the possibility of 'concurrent liability' in contract and tort. In French law there is either liability in contract or liability in tort, whereas in English law a person can be liable in both contract and tort in respect of one and the same incident. The possibility of concurrent liability certainly destabilises the distinction between contract and tort. However, it is important to note that contract and tort are not opposites in the way that public and private are. In this regard, public and private are more like reasonable and unreasonable than like contract and tort. In my view, the mere fact that English law is less 'categorical' than French law is of little or no relevance to whether the public/private distinction is likely to operate 'satisfactorily' in English law.

[67] N Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London, Blackstone, 1997), ch 6. See also S Fredman and G Morris, 'Public or Private? State Employees and Judicial Review' (1991) 107 *LQR* 298, 309–12

[68] See above, n 64, at 257; see also RH Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *U of Penn LR* 1428.

Finally, let us consider Allison's argument that the distinction between public law and private law can operate satisfactorily only if review of decisions is conducted by 'independent experts' following inquisitorial procedures. This argument can be helpfully rephrased in regulatory terms. A basic tenet of modern regulatory theory is that the more a regulator knows about the regulated activity, the more effective is its regulation likely to be in achieving regulatory goals. From this point of view, experts are likely to be more effective regulators than non-experts.[69] It is also widely believed that proactive investigation by the regulator is likely to generate more and better information about regulated activities than reactive, adversarial fact-finding. At the same time, it is important that the regulator remain independent of the regulated in order to avoid 'regulatory capture.' These are all good arguments. But what is their relationship to the public/private distinction? There is no obvious reason why expertise and independence would be more needed in the regulation of public activities than of private.

Regarding inquisitorial procedures, Allison argues that disputes which involve the state administration are likely to have 'far wider ramifications' than disputes which do not; and that inquisitorial procedures are better suited to the proper consideration of such 'polycentric' disputes. However, he also thinks that the first of these propositions is true only if one presupposes a theory of the state as a distinct entity; and that anyway, it is not only disputes involving the state that have wide ramifications.[70] Allison's hesitation at this point reflects the fact that polycentricity is a function more of the way we understand disputes than of their intrinsic nature. Indeed, the distinction between polycentric and bipolar disputes can itself be seen as a type of functional public/private distinction; and like the latter distinction, it is essentially evaluative. Bipolar disputes are those we are prepared to resolve in terms of the interests of the two parties, whereas polycentric disputes are those which we think ought only to be resolved by taking account of interests beyond those of the immediate parties.

In this light we can detect a serious tension in Allison's scheme. On the one hand he says that the public/private distinction will work satisfactorily only if inquisitorial procedures are available to resolve polycentric public disputes; while on the other hand he says that the public/private distinction will only work satisfactorily if publicness is understood institutionally in terms of a distinct state administration. However, these criteria fight against one another because Allison also accepts that not all—and not only—disputes involving the state will be polycentric. This suggests that far from being a condition of the satisfactory operation of the distinction between public and private law, the institutional concept of a distinct state administration fails to capture the very reason why we draw the distinction, which is to distinguish between activities and relationships in terms of the degree of society's *legitimate* interest in them. Ironically, perhaps, putting the matter in this way leads us to a different, and common, criticism of the public/private distinction: because

[69] See eg contributions of Colin Scott and Martyn Hopper in J Black, P Muchlinski and P Walker (eds), *Commercial Regulation and Judicial Review* (Oxford, Hart, 1998); especially Scott at 59–61.

[70] See above n 18, 191.

it operates in a binary way ('either public or private') it may fail to capture the complexity, subtlety and ambiguity of our value judgements about the proper relationship between the individual and society. This criticism is an application of a much more thorough-going objection to the binary fashion in which law organises and regulates social relationships. It is discussed further pp 269–75 below.

