

Editorial Foreword

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I have several objectives in writing this short editorial introduction to *European Public Law*. The first is to set out the province of European public law. What does it mean? What areas or subjects does it cover? The second is to say a little about a journal written in English but for an audience throughout Europe and, indeed, the world where the English tradition and legacy in terms of public law, let alone European public law, is not immediately apparent. The English legacy is one of common law with no apparent division between public and private law. The third objective is to explain the structure of the journal and what we hope it will achieve. The last is to encourage the interest of public lawyers throughout Europe and further afield in European public law and *European Public Law* so that there will be a ready outlet for their work. Let me start with the subject area of European public law.

European Public Law is concerned with the development of the public law of European States and their influence upon, and the way they in turn are influenced by, the developing law of the European Community or European Union, as it is increasingly called. Our interest is not restricted to the public law of Member States but potentially covers the public law of all European States. It is also concerned with the influence of the European Convention on Human Rights on the substantive law of nations which are members of the Council of Europe and the influence of the Convention on the judicial decisions of the European Court of Justice whose judgments have been influenced by doctrines of fundamental human rights. Indeed, the principles of the Convention on Human Rights constitute a part of the body of general principles of law which informs the Court's development.

The subject is concerned with security and policing in an expanding Union and in a Europe where old barriers have broken down. As well as the evolving constitutional and administrative law of the EC and of its Member States and of its non-Member States and the refinement of the law relating to human rights in

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modern Europe, there is a wide area – a sort of hybrid – which has grown from relationships dominated by private law but where a growing public interest has ensured more regulatory involvement by national and EC government. Here we include environmental law, labour relations, equality, competition and regulation of mergers, state support for industry and public procurement, regulation of utilities and social welfare. Indeed, in England, after the Children Act 1989, there is a public law and a private law relating to the care of children.

No one can honestly say that the division between public and private law in any jurisdiction represents the outcome of rational conceptualization – or at least not completely so. Some will doubtless want to refine the nature of the distinction; others to argue that increasingly it is of little consequence. And in a sense the editor is sympathetic to Emile Durkheim who over a century ago expressed the view that 'All law is public law.'¹ All law is social, he continued, and all the functions of society are social. 'There are [no functions] . . . which are not, in greater or lesser degree, under the supervision of action by governmental bodies.' It is a statement of fact and not wishful thinking to say that public law suffuses our existence in Europe and in each European State whether it be in our relationships with officialdom or some aspect of the State or in our relationships with each other. We are more administered and more ruled than we were twenty-five years ago. We are more spied upon and more regulated. More and more lawyers and more and more legal discourse throughout Europe and throughout the world embrace complex social and state developments in terms of powers and jurisdiction, procedural regularity and civil rights, discretion and natural justice or fairness in action. This is as true in the United Kingdom as elsewhere and the analysis and comprehension of these phenomena and these human and social forces form the central feature of this journal.

How are we, if at all, influencing each other in the development of our public law systems? How are national systems of law being influenced by EC law and is there a clear vision of European public law emerging? In terms of English law, for instance, it is quite clear that our approach to civil liberties and investigatory procedures is being influenced by the European Convention on Human Rights. Prison administration, interception of communications, data protection, freedom of speech, sexual integrity and protection of privacy and now criminal investigation and subsequent criminal trial have all shown the impact of decisions of the Court and Commission of Human Rights.

The journal will address the traditional concerns of constitutional and administrative law and it will chart out the emerging constitution of the European Community and the European Union and the interplay between law and politics. Its interests will be the perennial themes of public law which will be with us all 'So long as men can breathe and eyes can see'. Those I would describe as the identification, the examination, the control and answerability of public power or power exercised

¹ Emile Durkheim, *The Division of Labour in Society*, The Free Press, 1933, p. 127.

on behalf of and over the public as public and private become ever more intertwined. Public law is given a wide interpretation so that it includes the structure of government – so radically in transformation in the UK at this moment—judicial review, the powers and conduct of regulatory agencies, redress of grievances through ombudsmen and administrative bodies, political redress of grievance, access to justice, protection of human rights and protection against discrimination, openness and transparency, fiscal and monetary policy and the law and the role of regulation of public and significant private power in the contemporary State and the European Community after the Treaty on European Union.