Integrationism

Carol Harlow thinks that no distinction should be drawn between public and private law, and that the law which governs relations between citizens should also govern relations between citizens and the state. Dawn Oliver, by contrast, argues that there is no distinction between public and private law because underlying all legal rules and principles (whether thought of as public law or private law) that regulate the exercise of decision-making power, whether by government or citizen, is a common set of legal values.[71] She recommends the adoption of an 'integrated approach to substance, remedies and procedure' that 'would enable the common law and equity to develop, with statutory provisions and European and human rights law, so as to promote the protection of individuals and public interests against abuses of all kinds of power.'[72] The values which, according to Oliver, underlie legal regulation of the exercise of power are autonomy (freedom of action), dignity, equal respect, status and security. In her view, these values support 'duties of considerate decision-making'[73] which apply as much to dealings between citizens as to dealings by government with citizens. Oliver's argument is not that there are no important differences between the state and citizens,[74] but only (it seems) that these differences should not be (and, indeed, are not)[75] reflected in a substantive distinction between public and private law. Nor does Oliver subscribe to the implausible view that all law is public, or that an activity is public merely by virtue of being regulated by law.[76]

There are, it seems to me, two main weaknesses in Oliver's position. The first arises from the role that the five 'values' play in the argument. These values are so abstract that it is not surprising that they can be said to underpin both public and private law. Nor does their ubiquity, by itself, suggest that there are no substantive differences between the two areas of law. For instance, two laws that struck the balance between autonomy and security differently might each nevertheless promote both values. Secondly, it is a recurring theme of Oliver's book that the state has no interests 'of its own' but is required in everything it does to act 'altruistically' in the 'public interest'; and that the law does and should reflect this important difference

[71] D Oliver, *Common Values and the Public-Private Divide* (London, Butterworths, 1999).
[72] *Ibid* at 248.
[73] *Ibid* at 27.
[74] *Ibid* at 12–13.
[75] Although Oliver generally denies that there is any distinction between public law and private law, her detailed exposition does not entirely support this denial: see eg *ibid* at 16, 110, 132,135.
[76] *Ibid* at 24–5.

between the state and citizens. It is hard to see how this view of the state can consistently co-exist with the proposition that there neither is nor ought to be any substantive public law/private law divide.[77] Oliver's position here is reminiscent of Clapham's suggestion, noted earlier, that unlike its citizens—who have a right to privacy—the state has no more than a claim to secrecy which can only be successfully asserted by demonstrating that the public interest demands secrecy.

Oliver certainly demonstrates that there are important parallels and similarities between the legal obligations resting on governmental decision-makers on the one hand, and non-governmental decision-makers on the other; and although Oliver does not make the point, her analysis does illustrate the impact of institutional arrangements on substantive law. The clearest example of this in English law is the distinction between common law and equity, which would not have developed in the way it did had there not been separate courts of common law and equity. Since the merging of the two sets of courts in the nineteenth century, a process has been underway of integrating the two bodies of law. It has nevertheless been found useful to see them as distinct components of a complex whole rather than as forming one undifferentiated mass of legal rules and principles. The history of the public/private distinction has been somewhat the reverse of this. In the absence of separate public law and private law courts, legal rules and principles governing the conduct of public decision-makers were not sharply differentiated from private law. On the contrary, the former were significantly influenced and fertilised by the latter. The development since 1977 of a distinct 'judicial review jurisdiction' has not created a rigid, substantive public law/private law divide (as Oliver seems to suggest), but it has brought certain important legal distinctions into sharper focus.

Instrumentalism

We have already noted the criticism that the public/private distinction operates in a binary fashion—either public or private. On the other hand, we have also seen that the HRA introduces the more flexible idea of 'hybrid' public authorities, which are defined as bodies some of whose functions are public. The concept of hybridisation is prominent in discussions of law and regulation that draw on ideas and insights from social theory. A hybrid is a product of mixing two or more elements. As Scott says:

> The term 'hybrid' has been used to describe arrangements which consist of a mixture of market and hierarchical ordering ... Thus the concept precisely captures the notion of relationships ... which are partly based on contractual notions of exchange and partly on ... notions of hierarchical decision making.[78]

[77] For a useful discussion of this point in relation to property law see JW Harris, 'Private and Non-Private Property: What is the Difference?' (1995) 111 *LQR* 421 (the difference between private and non-private property is that the latter lacks the 'crucial feature of legitimate self-seeking exploitation').

[78] C Scott, 'The Juridification of Relations in the UK Utilities Sectors' in Black, Muchlinski and Walker (eds), above n 69, at 46 n 89.

Privatisation and contracting out have produced good illustrations of public/private hybridisation. In legal terms, the paradigmatic basis of private relationships is contract while the paradigmatic basis of public relationships is statute. One common result of privatisation and contracting out is that contractual relationships (for instance, between service-provider and customer, or between regulator and regulated) are embedded in, or operate as part or against the background of, a statutory regime that establishes duties of service provision or powers of regulation. It is not that contract and statute operate side-by-side in such a way that certain aspects of a relationship are governed by contract and others by statute. Rather the two elements are intertwined or blended with the result that the contract must be interpreted and applied in the light of relevant statutory provisions, and the statutory provisions must be interpreted and applied taking account of the contract.

Regulation scholars have been in the forefront of discussion of recent changes in 'the nature of the state' in terms of concepts such as hybridisation. A possible explanation for this it that unlike public lawyers, who tend to take an institutional (or 'constitutional') approach to understanding government, regulationists are concerned to describe and analyse certain social activities regardless of the institutional form they happen to take from time to time. They see regulation not as a function of *government* but rather as a form of *governance*—the latter being:

> characterised by interdependence between organisations (both state and non-state), a pattern of interactions within networks, observation of 'rules of the game' negotiated between the actors, and a degree of autonomy from the state.[79]

The careful observer now finds that regulation is not only something that the government imposes on citizens. Citizens may impose it on other citizens, and even on government itself.[80] Regulation can also be found 'inside government,' as government 'waste-watchers, quality police and sleaze-busters' keep a close eye on the activities of other parts of the government machine.[81]

The relevant question for present purposes concerns the implications of hybridisation for the distinction between public law and private law. In answering this question it is important, first, to observe that in the regulatory literature, hybridisation is typically understood in institutional terms. It describes the institutional structure within which certain tasks, understood in terms of the concept of 'governance,' are performed. It does not address what the tasks of governance are or should be, or where the boundaries of governance are or should be drawn. But it does assume, at least implicitly, that 'governance' describes a limited set of

[79] C Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' (2002) 8 *European LJ* 59, 61. See also Freeman, above n 2.

[80] C Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 *J of Law and Society* 56. Scott conceptualises 'accountability' on three dimensions: upwards to a higher authority, horizontally to a 'broadly parallel institution' and downwards to 'lower level institutions and groups': 'Accountability in the Regulatory State' (2000) 27 *J of Law and Society* 38, 42.

[81] C Hood, C Scott, O James, G Jones and T Travers, *Regulation Inside Government: Waste-Watchers, Quality Police and Sleaze-Busters* (Oxford University Press, 1999).

social activities. So although the concept of hybridisation, thus understood, can be used to undermine an institutional public/private divide, it would not support any conclusion about the viability or desirability of a functional public/private divide. This perhaps explains why Julia Black, who accepts the hybridisation analysis, nevertheless argues that 'regulation' should be understood as a public function and subjected to a distinctive set of legal controls ('public law accountability') appropriate to its nature as such.[82] Of course, this view leaves open the very large question of how 'regulation' should be defined and understood.[83] But it does not entail wholesale abandonment of the public/private divide. To do that, it is necessary to go one step further by arguing that regulation (for instance) should be understood simply as a social function or activity, and that questions about how that activity or function ought to be controlled and held accountable should be answered in purely instrumental terms.

Such a radical instrumentalist argument is (at least) implicit in Colin Scott's contention that public lawyers who worry that practices such as privatisation and contracting out have generated an 'accountability deficit' fail to take account of new forms of and opportunities for accountability and control that such practices have generated and which may, in practice, be as effective as or even more effective than the modes of accountability that are no longer available.[84] Whereas for Black the nature of power is relevant to deciding how its exercise should be controlled, for Scott the only criterion for judging control mechanisms is whether they produce effective accountability.[84a] An obvious point to make about Scott's approach (described in this way) is that if it is to be of any use in practical reasoning, the notion of 'effective accountability' needs to be spelled out in terms of a normative theory about the nature and goals of accountability mechanisms against which the success (or failure) of particular accountability regimes can be assessed. Scott's principles of 'interdependence' and 'redundancy' could be understood as part of such a normative theory; although it is doubtful whether Scott intended them as such.