We need to say something about a journal published in English on a very un-English theme. This journal is based at the Institute of European Public Law in the University of Hull and its working language is English. Nothing is implied by that. No *lex Anglica* let alone *lex Britannica* aspiring to become a *ius gentium*. We are all here to learn from each other and there are no preconceptions of the priority of one country's public law heritage or present offering over another. We all have something to learn and something to offer.

Interest in public law has never been greater in the United Kingdom. This is as true a statement for the senior judiciary in Britain as witnessed by Lord Diplock's famous observation that the creation of a 'coherent system of administrative law' was the English judiciary's most significant achievement since the end of the Second World War² as it is for many academics and practitioners. The English tradition in public law is not as meagre as is commonly supposed. Forms of public law flourished in England long before the events of the seventeenth century helped to introduce the doctrine of parliamentary supremacy and in terms of judicial law the supremacy of a common law, common to official and citizen alike. Public law, as Maitland famously observed, was ubiquitous; it was not systematic. To continental systems of administrative law we in the United Kingdom owe inspiration for the development of such doctrines as proportionality, legitimate expectation, legal certainty and to the EC the protection of equality. The law of the EC has been enriched by these doctrines and so has the case law – if I may – of the European Commission and Court of Human Rights.

The pragmatism of the English may have been resistant to refined, abstract or rational models of law, so common in the continental tradition and which have had more of an impact on the shaping of EC law than has the English system – if 'system' is the correct phrase. And this is no place to rehearse why a relatively stable political framework has not until comparatively recently felt the need for a developed system of public law. The need is becoming increasingly felt and our presence in Europe is making us all ever more keenly aware of that need. However, we have, along with all other jurisdictions in Europe, rich traditions and wide experience in a variety of practices including the use of tribunals and inquiries which have helped to judicialize the administrative process and also in our experience with ombudsmen, a concept

² *IRC v. National Federation of Self Employed and Small Businesses* [1982] AC 617.

borrowed from Scandinavia by way of New Zealand.

While the objectives of this journal include the encouragement of greater communication of ideas about European public law and the development of the principles through the courts and tribunals of domestic and EC and ECHR jurisdictions we are also alive to the process of constitution building in the EC and European Union itself and in the newly emerging democracies of Eastern Europe. We are alive to the ever-evolving constitutional developments within Member States as they adjust to a new legal order whose nature is protean and which is constantly placing new demands upon their legislatures and governments. While privatization and the creation of markets in the provision of government services was originally a British innovation, at least in Europe, an innovation which is influencing countries in the Union and elsewhere, and which has fostered regulatory regimes over domestic markets which are most highly developed in the UK, those regimes have not been without their critics. However, the British regime of regulation of privatized industries will offer much food for thought about how best to regulate utilities and monopolies operating in the marketplace. It will also become glaringly obvious that the subject which more than any other spawned administrative law in the USA, i.e. regulation of commerce and industry, has much to offer the incipient regulatory regimes in Europe.

Some immediate examples of this are access to information and openness. These are as live an issue in the institutions of the EC as they are in Member States. So also is the answerability of regulators for the exercise of their discretionary powers, a subject which in Britain has called for the creation of a system of administrative law in some unexpected quarters. The emergence of regulatory regimes across Europe, in mergers, competition and pharmaceutical development and testing will see these questions raised in an EC context. Conversely, subsidiarity and harmonization will place the onus on the shoulders of domestic States to develop appropriate standards and laws to implement European norms. The burgeoning area of liability now being fashioned in the ECJ will increase the demands for an action for unlawful action *per se* as that court widens the scope for the enforcement of EC provisions through direct enforcement of EC rights in domestic courts and as domestic laws have to be construed in the light of relevant EC provisions. The removal of the barriers in domestic law for remedies in domestic courts where there are breaches of European Law and the removal of unjustifiable limitations to the realization of those rights will force a reexamination of the basis of state liability. Here, as in many areas, the feeling prevails that nothing will remain the same; all is subject to change.