The public/private distinction can be understood as part of a normative theory of accountability under which the exercise of public functions should be subject to a particular accountability regime (different from that applicable to private activities) because they *are* public. In this account, the public/private distinction may cut either of two ways: it might be used to justify imposing more stringent controls on 'public' activities than on private activities, or less stringent controls. So, for instance, we might want to accord less contractual freedom to public contractors than to private contractors, but also relieve public contractors of certain contractual liabilities that rest on private contractors.

It is possible to understand the functional public/private distinction as utilised

[82] J Black, 'Constitutionalising Self Regulation' (1996) 59 *MLR* 24.

[83] On this see J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *CLP* 103; 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

[84] Scott, 'Accountability in the Regulatory State', above n 80.

[84a] *Ibid* 55.

by Black in precisely this way. On this basis, the difference between Scott's and Black's approach is that whereas Black thinks that the public/private distinction provides an attractive normative basis for a theory of accountability, Scott thinks that it does not.

For Scott, one reason why the public/private distinction is problematic is that as an empirical matter, the likely effectiveness of public law controls is questionable once it is recognised that accountability is achieved by a dense and complex network of relationships and techniques of control. This, he says, 'presents difficulties for public lawyers' because such networks are 'not directly 'programmable' with the public law norms (fairness, legality, rationality, and so on). Interventions to secure appropriate normative outcomes must necessarily be indirect and unpredictable in their effects.'[85] This empirical challenge is taken up by Anne Davies in her study of NHS contracting.[86] Her conclusion is that 'the success of contractualisation could be enhanced by creating a public law normative framework for internal contracts, based on the policy of using them as fair and effective mechanisms of accountability.'[87] Based on her empirical study, she identifies certain problems of regulation and enforcement of NHS contracts and argues that public law institutions and rules can contribute to their resolution in ways that the private law of contract probably could not. In his review of Davies' book, Peter Vincent-Jones draws attention to some empirical evidence that could be interpreted as pointing in a different direction.[88] Given the nature of empirical research in law,[89] it seems unlikely that the questions at stake here will ever be conclusively resolved. The meaning and goals of accountability, and judgements about the success of accountability mechanisms, are likely to remain contested and ultimately dependent on normative legal and political theories. Putting the point quite crudely, people who believe that a public/private distinction is normatively justified and an important accountability tool are unlikely to be shaken in this belief by the observable facts that the line between state and non-state is blurred, and that the social universe is characterised by complex and interacting networks of accountability. Nor will the assertion that it is difficult to impose public law values on complex accountability networks convince them to abandon the attempt to do so and instead to be satisfied with judging the 'success' of such networks according to other criteria.

Assume for the sake of argument, then, that some version of the public/private distinction can provide an acceptable normative approach to accountability and

[85] *Ibid* at 59–60.

[86] A Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford, 2001). Davies' approach is based on the idea of contract as a tool of governance as opposed to exchange. See also J Freeman, 'The Contracting State' (2000) 28 *Florida State ULR* 155. Failure to draw this distinction is identified by Julia Black as the basis of the refusal of courts to subject the exercise of contractual power to judicial review: Black, above n 82.

[87] Davies, above n 86, 185.

[88] P Vincent-Jones, 'Regulating Government by Contract: Towards a Public Law Framework?' (2002) 65 *MLR* 611, 619–20.

[89] For a general discussion see J Baldwin and G Davies, 'Empirical Research in Law' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) ch 39.

control of social decision-making. This poses the thorny question of whether and how this binary distinction can operate in the face of institutional hybridisation, which is more suggestive of a continuum. The problem can be illustrated by considering the HRA again. The provisions of section 6 recognise and are premised on institutional (but not functional) hybridisation, yet the issue to which the section is addressed—whether or not an entity is under an obligation to respect Convention rights—is binary. Or consider the *Takeover Panel* case:[90] the Takeover Panel was a hybrid entity in the sense that it performed regulatory functions, but its functions were not underpinned by statute nor was it institutionally part of the state. But the question the court had to decide was binary—whether or not the Panel was amenable to the (public law) judicial review jurisdiction.

A suggestive perspective on this issue is provided by Gunther Teubner's use of the idea of 'polycontexturality'.[91] His discussion is particularly pertinent for present purposes because while Teubner thinks that the public/private distinction can no longer be understood in terms of a state/non-state institutional dichotomy, he rejects the conclusion that the distinction should therefore be rejected. Rather social life should be understood in terms of distinctive activities—such as education, journalism and medicine—which Teubner calls by various names including 'spaces of social autonomy'. In his view, the task of law is to regulate social activities by striking a balance between conflicting public and private interests and values in relation to particular activities. The mechanisms by which Teubner sees this happening are (1) the 'fragmentation' of 'private law'—producing, for instance, education law, journalism law and medical law; and (2) its transformation into a form of 'constitutional law' of social activities which, in relation to each particular activity, reflects a distinctive mix of public and private concerns. A concrete example might help to explain Teubner's rather abstract discussion. A common objection to contracting-out of the provision of 'public services' is that the doctrine of privity of contract may make it difficult for citizens to complain about service failures. This objection might be overcome by modifying the doctrine of privity in this context to take account of the public interest in the delivery of such services. In other contexts, by contrast, where there was no such public interest in the performance of contracts, the doctrine of privity might be maintained. The result would be the creation of a set of laws of contract moulded to the distinctive characteristics of particular social activities.

Although Teubner does not put it in these terms, we might understand him (unlike Black) as rejecting *both* an institutional *and* a functional public/private divide, but accepting what might be called a 'values-based' public/private distinction. He sets up a dichotomy between 'political activities oriented toward the public interest' and 'profit-oriented economic activities' and suggests that instead of thinking about 'spaces of social autonomy' in terms of a bipolar distinction between 'politics and economics' we should think in triangular terms of the relationship between these two 'rationalities' and activities that are simply 'social'

[90] See above n 33.

[91] G Teubner, 'After Privatization? The Many Autonomies of Private Law' [1998] *CLP* 393.

rather than 'public' or 'private.'[92] An attraction of this approach is that it makes clear the normative nature and the distributional implications of the public/private distinction; and in so doing, it helps to explain the continuing attraction of the distinction in the face of institutional and functional hybridisation. The approach is, of course, diametrically opposed to Oliver's (see pp 268–69 above). Her solution to hybridisation is to argue that a single set of values, neither public nor private, applies or should apply to all social activities. It is also diametrically opposed to the approach of those who argue that 'the private is the political' and that all human life should be viewed in social terms;[93] or conversely that all human action, in the political sphere as much as in the non-political, is motivated by self-interest and is, in that sense, private.[94]

Returning, then, to the question of whether a binary public/private distinction can operate in the face of institutional and functional hybridisation, Teubner's analysis would support a positive answer to this question. By positing a polarity between the individual and society, and by associating each pole with a distinct set of values relevant to the regulation and control of human activity, a normative, values-based binary public/private distinction can be maintained even if the public/private dichotomy is rejected as a way of understanding and classifying social institutions and social activities. There is some evidence that this is the direction in which the law is moving. Consider again the *Takeover Panel* case for instance. There the jurisdictional question of the amenability of the Panel to judicial review was decided on the basis of a binary public/private distinction. By contrast, the court made it clear that whether a judicial review application against the Panel would succeed was a discretionary matter to be decided flexibly and partly on the basis of the (hybrid) nature of the Panel and of its activities.[95]

In the context of judicial review of interpretations of rules by regulators, Julia Black pushes this approach further by arguing that all such interpretations should be reviewed on the basis of their 'rationality.' She recommends adoption of this standard of review as part of 'a united set of public and private law principles.'[96] This ground of review would certainly have the benefit of flexibility, allowing the court to take account of the many forms of hybridisation that characterise contemporary governance regimes. However, the concept of rationality needs to be informed by a set of values. As Black says, we need to look 'at the type of function being exercised' and ask 'what duties and responsibilities should accompany the exercise of such functions and to whom they should be owed, what degree of autonomy should those exercising them have and what degree of judicial supervision should be exercised over them.'[97] Those questions can be answered only on the

[92] See especially *ibid* at 402.

[93] This line of argument is particularly associated with legal realism and critical legal studies (Horwitz, above n 18; Mnookin, above n 68, at 1436–39). In the public law literature, civic republicanism tends in this direction.