Let me say a little about the structure of the journal. A distinctive if not a unique feature of *European Public Law* is to be found in the *Rapports* written by experts on public law and EC Law in each major jurisdiction of the Union and in other major jurisdictions. In due course it is our aim to have all major jurisdictions represented. We expect this to become a significant and regular means of understanding comparative development and mutual influence in the public law systems of Europe. It should establish a means whereby practising and academic lawyers and government advisers shall be able to follow developments in major jurisdictions as

the *Rapports* become established as authoritative guides to national and Community approaches to common questions and problems.

Shorter and longer articles will address the themes that we addressed above and others. No approach or viewpoint is given preference. European public law is not restricted to the development or otherwise of coherent principles of legality or liability, effectiveness or fairness, important as these undoubtedly are. If I may borrow from Karl Llewellyn's terminology in his famous Law Jobs theory³ – famous at least in the common law world although it is a theory of universal application – wherever disputes are resolved through judicial, administrative, political formal or informal means we are present in our subject matter. In fashionable terms, this would cover the movement known as 'alternative dispute resolution'. So also when behavior is channelled by legislative or regulatory provisions, Directives or Treaty obligations, Decree or authoritative command and be the behavior which is being directed or channelled that of individuals or organizations, private or public, then we witness a Law Job in action. Wherever we see the 'say' being located, that is seeking out the authoritative – but not to be confused with 'authoritarian' – level where a decision with binding force may be made or seeing who prevails where there is a clash between tiers of government, between different jurisdictions, between different States or different entities or between Member States and the EC we are again seeing our subject matter in action. The fourth of Llewellyn's Law Jobs we may conveniently term the policy formulation function of any group. So also this journal will be concerned with those places where policy is formulated and how accountability for that policy is achieved. And we shall be interested in the policy behind law making and adjudication and the policy inherent in specific laws: judicial, legislative and administrative.

Theoretical, empirical, descriptive, exegetical work is judged on its merits and not on its membership of any movement, school or approach. We fervently hope our journal will make its mark in the world of European public law as much for its contribution to theoretical understanding as for its practical application.

A book section finally serves the purpose of all book sections and introduces readers to developments in the literature which is relevant to European public law, and in the light of what has already been said it will come as no surprise that books will cover the whole spectrum of issues from domestic public law, comparative public law and EC law, law and politics and legal policy.

We are assisted in our work by an international advisory board of the highest and most distinguished credentials. We are rightfully proud of their contribution, assistance and participation.

We hope readers agree that this is a worthwhile and exciting venture and we hope they will come to see it as an important one. As the world moves ever closer together temporally and in terms of communication and as ancient and not so ancient barriers

³ Karl Llewellyn, 'The normative, the legal and the Law Jobs: the problem of juristic method' 49 (1940) *Yale Law Journal* 1355.

evaporate or are dismantled we must increasingly seek enlightenment from each other to see how political power may be tempered with legal discipline or how, as it once appeared historically in England, the power of the Crown may be constitutionalized. What have different jurisdictions learned about the relationship between law and politics and what are comparatively recent ones, by which I include the EC, doing and learning about the balance between might and right? The problems are increasingly of an international dimension and posed by bodies which are not governmental in nature or, more precisely, in form. And they occur whether we like it or not when we are being pulled towards ever closer union and cooperation. I have already quoted from Durkheim and I conclude with a prescient passage of the same author from his classic work on *The Division of Labour in Society* where he wrote of the nature of an international society:

Truly . . . we must recognise that this ideal is not on the verge of being integrally realised, for there are too many intellectual and moral diversities between different social types existing together on the earth to admit of fraternalization in the same society. But what is possible is that societies of the same type may come together, and it is, indeed, in this direction that evolution appears to move. We have already seen that among European peoples there is a tendency to form, by spontaneous movement, a European Society which has, at present, some idea of itself and the beginning of organisation. If the formation of a single human society is forever impossible . . . at least the formation of continually larger societies brings us vaguely nearer that goal.⁴

⁴ Durkheim, *op cit*, note 1, p. 405.