[94] DA Farber and PP Frickey, *Law and Public Choice: A Critical Introduction* (Chicago, Chicago UP, 1991); Mnookin, above n 68, at 1434–36.

[95] P Cane, 'Self Regulation and Judicial Review' [1987] *CJQ* 324; Scott, above n 69, at 38–41.

[96] See above n 56, at 157.

[97] *Ibid.*

basis of a set of values. A public/private distinction provides one way of thinking about such values. As we might say, adopting Teubner's terminology, the 'rationality' of individual autonomy (or of 'the economic') is different from the 'rationality' of social co-operation (or of 'the political').[98] In this view, legal regulation requires the striking of a balance between the demands of these two rationalities in the context of particular social activities.

CONCLUSION

We began with the observation that there is a paradox in legal thinking about the public/private distinction. On the one hand, it is deeply embedded in the law, but on the other it is widely rejected as a way of understanding social life. We have examined legal regimes in which both institutional and functional public/private dichotomies play an important part. We have surveyed various criticisms of the public/private distinction all of which, in their different ways, either explicitly or implicitly rest on a rejection of binary opposition between public and private institutions, and public and private functions, or both, in favour of some concept of hybridity.

Building on Teubner's work, I have suggested a resolution of the paradox initially highlighted by arguing that rejection of an institutional or functional public/private dichotomy in favour of a concept of hybridity is not inconsistent with retaining a values-based binary public/private distinction. Such a distinction embodies a particular theory about the way power ought to be distributed in society and about the forms that accountability for the exercise of power should take. Pointing to the phenomenon of institutional and functional hybridity does not by itself undermine a values-based public/private approach to the legal regulation and control of power. To do this, what is needed instead is a competing normative theory of accountability.[99] It is not enough to say that it does not matter whether accountability mechanisms are 'public' or 'private', so long as they are 'effective' or 'successful', because effectiveness and success can only be judged in the light of a normative theory about the way power ought to be distributed.

In brief, the resolution of the paradox lies in the observation that the supporters and the opponents of the public/private distinction are talking about different

[98] Teubner does not explicitly associate individual autonomy with market rationality and community interest with political rationality, but the association seems to be implicit in his analysis. It is, nevertheless, problematic. Human rights are, on the whole, concerned with non-economic aspects of individual autonomy.

[99] John Braithwaite offers such a competing theory in his 'republican' reinterpretation of the doctrine of separation of powers as a normative principle equally applicable to all power regardless of whether it is public or private: 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *U of Toronto LJ* 305. Andrew Clapham's and Dawn Oliver's projects (see pp 254–56 and 268–69 above respectively) may be similarly understood. Underlying such approaches is the idea that *power* should be controlled, whatever its nature or source. See also M Hunt, 'Constitutionalism and Contractualisation of Government in the United Kingdom' in M Taggart (ed), *The Province of Administrative Law* (Oxford University Press, 1997), ch 2. For a contrary view see Black, above n 82, at 29–30.

things. In the view of the opponents, the distinction misrepresents the way power is distributed and exercised; while according to its supporters, it embodies an attractive normative theory of the way power ought to be distributed and its exercise controlled.

11

Courts in a Multi-Layered Constitution

NICHOLAS BAMFORTH*

MANY OF THE legal consequences of the UK membership of the European Union are highly visible, as are those associated with the bringing into national law—via the Human Rights Act 1998—of the European Convention on Human Rights. Courts must 'disapply' legislation if it contravenes EC law,[1] and short of that must interpret the legislation as far as possible in the light of parallel rules of EC law.[2] Legislation may not be set aside for incompatibility with Convention rights, but a court can make a declaration of that incompatibility under section 4 of the 1998 Act, opening the way for the legislation to be amended. Meanwhile, section 3 contains an obligation, analogous to that in play in cases involving EC law, to interpret legislation compatibly with Convention rights so far as this is possible.[3] By contrast, 'disapplication' and declarations of incompatibility are not permitted outside of the EC law and Convention contexts, and ordinary common law rules of statutory interpretation apply.[4] Proportionality review—albeit using differently formulated tests—is used in cases involving EC law[5] or Convention rights,[6] but not—at least, officially—in other cases. Furthermore, distinctive tests are used—depending upon whether a case involves EC law, Convention rights, or the ordinary common law—when assessing whether a litigant has standing and whether a body is public in nature.[7] These various contrasts provide clear illustrations of the impact of what has been categorised—in the

* I should like to thank Peter Leyland and Gordon Anthony for their helpful comments concerning drafts of this chapter.

[1] *R v Secretary of State for Transport, ex p. Factortame(2)* [1991] 1 AC 603; *R v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

[2] Case C-106/89, *Marleasing v La Comercial* [1990] ECR I-4153.

[3] On s 3, see *Poplar Housing Association v Donoghue* [2002] QB 48, paras [75] & [76] (Lord Woolf LCJ); *R v A.* [2002] 1 AC 45, paras [44] (Lord Steyn) & [162] (Lord Hutton); but cf para [108] (Lord Hope); *Wilson v First County Trust Ltd (No 2)* [2002] QB 74; *Mendoza v Ghaidan* [2002] EWCA Civ 1533; C Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *LQR* 248.

[4] According to the common law, this may still give effect to fundamental rights: see : *R v Secretary of State for the Home Department, ex p. Leech (No 2)* [1994] QB 198, 209; *R v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385; *R v Lord Chancellor, ex p. Witham* [1998] QB 575; *R v Secretary of State for the Home Department, ex p. Simms* [1999] 3 WLR 328.

[5] See, eg, *R v Chief Constable of Sussex, ex p. International Trader's Ferry* [1999] 2 AC 418.

[6] See Section 2 below.

[7] See the Miles and Cane chapters in this volume.

introductory essay in this volume—as a 'multi-layered' constitution: that is, one which contains multiple, but inter-connected and sometimes overlapping 'European' and 'national' layers. For the remedies which may be awarded by courts, and the tests and standards which may or must be employed, vary depending upon whether an EC law point, a Convention right, or the ordinary common law—affected by neither of the aforementioned things—is in play. At 'national' level, devolution provides a further illustration of the operation of the 'multi-layered' constitution, given the differing powers conferred on courts—under the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998—to police each set of devolved institutions.

This chapter is concerned not so much with the details of these illustrations, as with the background to them. What is it, constitutionally-speaking, that causes courts to act 'differently' in cases involving EC law, Convention rights, and ordinary common law, and how far can or should they do so? Consideration of these questions highlights the true complexity of the 'multi-layered' constitutional structure. It is unsurprising that the answers should vary depending upon whether EC law or the Convention is involved. However, analysis also reveals that the answers are either hotly contested (in the case of both questions, in the EC law context) or unclear (in relation to the second question, in the Convention context) and that they may, depending upon one's perspective, rest as much on one's understanding of the constitutional norms which prevail within the 'national' constitutional layer as on one's understanding of the rules of the two 'European' layers.[8] It would be impossible in a single chapter to deal comprehensively with every issue posed for courts by the existence of a 'multi-layered' constitution: and, given that devolution is analysed elsewhere in this volume,[9] the focus will be on the impact of EC law and Convention rights. The first section of the chapter will analyse the competing arguments surrounding the role of courts in relation to EC law and the European Communities Act 1972, and the second section will consider the Convention and the Human Rights Act 1998. The third section will explore the notion of 'spill over': that is, the possibility that EC law or the Convention may influence judicial interpretation of statutes or the common law in 'non-European' contexts. Given the dualist nature of the domestic legal system, the possibility of judicial reliance on 'European' legal norms in cases which do not involve EC law or Convention rights begs important questions concerning the role of the courts and of those norms.[10] It will be argued in the final section of the chapter that the views of analysts and judges concerning the issues canvassed in this introduction are often driven by considerations which need explicitly to be

[8] One's characterisation of the constitutional role of national courts can have important implications for one's view of their ability to develop the common law by reference to EC law and the Convention: see G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (Oxford, Hart, 2002).

[9] See the Hadfield and Cornes chapters in this volume.

[10] Particularly in the public law field, given the ambitious judicial development which has occurred following the creation of the application for judicial review procedure in 1977: see the essays collected in C Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart, 2000).